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

[2023] SGHC 330

Originating Summons No 452 of 2020 (Summonses Nos 2989 and 3297 of 2021)

In the matter of Sections 227B and 227G of the Companies Act (Cap 50, 2006 Rev Ed)

Ocean Tankers (Pte) Ltd (in liquidation)

… *Applicant*

JUDGMENT

[Choses in Action — Assignment — Whether assignment barred by non-assignment clause — Effect of non-assignment clause on validity of assignment]
[Choses in Action — Assignment — Assignment of a bare right to litigate — Whether assignment valid and enforceable]
[Debt and Recovery — Right of set-off — Legal set-off — When legal set-off takes effect]
[Insolvency Law — Insolvency set-off — Whether provisions of Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) apply to a judicial management application made under the Companies Act (Cap 50, 2006 Rev Ed)]
[Insolvency Law — Insolvency set-off — Mutuality — Relevant point in time at which to assess whether mutuality exists]

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S Mohan J
28 February, 3 March 2023, 25 July 2023

24 November 2023 Judgment reserved.

S Mohan J:

Introduction

1 The applications before me arose in the wake of the now widely publicised collapse of several businesses controlled by Mr Lim Oon Kuin ("Mr O K Lim") and his family members. The company which is the subject of these proceedings is Ocean Tankers (Pte) Ltd (the "Company"). The Company applied on 6 May 2020 to be placed under judicial management pursuant to Part VIIIA of the Companies Act (Cap 50, 2006 Rev Ed) (as in force immediately before 30 July 2020) (the "Companies Act"). It was placed under judicial management on 7 August 2020. On 12 July 2021, the judicial managers (the "JMs") of the Company applied in HC/CWU 117/2021 ("CWU 117") for the Company to be wound up under the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA"). The winding-up order was made by Kannan Ramesh J (as he then was) on 16 August 2021, and the JMs were confirmed as the Company's liquidators. While the Company is presently in liquidation and

the JMs are the liquidators, in this judgment and for the purposes of the applications before me, I shall continue to refer to them as the JMs.

2 The present applications are made by the JMs in respect of two assignments of claims (the "Assignments") obtained by an alleged debtor of the Company during the interim period between the Company's judicial management and its winding-up. The JMs accuse the debtor of trafficking in claims in an effort to reduce its liabilities to the Company by way of set-off; the debtor counters that there is nothing legally wrong with what it has done.

3 The JMs have filed two applications. The first is HC/SUM 2989/2021 ("SUM 2989"), in which the JMs apply under s 227G(5) of the Companies Act for the court's guidance on two questions:

(a) Whether a debtor of a company placed in judicial management under Part VIIIA of the Companies Act, who acquires a claim against the company by way of assignment after the date on which an Order is made to appoint JMs to the company (the "Post-JM Assigned Claim"), can assert legal or independent set-off against the company for the value of the Post-JM Assigned Claim ("Question 1").

(b) Whether legal or independent set-off, or insolvency set-off, can be asserted by the debtor for the value of the Post-JM Assigned Claim in the event that the company is discharged from judicial management and wound up under the IRDA ("Question 2").

4 The second application is HC/SUM 3297/2021 ("SUM 3297"), in which the JMs seek a declaration that the purported assignments effected by way of two deeds of assignment concluded as between the debtor and its assignor on [date redacted] are void and/or unenforceable as against the Company, and as

against the JMs and/or liquidator(s) in the event that Company is subsequently wound up.

5 For completeness, there is a sealing and redaction order in place for SUM 3297. As I am dealing with both applications in this judgment, I have anonymised the identity of the debtor (hereinafter, the "Debtor") and redacted other details of the transactions in question for both applications. With that, I turn to the facts leading up to the applications.

Facts

Background to the applications

6 The Company's principal business activities whilst it was a going concern included ship chartering, provision of ship managements services, and the manufacture and storage of petroleum lubricating oil.[1] In this respect, it had entered into several charterparties (the "Charterparties") with the Debtor for the charter of various vessels by the Debtor from the Company.

7 After the Company was placed in judicial management, the Debtor commenced arbitration proceedings against it (the "Arbitration"), alleging that the Company had committed breaches of its duties of confidentiality and of the arbitration agreements contained in the Charterparties. The Company counterclaimed in the Arbitration, among others, for outstanding freight owed by the Debtor under the Charterparties.[2]

8 After the commencement of the Arbitration, the JMs received two notices of assignment from an alleged creditor of the Company (the "Assignor")

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1 22nd Affidavit of Ee Meng Yen Angela dated 12 July 2021 at para 3.

2 1st Affidavit of Wu Him, Exhibit WH-1, Tab 1 at p 12 at para 10.

that it had assigned its claims against the Company to the Debtor. It is worth nothing that the Assignor and Debtor are related entities in the same corporate group of companies (the "Corporate Group").

9 The first notice of assignment stated that the Assignor had assigned to the Debtor all of its alleged rights, title, interests and benefits in and to its claim against the Company arising from:[3]

> (a) the Assignor's claim against the Company arising from the absence and/or loss of petroleum products which were to have been carried on board Vessel [A] pursuant to several bills of lading (the "Vessel [A] Claim"); and
>
> (b) a judgment in default of defence obtained by the Assignor against the Company in an overseas jurisdiction against the Company (the "Default Judgment"), including the right to execute on the judgment and the judgment sum.

10 While the first notice of assignment lists the assignments of the Vessel [A] Claim and the Default Judgment separately, it is clear from the Debtor's submissions,[4] the Deed of Assignment[5] and the proofs of debt[6] filed with the JMs that they are in effect one and the same – what the Debtor claims for is the Vessel [A] Claim for which the cause of action has merged with the Default Judgment.

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3 19th Affidavit of Angela Ee, Exhibit EMY-82, Tab 1 at p 10.

4 Debtor's Submissions for SUM 3297 at para 2.

5 22nd Affidavit of Angela Ee, Exhibit EMY-90, Tab 2 at p 25.

6 22nd Affidavit of Angela Ee, Exhibit EMY-90, Tab 2 at p 18.

11 The second notice of assignment stated that the Assignor had assigned to the Debtor all of its alleged rights, title, interests and benefits in and to:[7]

> (a) the petroleum products stored on board Vessel [B] (the "Cargo");
>
> (b) a storage agreement (the "Storage Agreement") entered into between the Assignor and the Company;
>
> (c) a document (the "Document") issued by the Company evidencing the existence and transfer of the Cargo; and
>
> (d) any and all causes of action which the Assignor has or may have against the Company in connection with or arising from the Cargo, the Storage Agreement and the Document.
>
> (collectively, the "Vessel [B] Claims").

12 Hereafter, I shall refer to the claims assigned pursuant to both notices of assignment collectively as the "Assigned Claims" and to the assignments as the "First Assignment" and "Second Assignment" respectively, and collectively, as the "Assignments".

13 Following the JMs' receipt of the notices of assignment, the Debtor raised the Assigned Claims in the Arbitration as a defence by way of legal and/or insolvency set-off.[8]

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7 19th Affidavit of Angela Ee, Exhibit EMY-82, Tab 1 at p 13.

8 19th Affidavit of Angela Ee at para 11.

14 As alluded to above, proofs of debt were also filed with the JMs in respect of the Assigned Claims – not just by the Debtor, but also by the Assignor.[9] It was, however, clarified in *the Assignor's* proof of debt that there was to be no double counting of its claim with *the Debtor's* proof of debt, and that the Assignor was only maintaining its claim in the event the assignments were ineffective or the Debtor's claims were not admitted by the JMs.[10] Similarly, the Debtor made clear in its proofs of debt that it was the legal assignee of the Assigned Claims and that its claim was not intended to be double counted with the Assignor's claim.[11]

15 The sequence of events as summarised above set the stage for the present applications filed by the JMs. For completeness, the Arbitration has been stayed pending the resolution of these applications.[12]

Procedural history

16 The parties filed written submissions in respect of both applications on 22 February 2023, and presented oral arguments before me on 28 February and 3 March 2023.

17 Subsequently, I directed the parties to tender further submissions to address two issues which were not addressed in their initial submissions and which I felt were material to the applications:

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9 19th Affidavit of Angela Ee at para 16.

10 19th Affidavit of Angela Ee, Tab 3 at pp 40–41.

11 19th Affidavit of Angela Ee, Tab 3 at pp 30–31.

12 Debtor's Further Submissions for SUM 2989 and SUM 3297 at para 10.

(a) whether the Debtor is entitled to exercise legal or independent set-off in respect of the Assigned Claims if such set-off has not been given effect to by the judgment of a court; and

(b) whether any of the Assigned Claims would constitute bare rights of action or mere rights to litigate which, in principle, may not be assigned, and if so, whether there are any exceptions that might apply.

18 Pursuant to these directions, the parties filed further submissions on 11 July 2023, and reply submissions on 25 July 2023.

19 Having laid out the factual and procedural background, I turn to the issues in the applications.

SUM 3297

20 I shall deal firstly with SUM 3297, which centres on the validity of the assignments as against the Company and/or the JMs. I note as a preliminary point that it is common ground between the parties that the court has the jurisdiction to make these determinations.

21 On the merits of the application, the JMs initially challenged only the assignment of the Vessel [B] Claims on the ground that the Second Assignment was prohibited by a non-assignment clause in the Storage Agreement.[13] Mr N Sreenivasan SC ("Mr Sreenivasan"), counsel for the JMs, conceded at the hearing that the JMs were not disputing the assignability of the Vessel [A] Claim.[14] However, in their further submissions, the JMs changed tack and now

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13 JMs' Submissions for SUM 3297 at paras 11(a), 12–20.

14 Minute Sheet for SUM 3297 (28 February 2023), p 2.

contend that *all* the Assigned Claims are non-assignable as bare rights of action.[15]

22 Therefore, there are two issues that arise in respect of the assignability of the Vessel [B] Claims: (i) whether they are rendered ineffective by the non-assignment clause in the Storage Agreement and (ii) whether they are in any case void and/or ineffective as assignments of bare rights of action. The latter issue also arises with respect to the Vessel [A] Claim (as merged in the Default Judgment) assigned pursuant to the First Assignment.

Whether the assignment of the Vessel [B] Claims is prohibited by the non-assignment clause

23 I first consider the effect of the non-assignment clause in the Storage Agreement on the assignment of the Vessel [B] Claims. Pursuant to this clause, the Company's consent was required for the assignment and novation of rights under the Storage Agreement (see [27] below). The Company's consent was not sought in respect of the assignment of the Vessel [B] Claims.[16] The Debtor does not dispute this.

24 Instead, the Debtor (represented by Mr Lok Vi Ming SC ("Mr Lok")) argues that the Vessel [B] Claims do not fall within the scope of the non-assignment clause. Mr Lok contends that the Vessel [B] Claims consist of two separate categories:[17]

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15 JMs' Further Submissions for SUM 3297 at paras 36–47.

16 22nd Affidavit of Angela Ee at para 19.

17 Debtor's Submissions for SUM 3297 at para 3.

(a) The Assignor's causes of action against the Company in connection with or arising from the Storage Agreement (the "Vessel [B] Storage Agreement Claim"); and

(b) the Assignor's causes of action against the Company in connection with or arising from the Document (the "Vessel [B] Document Claim").

25 Mr Lok argues that the non-assignment clause, objectively construed, applies only to the assignment of contractual rights and claims. Hence, it does not affect the Vessel [B] Document Claim, which is a tortious claim for the Company's misrepresentation in the Document that [X] barrels of petroleum products on board Vessel [B] had been transferred to the Assignor.[18]

26 The JMs disagree. Mr Sreenivasan argues that the non-assignment clause should be construed to prohibit the assignment of *both* contractual and non-contractual tortious rights. In support of this construction, Mr Sreenivasan relies primarily on the case of *Burleigh House (PTC) Ltd v Irwin Mitchell LLP* [2021] EWHC 834 ("*Burleigh House*").[19] I examine *Burleigh House* in greater detail below. The JMs also disagree with the Debtor's separation of the Vessel [B] Storage Agreement Claim from the Vessel [B] Document Claim. Mr Sreenivasan contends that the Document and the Storage Agreement are inextricably connected as the former would not exist without the latter. Thus, any tortious claims in respect of the Document cannot be separated from the contractual relationship established under the Storage Agreement.[20]

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18 Debtor's Submissions for SUM 3297 at paras 8–12; 1st Affidavit of Wu Him at paras 17–18.

19 JMs' Submissions for SUM 3297 at paras 18–20.

20 JMs' Submissions for SUM 3297 at paras 16–17.

The proper interpretation of the non-assignment clause

27 As with any exercise in contractual interpretation, the starting point is the text of the non-assignment clause:[21]

> TRANSFER OR ASSIGNMENT OF AGREEMENT
>
> Unless otherwise provided hereunder, the rights and obligations of [the Assignor] and [the Company] under the Agreement shall not be assigned or novated without the prior written consent of the other Party, whose consent shall not be unreasonably withheld.

28 There are clear indications in the clause itself that it relates to contractual rights but not tortious rights. Firstly, the clause provides that the "rights and obligations" under the Storage Agreement shall not be *assigned or novated* without the other party's consent. It is trite that one can assign benefits but not burdens. Therefore, while rights can be assigned or novated, obligations can only be novated. As the Debtor points out, novation is a process by which a *contract* between the original contracting parties is discharged through mutual consent and substituted with a new contract between the new parties (*Fairview Developments Pte Ltd v Ong & Ong Pte Ltd* [2014] 2 SLR 318 at [46]). This supports the view that when the non-assignment clause refers to the *novation* of "rights and obligations", this must be understood to mean *contractual* rights and obligations. One clearly cannot read the clause as prohibiting the assignment or novation of tortious rights and obligations. Nor can one, without great difficulty, read it disjunctively as prohibiting the assignment of contractual *and* tortious rights, but *only* the novation of contractual obligations – that would leave an awkward gap for the transfer of contractual rights by novation.

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[21] 22nd Affidavit of Angela Ee at para 18.

29 Secondly, the heading to the clause states "TRANSFER OR ASSIGNMENT *OF AGREEMENT*" [emphasis added]. This wording, while not conclusive, is a further indication that the clause is not intended to cover the transfer of tortious rights.

30 Thirdly, the Debtor has referred me to other clauses in the Storage Agreement which *specifically* refer to rights other than contractual rights:[22]

> (a) Clause [Y] provides that all exclusions and indemnities given under the clause "will apply irrespective of cause and notwithstanding the negligence or breach of duty (whether statutory or otherwise) of [the Assignor] or [the Company] as the case may be and will apply irrespective of any claim *in tort*, *under contract* or *otherwise at law*" [emphasis added].
>
> (b) Clause [Z] states that "review or acceptance by [the Assignor] of any certificate, insurer, or terms or limits of insurance proposed by [the Company] will not relieve [the Company] of any obligation or liability *under or arising from this Agreement* or *at law*" [emphasis added].

31 What is apparent from these clauses is that the Assignor and the Company have drawn precise distinctions between different types of rights and obligations. In particular, Clause [Z] distinguishes between obligations or liabilities "under or arising from this Agreement" or "at law" – it is clear from this distinction that the former refers to contractual obligations or liabilities specifically. This further affirms my view that when the contracting parties refer to rights and obligations "under the Agreement" in the non-assignment clause, they intend to refer specifically to contractual rights and obligations.

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22 Debtor's Submissions for SUM 3297 at para 9(e).

32 I turn to *Burleigh House*, which the JMs rely on in support of their contention that the non-assignment clause also prohibits assignments of tortious rights. *Burleigh House* involved a professional negligence claim against a law firm by an assignee of its former client. The defendant law firm applied for summary judgment against the assignee (our equivalent would be an application to strike out a claim) on the ground, among others, that the claim was unsustainable as the assignment was in breach of a non-assignment clause in the firm's terms of retainer (set out in *Burleigh House* at [10]):

> You may not assign all or any part of the benefit of, or your rights and benefits under, the agreement of which these standard terms and condition *[sic]* form part…

33 The English High Court held that the non-assignment clause prohibited both assignments of contractual and tortious rights, and granted summary judgment against the assignee. There were two main reasons for the court's decision:

(a) The court applied the approach taken towards the construction of arbitration clauses in *Fiona Trust & Holding Corp v Privalov* [2007] Bus LR 1719 ("*Fiona Trust*"), where it was held that rational businesspeople who agree to such clauses, regardless of whether they refer to disputes "arising under", "in connection with" or "under" a contract, intend any dispute arising out of their relationship to be decided by the same tribunal. Very clear language would be needed to show a contrary intention (*Burleigh House* at [24], citing *Fiona Trust* at [13]).

(b) The court also accepted the law firm's argument that it was uncommercial and undesirable to interpret the clause to mean that the parties had intended that clients could assign tortious rights – among other reasons, the law firm could find itself owing obligations to a third

party it did not choose to do business with, regardless of issues of money-laundering and conflict of interests (*Burleigh House* at [26]).

34 In my judgment, *Burleigh House* does not assist the JMs. As canvassed above, the case concerned assignments in the context of a former client's claim against a law firm for professional negligence. The implications that such an assignment would have on the solicitor-client relationship was evidently a significant consideration for the court in its interpretation of the non-assignment clause in the terms of the law firm's retainer. Those concerns do not feature in the Second Assignment, which arises in a completely different context. To that extent, *Burleigh House* is distinguishable.

35 Furthermore, I do not agree that the approach towards the interpretation of arbitration clauses as espoused in *Fiona Trust* should *ipso facto* apply to other clauses in a contract or to non-assignment clauses generally. As explained in *Fiona Trust* at [13], the rationale underlying that broad interpretation is that rational businesspeople are presumed to intend for all *disputes* arising from their relationship to be decided in the same forum. Indeed, our Court of Appeal found the *Fiona Trust* principle to apply to jurisdiction clauses generally (*Bunge SA and another v Shrikant Bhasi and other appeals* [2020] 2 SLR 1223 at [37], citing Adrian Briggs, *Civil Jurisdiction and Judgments* (Informa Law, 5th Ed, 2009) at pp 433–434). A non-assignment clause, however, is not a dispute resolution clause and is intended to perform a very different function. It is difficult to see why the rationale in *Fiona Trust* should apply when interpreting such a clause. Hence, I respectfully decline to follow *Burleigh House* insofar as it relies on the *Fiona Trust* approach in interpreting non-assignment clauses.

36 In my judgment, the non-assignment clause in the Storage Agreement only extends to contractual rights under the Storage Agreement. It does not prohibit assignments of tortious claims such as the Vessel [B] Document Claim.

37 As for the JMs' contention that the Document (and consequently, the Vessel [B] Document Claim) is inextricably connected to the Storage Agreement, this argument is neither here nor there with respect to the present issue, which is centred on the interpretation of the non-assignment clause. However, insofar as the JMs argue that the Vessel [B] Document Claim is dependent upon the assignment of contractual rights under the Storage Agreement, that may have some bearing on their further challenge that the Second Assignment is one of a bare right to litigate and therefore void and/or unenforceable. I elaborate on that issue later in this judgment.

Whether assignments prohibited by the non-assignment clause nonetheless take effect in equity

38 What then of the Vessel [B] Storage Agreement Claim? The Debtor does not (and indeed cannot) deny that this claim falls within the ambit of the non-assignment clause. It would logically follow that the assignment of the Vessel [B] Storage Agreement Claim is prohibited by the non-assignment clause, and is consequently void.

39 The Debtor disagrees with that conclusion. It argues that the effect of the non-assignment clause is not to render the assignment void altogether. Rather, all it means is that the assignment takes effect as an equitable assignment or as a declaration of trust. In either case, the Debtor acquires an equitable interest in the assigned claim.[23]

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[23] Debtor's Submissions for SUM 3297 at para 17.

(1) No equitable assignment

40 I disagree with the Debtor. The law is clear that an assignment of rights in breach of a non-assignment clause is ineffective, *both* at law and in equity. This position was set out by Lord Browne-Wilkinson in the House of Lords case of *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 ("*Linden Gardens*") at 107–108:

> … We were not referred to any English case in which the courts have had to consider restrictions on the alienation of tangible personal property, probably because there are few cases in which there would be any desire to restrict such alienation. In the case of real property there is a defined and limited supply of the commodity, and it has been held contrary to public policy to restrict the free market. But no such reason can apply to contractual rights: there is no public need for a market in choses in action. A party to a building contract, as I have sought to explain, can have a genuine commercial interest in seeking to ensure that he is in contractual relations only with a person whom he has selected as the other party to the contract. In the circumstances, *I can see no policy reason why a contractual prohibition on assignment of contractual rights should be held contrary to public policy.*
>
> …
>
> Therefore *the existing authorities establish that an attempted assignment of contractual rights in breach of a contractual prohibition is ineffective to transfer such contractual rights…*
>
> [emphasis added]

41 *Linden Gardens* has been accepted and applied in Singapore. In *Total English Learning Global Pte Ltd v Kids Counsel Pte Ltd* [2014] SGHC 258 at [64], Tay Yong Kwang J (as he then was) declined to depart from the position as stated in *Linden Gardens*:

> … Although Mr Goh urged me to depart from the English position set out in *Linden Gardens v Lenesta*, there was no reason to suggest why the legal reasoning adopted therein would be inapplicable to the local context.

42 Further, in *Arris Solutions, Inc and others v Asian Broadcasting Network (M) Sdn Bhd* [2017] 4 SLR 1 at [20], the Singapore International Commercial Court also acknowledged this to be the position under Singapore law:

> … The Plaintiffs' attention was then drawn to the English House of Lords decision in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 ('*Linden Gardens*'), a decision which has subsequently been applied in Singapore in *Total English Learning Global Pte Ltd v Kids Counsel Pte Ltd* [2014] SGHC 258 ('*Total English*'). *Linden Gardens* stands for the rule that where there is a contractual prohibition on assignment without prior consent, *a purported assignment executed without obtaining such consent will be only effective as between the assignor and assignee, but will not bind the other contracting party, whose rights and obligations will remain to the assignor.*
>
> [emphasis added]

43 The Debtor relies primarily on several academic articles and treatises to support its case. The first is Roy Goode, "Contractual Prohibitions Against Assignment" [2009] LMCLQ 300. In this article, at pp 305–306, Professor Goode argues that while non-assignment clauses do prevent assignment clauses from taking effect at law (due to the inability to give an effective notice of assignment), they cannot invalidate the transfer of a contract right as a matter of property, because that would be contrary to public policy:

> … The first point to make is that an assignment of a contract right in breach of a no-assignment clause takes effect only in equity. That is because a statutory (or legal) assignment requires notice of assignment to be given to the debtor and this is a requirement that cannot be satisfied where, because of the prohibition against assignment, no effective notice can be given.
>
> …
>
> … The reason why the common law rule barring restraints against alienation does not apply to a valid no-assignment clause is not that contract rights do not constitute property (they clearly do in the relations between assignor and assignee), but that the clause is almost invariably intended to operate only as a contractual provision absolving the debtor from any duty to the assignee, not as an invalidation of the transfer. It is

> established that such a clause, as opposed to one seeking to invalidate the transfer of the contract right from assignor to assignee as a matter of property, is not contrary to public policy. *If, however, it purports to render a transfer void, whether of the fruits of performance or of beneficial ownership of the contract right itself, it invades the field of property law and is of no effect, both on the ground of repugnancy and on the ground of public policy*.
>
> [emphasis added]

44 The same view is taken in Michael Bridge, "The Nature of Assignment and Non-Assignment Clauses" [2016] 132 LQR 47, which the Debtor also relies on. Together, these may be taken to represent the "contract view" of non-assignment clauses, that is, the view that non-assignment clauses cannot affect the fundamental alienable character of property (including contractual or tortious rights).

45 Attractive as those arguments may be, they do not represent the position under our law. Also, the House of Lords in *Linden Gardens* took the view that contractual prohibitions against choses in action (including contractual and tortious rights) do not offend public policy (see [40] above). I am inclined to agree. One further point to consider is that if the "contract view" as argued for by the Debtor was adopted as part of our law, that could render non-assignment clauses nugatory *in general* – the ramifications for the commercial world could be severe and wide-ranging. I am not persuaded that the current position under Singapore law should be departed from; even if it were to be departed from, given the potential wide-ranging implications, it is my respectful view that the court is ill-equipped to effect such change.

(2) No declaration of trust

46 The Debtor advances an alternative case that the prohibited assignment may nonetheless take effect as a declaration of trust. That assumes that the requisite intention to create a trust is present to begin with.

47 Reading the deed of assignment in respect of the Vessel [B] Claims, I see no basis to read it as a declaration of trust, whether express or implied. The operative clause makes it clear that what the Assignor had intended was an absolute transfer, and evinces no intention on the part of the Assignor to hold any right for the benefit of the Debtor:[24]

> The Assignor *unconditionally and absolutely assigns* to the Assignee *all of the Assignor's rights, title, interest and benefits* in and to:
>
> (a) the Cargo;
>
> (b) the Storage Agreement;
>
> (c) the [Document]; and
>
> (d) any and all causes of action that the Assignor has or may have against OTPL in connection with or arising from the Cargo, the Storage Agreement and the [Document], whether set out in any existing legal action or otherwise,
>
> [emphasis added]

48 In my judgment, the assignment of the Vessel [B] Storage Agreement Claim is prohibited by the non-assignment clause, and is therefore void and/or ineffective, both at law and in equity.

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[24] Agreed Bundle of Documents for SUM 3297 at p 247.

Whether the Assigned Claims are bare rights of action which cannot be assigned

49 I turn to the second prong of the JMs' challenge – that the Assignments (see above at [9]–[11]) are in any event void as assignments of bare rights of action.

The law of assignment

50 I start by setting out some basic principles governing the assignment of choses in action. First, a chose in action is property; it is capable of being owned and transferred (by assignment). Second, it is uncontroversial that debts, contractual rights and rights of action in tort – all subjects of the Assignments in this case – are choses in action which in theory may be assigned (see Ying Khai Liew, *Guest on the Law of Assignment* (4th ed, Sweet & Maxwell, 2021) ("*Guest*") at paras 1-17–1-25).

51 However, a bare right to litigate is not generally assignable. The objectionability lies not in whether such a right is property – plainly, it is. It lies in the public policy against maintenance and champerty. The position is well-summarised in *Guest* at para 4-33:

> **Assignments of the right to litigate.** A chose in action is not assignable if the assignment 'savours of' or is conducive to maintenance or champerty. For this reason, a bare right of action, that is, the mere right to litigate, cannot in principle be assigned. Thus *the right to bring an action for damages for a tort or for unliquidated damages for a breach of contract committed before the date of the assignment is in principle not assignable…* [emphasis added]

52 There are several recognised exceptions to this principle. First, an assignment of a cause of action is valid where it is ancillary to the assignment of a property right or interest. Second, an assignment of a claim is valid where the assignee has a genuine commercial interest in the enforcement of the

assigned claim (*Trendtex Trading Corporation and another v Credit Suisse* [1982] AC 679 at 703).

53 With these basic principles in mind, I turn to the JMs' challenges in respect of each of the Assigned Claims.

The Default Judgment

54 In my view, it is clear that the assignment of the Default Judgment is valid as an assignment of a judgment debt. It is uncontroversial that judgment debts are no different from other types of debts and may be assigned in the same manner. This is clear from the decision of the English Court of Appeal in *Crooks v Newdigate Properties Ltd and others* [2009] EWCA Civ 283 at [22]:

> …The assignee can in this respect be in no better position than the assignor. An assignment of a debt, *including a judgment debt*, is subject to equities, including the right of the debtor to raise defences to enforcement arising out of the subject matter of the assignment… [emphasis added]

55 The assignability of a judgment debt is also recognised in *Guest* at para 1-18:

> A judgment debt is a chose in action. An assignment of a judgment debt will enable an assignee to claim the debt and enforce the judgment and to give a good discharge…

56 Further, it makes no difference that the judgment debt in this case arose from a default judgment. A default judgment is no less a judgment and is good and enforceable unless it is set aside (*Payna Chettiar v Maimoon bte Ismail and others* [1997] 1 SLR(R) 738 at [11]).

57 Mr Sreenivasan, however, maintains that the assignment of the Default Judgment (and by extension, the Vessel [A] Claim) is void and/or unenforceable. He argues that at the time the Default Judgment was obtained,

the Company was already in judicial management. This meant that the Assignor's only recourse in respect of the judgment debt was to file a proof of debt with the JMs and receive a *pari passu* distribution of the Company's assets. However, what was assigned to the Debtor was not the proceeds that the Assignor would have received from that distribution; instead, it was the Assignor's statutory right to assert insolvency set-off of any mutual debts with the Company. This was not a property right, but a personal right which had vested in the Assignor, the assignment of which would enable the Debtor to profit by extinguishing/diminishing the Company's claims against it in the Arbitration. Further, the Debtor had no genuine commercial interest in taking the assignment of the claim.[25]

58 I disagree with the JMs' contention that creditors of a company in judicial management are entitled only to file proofs of debt and receive a *pari passu* distribution of its assets. This is erroneous on two fronts. Firstly, *pari passu* distribution of the company's assets is a feature of the liquidation regime, *not* the judicial management regime – it is fallacious to conflate the two regimes. Secondly, the purpose of filing a proof of debt with judicial managers is not for the creditor to obtain a distribution of the company's assets, but to obtain a right to vote at a meeting of the creditors. While it is true that the Assignor's right to *enforce* the judgment debt was restricted temporarily while the Company was in judicial management, that did not fundamentally change the *nature* of that debt in the way that the JMs contend.

[25] JMs' Further Submissions at paras 36–37.

The Vessel [B] Claims

59 I turn to the Vessel [B] Storage Agreement Claim and the Vessel [B] Document Claim. Unlike the Vessel [A] Claim/Default Judgment, these claims have not been merged into any judgments so as to create judgment debts. They are therefore properly characterised as bare rights to litigate, which are *prima facie* unassignable as a matter of public policy. The question that follows is whether the assignments of these claims are nonetheless valid because they fall within either of the established exceptions (see [52] above).

(1) Whether the assignments were ancillary to assignments in property

60 I first consider whether the assignments of the claims were ancillary to assignments in property. The Debtor contends that they were, because the Cargo, the Storage Agreement and the Document constitute assigned property rights or interests.[26] This argument of course begs the question whether such rights or interests were assigned *at all*. On the Debtor's own case (see [25]), the non-assignment clause in the Storage Agreement applies to prohibit assignments of contractual rights. I have also explained my reasons for finding that an assignment which is prohibited by a non-assignment clause does not take effect in equity either. Accordingly, this would rule out any possibility of any rights to or under the Storage Agreement being assigned to the Debtor.

61 As for the assignment of rights to and interests in the Vessel [B] Document Claim, I also find that it is not ancillary to an assignment of any property right or interest. The Debtor's case is that this claim is separate and independent from the Storage Agreement. Mr Lok also contends that there was nothing in the Storage Agreement which obliged the Company to issue the

[26] Debtor's Further Submissions for SUM 2989 and SUM 3297 at para 32.

Document; instead, the Document was issued to enable the delivery of the Cargo to the Debtor pursuant to the underlying sale contract.[27]

62 However, as Mr Sreenivasan correctly points out, the Debtor's *own pleadings*[28] in the Arbitration betray this understanding. The Vessel [B] Document Claim was pleaded in the Arbitration in the following terms:

> (a) The Assignor entered into the underlying sale contract to purchase the Vessel [B] Cargo from its seller (the "Seller"), and separately entered into the Storage Agreement with the Company.
>
> (b) The Storage Agreement contained an implied term whereby the Company undertook not to misstate the amount of petroleum products transferred onto or out of Vessel [B] and/or whether any such transfers had taken place, whether by way of a certifying document or otherwise.
>
> (c) The Company issued the Document, but it later became clear that it was not complying with its obligations under the Storage Agreement. It transpired that the Document falsely represented that the Vessel [B] Cargo had been transferred.
>
> (d) The Seller also issued a false certifying document recording the same transfer.
>
> (e) By reason of the fact that the Company and Seller had issued their respective false documents on the same day, it was clear that the Company and Seller had entered into a combination to defraud the Assignor. Further or alternatively, the Company had coordinated with

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27 Debtor's Submissions for SUM 3297 at paras 10–11.

28 Agreed Bundle of Documents for SUM 3297 at pp 148–151.

> the Seller in the issuance of their respective false documents, thereby inducing the Seller to breach the underlying sale contract. Further, the Company itself had breached the implied term under the Storage Contract in issuing the Document.

63 It is apparent from the Debtor's pleadings in the Arbitration as set out above that the Debtor's current framing of the Vessel [B] Document Claim cannot hold any water. Far from being separate and independent, each and every limb of the claim *depends* upon the Company's issuance of the Document, which it had issued *pursuant* to the Storage Agreement, and which was wrongful *because* it breached an implied term of the Storage Agreement. The underlying sale contract itself did not oblige the Company to issue the Document – instead, that obligation was on the Seller to issue its own separate certifying document, which was also relied on in the Vessel [B] Document Claim. Thus, it is clear from the Debtor's framing of the Vessel [B] Document Claim in the Arbitration that it is based upon the claimant having contractual rights under the Storage Agreement. It is not separate and independent from the Storage Agreement – on the contrary, it is substantially (if not wholly) dependent upon it. Since the contractual rights under the Storage Agreement have not been assigned by virtue of the non-assignment clause, the assignment of the Vessel [B] Document Claim cannot be said to be ancillary to any assignment of a right or interest in property.

64 Lastly, it cannot possibly be contended that the Debtor had obtained an assignment of the rights to the *Cargo* when the Assignor did not have that cargo in the first place – in fact, the *non-existence* of that cargo forms the very basis of the Vessel [B] Document Claim.[29]

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[29] 1st Affidavit of Wu Him at para 17; Debtor's Submissions for SUM 3297 at para 10(d).

65 The Debtor relies on the following passage from *Commission Recovery Ltd v Marks & Clerk LLP and another* [2023] EWHC 398 (Comm) ("*Commission Recovery Ltd*") as authority for the proposition that an assignment may be valid notwithstanding that there is a dispute over the assigned property:[30]

> 36. It was not in issue on the application before me that an assignment of property is not champertous (and thus is not unlawful and invalid for that reason). The assignment of a debt may be taken as an often encountered example. The authorities also show that the fact that there is a dispute as to whether the Claimant (acting bona fide) is correct (i.e. if there is a dispute that the client does have the property that is being assigned) does not affect the validity of the assignment in this context.

66 In *Commission Recovery Ltd*, the defendant law firm sought to strike out certain claims for secret commissions which had been paid to it on the ground that the claimant had obtained a champertous assignment of the bare right to litigate those claims from the defendants' former clients. The court held that those secret commissions constituted property held on trust by the law firm for its client. That being the case, the client could assign it to the claimant, and with it, the right to commence litigation against the law firm to realise that property: *Commission Recovery Ltd* at [35].

67 Given the nature of the dispute in *Commission Recovery Ltd*, one can understand why the court there arrived at the decision it did. The secret commissions received by the law firm, which formed the subject matter of the assigned claim, was itself *also* the assigned property. The court was clearly concerned with the circularity involved in permitting the defendant to defeat the assignment by the very act of asserting that it disputed the claim. In my view, the passage cited by the Debtor is to be confined to those specific facts.

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30 Debtor's Further Submissions for SUM 2989 and SUM 3297 at para 27.

68 Those facts do not feature in the present case. As I have explained above, there are clear reasons to find that there was no assignment of property in respect of the Vessel [B] Cargo, the Storage Agreement, or the Document. Those reasons are independent of the merits of the underlying claims themselves. No "dispute" of the kind envisaged in *Commission Recovery Ltd* arises here.

69 Therefore, I find and hold that the assignments of the Vessel [B] Claims were not ancillary to any assignments of rights or interests in property.

(2) Whether the Debtor had a genuine commercial interest in the assigned claims

70 With regard to the Vessel [B] Claims, Mr Lok argues that the Debtor has a direct, clear and genuine interest in the enforcement of those claims for two reasons. The first is that it is the assignee of the property underlying those claims, those being the Cargo, the Storage Agreement and the Document.[31] This ground overlaps with Mr Lok's arguments in respect of the assignments being ancillary to assignments of rights and interests in property which I have already rejected. Insofar as those arguments overlap here, I would also reject them accordingly.

71 The second ground is that it has a genuine commercial interest in seeking to reduce or extinguish the Corporate Group's liability to the Company by acquiring the assignments. The Debtor says that these are intercompany transactions which assist the Corporate Group in achieving optimisation for its global trade business.[32]

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31 Debtor's Further Submissions for SUM 2989 and SUM 3297 at para 35.

32 Debtor's Further Submissions for SUM 2989 and SUM 3297 at paras 36–37.

72 This submission raises an interesting issue as to what constitutes a genuine commercial interest. This is usefully illustrated in some of the cases referred to by Mr Lok.

73 In *Bourne v Colodense Ltd* [1985] ICR 291 ("*Bourne*"), a company had prevailed in defending a personal injury suit commenced by its former employee with the funding of his union. The company was awarded costs, but the employee (who was impecunious) did not pay. It was found that the union had agreed to indemnify the employee for his legal costs, but the employee refused aid. The English Court of Appeal granted an order permitting the appointment of a receiver by way of equitable execution to enforce the employee's indemnity against the union. The court held this was not an assignment of a bare right to litigate because "the defendants clearly have a commercial interest in the enforcement of such rights as the plaintiff had against his union. If they could not through the receiver enforce their rights, they would have had no more than a worthless order for costs in their favour." (*Bourne* at 302C).

74 In *Scholle Industries Pty Ltd v AEP Industries (NZ) Limited & Anor* [2007] SASC 322 ("*Scholle*"), the Supreme Court of South Australia made the following observations in determining whether there was a genuine commercial interest:

> 17 Subsequent authority has illustrated the variety of circumstances in which a genuine commercial interest may exist. A substantial creditor of the assignor, a sole shareholder who was the guarantor of the overdraft of the assignor, and a defendant who had paid money into court to satisfy a plaintiff's claim and who had taken an assignment of the plaintiff's cause of action against a co-defendant have each been held to have an interest amounting to a genuine commercial interest sufficient to sustain an assignment. *But in all cases in which it has been held that the assignee had a genuine commercial interest in taking the assignment,* ***that interest has existed independently of, and prior to, the assignment itself****. That is to say, the interest of the assignee in the subject matter of the*

> *assignment was distinct from the benefit which it sought to derive from it.*
>
> …
>
> 19 In support of his submission that it is at least arguable that the plaintiff's status as a wholly owned subsidiary of Scholle Corporation gave it a genuine commercial interest in taking the assignment from its parent, Mr Ericson referred to a number of authorities concerning assignments of causes of action or, alternatively, claims of unlawful maintenance or champerty in which the interests of a shareholder, or a member of a corporate group, has been recognised as sufficient. The first was *Bandwill Pty Ltd v Spencer-Laitt*. In that case, the defendants sought a stay of the action on the ground that the action was being maintained against them pursuant to champertous agreements (one, a funding agreement, and the other, an investigation and litigation support agreement). *The circumstances were that one member of a corporate group had lent monies to a borrower. Its security extended to any claim or right of action to which the borrower was, or might become, entitled in respect of a secured fund.* Later, the borrower and the lender proposed litigation on a cause of action which formed part of the security. They entered into a litigation funding agreement with company A and a litigation support agreement with company B. Each of the lender and companies A and B formed part of the one commercial group. Although finding that the litigation funding and litigation support agreements in question were champertous, Templeman J declined to conclude that they were unlawful. This was because each company was a member of the same corporate group. ***It was said that the "association between the companies" made it "artificial" to say that the companies providing funding and litigation support had no pre-existing interest in the outcome of the litigation***.
>
> …
>
> 22 These authorities indicate that the concept of a genuine commercial interest is to be applied in a broad and practical way and that such an interest may be found in the relationship of members of the one corporate group, as well as in the relationship of shareholder and company.
>
> 23. Further, in considering whether an asserted interest is sufficient to support an assignment, *regard may appropriately be had to the vice which the rule against assignment of causes of action seeks to prevent.* The identification of the vice gives some colour to the concept of a genuine commercial interest. As already noted, the relevant vice is the unlawful maintenance of litigation. The basis of the law's disapproval of maintenance was

> discussed in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*. Gummow, Hayne and Crennan JJ referred to authority indicating the law's distaste of "trafficking" in litigation and of "wanton and officious intermeddling with the disputes of others." Although for the purposes of determining this appeal it is not appropriate to express a concluded view, it can at least be said that the circumstances of the present case do not appear to have the flavour of "trafficking" in litigation or of an inappropriate intermeddling by the plaintiff in the claim of its parent company. It is also of interest that in two of the authorities to which Gummow, Hayne and Crennan JJ referred, *the existence of a common interest in the litigation, such as that between persons of near kin, was recognised as an exception to the general prohibition against maintenance*.
>
> [emphasis added in italics and bold italics]

75 *Scholle* itself involved the plaintiff taking an assignment from its parent company of a cause of action in tort against the defendant. The defendant had supplied defective wine taps to the plaintiff, requiring the plaintiff to obtain replacements from its sister company – that in turn resulted in its sister company having to obtain taps from another supplier at greater cost to meet its own obligations, and this was regarded as a loss to the parent company. To recover this loss, the plaintiff took an assignment of the parent company's cause of action. The court held that it was reasonably arguable that the plaintiff had a genuine commercial interest, although it did not have to decide this conclusively (*Scholle* at [24]).

76 It appears that there is some scope to argue that the Debtor and Assignor are in fact part of a singular corporate group with a singular interest. One factor against viewing them as such, however, is the fact that both entities had *individually* filed proofs of debt with the judicial managers, and the Debtor's proof of debt was phrased to make clear that the claims against the Company were firmly the Assignor's claims, and that the Debtor's claims were not to be double counted with them.

77 In any case, I find that on the facts before me, the Debtor *does not* have a genuine commercial interest in the Vessel [B] Claims. It must be noted that even in *Scholle* (as well as the case of *Bandwill Pty Ltd v Spencer-Laitt* ("*Bandwill*") cited therein at [19]), the assignee appeared to at least have a prevailing commercial interest in the litigation *prior to the assignment.* In *Scholle*, the plaintiff assignee itself had entered into the transaction with the defendant which resulted in loss. In *Bandwill*, the assignee member of the corporate group had loaned money to the assignor member and the litigation would help it recover some of the loan moneys. Therefore, *Scholle* and *Bandwill* do not stand as authority that *any* assignment between two companies in a corporate group would be automatically clothed with a veil of legitimacy in the form of genuine commercial interest. The facts of each case must be closely examined.

78 Furthermore, the court in *Scholle* (at [23]) expressly referred to the law's distaste of trafficking in litigation as also a factor to consider.

79 In my judgment, the Debtor has no genuine commercial interest in the Vessel [B] Claims. It had no prevailing interest in them prior to the Second Assignment, and has only obtained the Second Assignment for the purpose of raising them against the Company in the Arbitration by way of set-off. The claim made by the Debtor against the Company in the Arbitration and the counterclaim for outstanding freight raised by the Company against the Debtor in the Arbitration have no connection whatsoever with the Vessel [B] Claims. Accordingly, I find that the Second Assignment is void and/or ineffective as a champertous assignment of bare rights to litigate.

80 However, as I have concluded at [54], there is no such obstacle to the First Assignment (of the Vessel [A] Claim which has merged with the Default

Judgment) because that concerns the assignment of a judgment debt and not of a bare right to litigate.

Conclusion on SUM 3297

81 To summarise, my findings and conclusions on SUM 3297 are as follows:

(a) The assignment of the Vessel [A] Claim (which has merged into the Default Judgment) pursuant to the First Assignment is a valid assignment. As it is not an assignment of a bare right to litigate but of a judgment debt due and payable under the Default Judgment, the First Assignment is not a champertous assignment.

(b) The assignment of the Vessel [B] Storage Agreement Claim pursuant to the Second Assignment is in breach of the non-assignment clause in the Storage Agreement and therefore void and/or ineffective as against the Company, the JMs and the liquidators. Even if I am wrong on this, I find that it is a champertous assignment of a bare right to litigate and therefore also void and/or ineffective as against the Company, the JMs and the liquidators.

(c) The assignment of the Vessel [B] Document Claim pursuant to the Second Assignment does not breach the non-assignment clause in the Storage Agreement. However, it is also a champertous assignment of a bare right to litigate and therefore void and/or ineffective as against the Company, the JMs and the liquidators.

SUM 2989

82 I turn now to SUM 2989. Given the conclusions I have reached in respect of SUM 3297, my determination of SUM 2989 will affect only the Debtor's entitlement to assert set-off against the Company in respect of the Vessel [A] Claim as merged in the Default Judgment.

The law of set-off

83 I begin by summarising the relevant principles governing (i) legal set-off (which is often also referred to as independent set-off) and (ii) insolvency set-off.

Legal set-off

84 Legal set-off originated from the English Statutes of Set-off enacted in 1729 and 1735. It was applied in the common law courts, and was retained as part of the common law even after the repeal of those statutes. Legal set-off is distinct from the doctrine of equitable set-off, which developed independently in the Court of Chancery. The principles relating to and background context of legal set-off are summarised in *Hayate Investment Co Ltd v ManagementPlus (Singapore) Pte Ltd* [2012] SGHCR 3 ("*Hayate*") at [15]–[17] (see also Rory Derham, *The Law of Set-Off* (Oxford University Press, 4th Ed, 2010) at paras 2.01–2.06).

85 Legal set-off allows for the set-off of entirely unconnected and independent claims, provided the requirements for such set-off to take effect are met. These requirements are that (1) the claims must be liquidated or for amounts capable of ascertainment without valuation or estimation; (2) the claims must be due and payable; and (3) the claims must be mutual, in the sense

that each party must be the sole beneficial owner of the claim he is owed and solely and personally liable on the claim he owes (*Hayate* at [16]).

86 However, legal set-off does not take effect automatically simply by virtue of these three requirements being satisfied. The law is clear that legal set-off is *not* a self-help remedy (*Hayate* at [17]). It must be given effect to in a judgment. This was made clear by Lord Hoffman in *Stein v Blake* [1996] AC 243 ("*Stein v Blake*") (at 251 and 256):

> Legal set-off does not affect the substantive rights of the parties against each other, at any rate *until both causes of action have been merged in a judgment of the court.*
>
> …
>
> It is true that bankruptcy set-off does cover a much wider range of claims than legal set-off. But for present purposes the important difference is that *the latter must be pleaded and is given effect only in the judgment of the court*, whereas the latter is self-executing and takes effect on the bankruptcy date.
>
> [emphasis added]

87 However, is it the case that only the judgment of a *court* can breathe life into a legal set-off, or could the award of an arbitral tribunal have the same effect? As a matter of principle, I see no reason why a tribunal, as an adjudicator of claims (much like a court), should not be empowered to give effect to a legal set-off.

88 Further, I do not read Lord Hoffman's comments in *Stein v Blake* (at [86] above) to mean that the power to effect legal set-off is within the exclusive remit of the courts. The House of Lords in that case had simply not been confronted with this issue. I also observe that in *CKG v CKH* [2021] 5 SLR 84, the Singapore International Commercial Court implicitly recognised (at [30]–[33]) the power of an arbitral tribunal to give effect to legal set-off when it held

that the tribunal had failed to set-off certain sums owed to one party against damages which had been awarded against it.

89 Thus, in my view, legal set-off can also be given effect to by the award of a tribunal, but with one caveat – while legal set-off allows for the set-off of completely unrelated and independent claims, a tribunal can only give effect to legal set-off *if it has the jurisdiction to decide both reciprocal claims*. This is a corollary of the fundamental principle that a tribunal cannot exceed its jurisdiction in making an award. If an award which purports to set-off two reciprocal claims is set aside on the ground that one of the claims was not within the scope of the parties' submission to jurisdiction, then any legal set-off naturally falls away with the award.

90 This caveat is not unique to arbitral tribunals. It applies equally to a court which has no jurisdiction to hear one of the reciprocal claims, for example, because that claim is subject to an arbitration agreement. This was recognised in *Glencore Grain Ltd v Agros Trading Co Ltd* [1999] 2 All ER (Comm) 288, where the English Court of Appeal stated (at [21]):

> 21 … In short Hoffmann LJ's analysis shows that a defendant is only entitled to set off a mutual debt if it remains available to him when the plaintiff brings his action. *Moreover it must be capable of being litigated in the action in the sense referred to by Hoffmann LJ. Thus if the court is or would have been bound to stay such an action under s 1 of the Arbitration Act 1975 or s 9 of the Arbitration Act 1996 the claim would not be capable of being so litigated.* The same is true if the court would have no jurisdiction by reason of a choice of jurisdiction clause under art 17 of the Brussels Convention. …
>
> [emphasis added]

Insolvency set-off

91 Unlike legal set-off, insolvency set-off is a creature of statute. There are two clear aspects of insolvency set-off. First, it is mandatory, in the sense that

parties cannot exclude its effect by contract. Second, it is a self-executing procedural directive – unlike legal set-off, insolvency set-off takes effect automatically without the need for further intervention (*CIMB Bank Bhd v Italmatic Tyre & Retreading Equipment (Asia) Pte Ltd* [2021] 4 SLR 883 at [134]). As with legal set-off, there is similarly a requirement of mutuality for insolvency set-off to apply.

92 Before the IRDA came into operation, insolvency set-off was provided for in s 327(2) of the Companies Act read with s 88 of the Bankruptcy Act (Cap 20, 2009 Rev Ed) as in force before 30 July 2020 (the "Bankruptcy Act").

93 Section 88 of the Bankruptcy Act provides:

> **88.**—(1) Where there have been any mutual credits, mutual debts or other mutual dealings between a bankrupt and any creditor, the debts and liabilities to which each party is or may become subject as a result of such mutual credits, debts or dealings shall be set-off against each other and only the balance shall be a debt provable in bankruptcy.
>
> (2) There shall be excluded from any set-off under subsection (1) any debt or liability of the bankrupt which —
>
> (a) is not a debt provable in bankruptcy; or
>
> (b) arises by reason of an obligation incurred at a time when the creditor had notice that a bankruptcy application relating to the bankrupt was pending.

94 Section 327(2) of the Companies Act provides:

> (2) Subject to section 328, in the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and debts provable and the valuation of annuities and future and contingent liabilities as are in force for the time being under the law relating to bankruptcy in relation to the estates of bankrupt persons, and all persons, who in any such case would be entitled to prove for and receive dividends out of the assets of the company, may come in under the winding up and make such claims against the company as they respectively are entitled to by virtue of this section.

95 It is apparent from the provisions as set out above that prior to the IRDA, insolvency set-off applied *only* to the *winding up* of an insolvent company; it did not apply to *judicial management*. Upon the commencement of winding up, any mutual credits, mutual debts and mutual dealings between the company and a creditor would be set-off, with only the balance provable in the company's liquidation – hence, the requirement of mutuality. However, even if there was mutuality, a claim could nonetheless be excluded from insolvency set-off under s 88(2) of the Bankruptcy Act read with s 327(2) of the Companies Act, either because that claim was not provable in liquidation or because it arose by reason of an obligation incurred at a time when the creditor had notice of the winding-up application relating to the company.

96 The mutuality requirement and the exclusion criteria did not change substantially with the IRDA coming into operation. One notable change, however, was that insolvency set-off was *extended* to the judicial management regime. Thus, s 219 of the IRDA provides:

> **219.**—(1) This section applies to —
>
> (a) a company in judicial management; and
>
> (b) an insolvent company that is being wound up.
>
> (2) Where there have been any mutual credits, mutual debts or other mutual dealings between a company and any creditor, the debts and liabilities to which each party is or may become subject as a result of such mutual credits, debts or dealings must be set off against each other and only the balance is a debt provable in the judicial management or the winding up of the company, as the case may be.
>
> (3) There is to be excluded from any set-off under subsection (2) any debt or liability of the company which —
>
> (a) is not a debt provable in judicial management or winding up; or
>
> (b) arises by reason of an obligation incurred at a time when the creditor had notice that an interim judicial manager had been appointed under section

> 94(3), or that the application for a judicial management order or the application for winding up (as the case may be) relating to the company was pending.
>
> (4) A sum is to be regarded as being due to or from the company for the purposes of subsection (2) regardless of whether —
>
> (a) the sum is payable at present or in the future;
>
> (b) the obligation by virtue of which the sum is payable is certain or contingent; or
>
> (c) the sum is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion.

97 With the basic principles set out, I turn to the questions posed in SUM 2989.

Question 1

98 In my view, Question 1 in SUM 2989 (see [3(a)] above) poses an immediate problem: the question is premised on the Company being in judicial management at the time legal set-off is purportedly given effect to. *Neither* of those conditions are present here. The Company, having since entered into liquidation on 16 August 2021, is no longer in judicial management. Further, there is no judgment or award purporting to give effect to legal set-off during the time the Company was in judicial management. Given these circumstances, it is accepted by both the JMs and the Debtor that legal set-off has not taken effect.[33]

99 Therefore, Question 1 *is no longer a live issue* but instead, seeks guidance from the court on a hypothetical scenario. As the courts do not answer hypothetical questions, I decline to answer Question 1.

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[33] Debtor's Further Submissions for SUM 2989 and SUM 3297 at para 11; JMs' Further Submissions for SUM 2989 at para 14.

100 While this would ordinarily be sufficient to dispose of this question, it appears that a dispute has arisen between the parties as to the very meaning of Question 1. It is to this point to which I now turn.

101 The parties initially shared the same understanding of Question 1 – did the legal set-off raised by the Debtor have any legal effect? This was evident from the JMs' supporting affidavit:[34]

> 18 The JMs are advised and believe that both issues should be answered in the negative. Once a company is placed in judicial management, its assets are held and administered by the judicial managers for the benefit of its creditors. *A subsisting claim of a company in judicial management against a debtor as at the date of the judicial management order* ***cannot be reduced or extinguished*** *by the debtor acquiring claims against the company and asserting a set-off…*
>
> [emphasis added]

102 This understanding was clearly shared by the Debtor in its initial submissions:[35]

> 7. What this means in practical terms is that where legal set-off has been successfully asserted in respect of a cross claim after a company has entered into judicial management, the same cross claim would not be available for insolvency set-off, at the point when that company goes into liquidation, *since the cross claim will already have been extinguished through its successful deployment by way of legal set-off…*
>
> [emphasis added]

103 To put matters beyond all doubt, at the hearing of this matter, Mr Lok confirmed that the Debtor was contending that legal set-off took effect *pre-winding up*. Therefore, if the Debtor had succeeded on that point, it would not be relying on its argument that insolvency set-off took effect once the company

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34 19th Affidavit of Ee Meng Yan Angela at para 18.

35 Debtor's Submissions for SUM 2989 at para 7.

entered into liquidation.[36] For the JMs, Mr Sreenivasan had also argued on the assumption that legal set-off would take effect *automatically* provided the requisite elements to establish the set-off were met. As it turned out, this was a mistaken assumption, and it was for this reason that I directed the parties to file further submissions on the issue (see [17] above).

104 However, in its further submissions, the Debtor now argues that Question 1 is not in fact a question about whether legal set-off had any effect. Instead, the Debtor contends that Question 1 is merely asking the court for guidance on whether the Debtor is entitled to *assert* legal set-off, in the sense of pleading it in the Arbitration:[37]

> 7. … The issue raised by SUM 2989 is, therefore, not in fact whether [the Debtor] can exercise or effect legal set-off – plainly it cannot, as conceded above…
>
> 8. *SUM 2989 only raises a specific question as to whether a debtor can assert legal set-off* in respect of a claim that it has acquired by way of assignment after the date on which an order for the appointment of judicial managers has been made. It bears highlighting that this is the only issue before the Singapore Courts. [The Debtor] contends that the Tribunal otherwise retains jurisdiction over the disputes before it, which, save for the specific questions referred to the Singapore Court by way of SUM 2989 and 3297, include the overall question of whether the Assigned Claims may be set-off against the Company's claims. In complying with the Court's directions to address the two issues, [the Debtor] does not waive its rights and continues to maintain its position that the Tribunal has jurisdiction over the Assigned Claims (save for the specific questions referred to the Court for determination via the two summonses).
>
> [emphasis added]

105 As is evident from the passage quoted above, the Debtor's latest position in its further submissions is that the court only has the jurisdiction to decide

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36 Minute Sheet for SUM 3297 (28 February 2023) p 6.

37 Debtor's Further Submissions for SUM 2989 and SUM 3297 at paras 7–8.

whether the Debtor is allowed to plead legal set-off in the Arbitration, and that it is for the tribunal in the Arbitration to decide whether such set-off could actually have legal effect. Notwithstanding that the Debtor has admitted to this court that legal set-off did not take effect whilst the Company was in judicial management, it appears that it wishes to reserve to itself the opportunity to argue to the contrary in the Arbitration. I make no comment on that strategy.

106 Instead, what is problematic is the Debtor's present interpretation of what Question 1 seeks the court's guidance on. In my view, it is an interpretation which defies common sense and logic – for a start, it would be a significant waste of judicial resources and time for the court to be asked for guidance or directions on whether something can be pleaded in an arbitration. To draw an analogy from contract law, if the ubiquitous officious bystander was asked this question, the answer would be "Of course!". That by itself should be a strong indication that this cannot be a reasonable, sensible or logical reading of Question 1. As shown above, it is not an interpretation which the JMs advanced, and even the Debtor itself did not operate on this understanding of Question 1 until its latest set of submissions. As an interpretation that is without any merit, I have no hesitation rejecting it.

107 Thus, on Question 1 as properly understood, the position remains that it has become a hypothetical question and accordingly, I decline to answer it.

Question 2

108 Question 2 concerns whether the Debtor can assert legal set-off or insolvency set-off in respect of the Assigned Claims where the Company has entered into liquidation. Given that insolvency set-off, if any, will have taken effect (whereas a judgment or award will be required to give effect to a legal set-off), I will address the former first.

109 The JMs contend that insolvency set-off cannot be asserted. They say that this is because (a) there was no mutuality in respect of the Assigned Claims at the relevant time (such time being when the *judicial management application* was made on 6 May 2020); (b) in any case, there was never any mutuality because the Company's assets were impressed with a statutory trust; and (c) the Assigned Claims fall within the exceptions in s 219(3) of the IRDA.[38]

110 The first two grounds of challenge relate to mutuality. As I have discussed at [91] above, for insolvency set-off to take effect, there must be mutuality of the respective cross-claims. Each claimant must be solely and personally liable on the claim it owes, while being the sole beneficial owner of the claim it is owed (see [85] above). This is clear from *Good Property Land Development Pte Ltd (in liquidation) v Société-Générale* [1996] 1 SLR(R) 884 ("*Good Property*") at [18], where the Court of Appeal stated:

> … This is part of the wider principle that for mutuality to exist, two conditions must generally be satisfied. First, each claimant must be personally liable for the debt he owes to the other claimant. Mutuality sees through to the real beneficial ownership, regardless of who is the legal, nominal, titular or procedural holder of the claim or procedurally the appropriate plaintiff. Secondly, each claimant must beneficially own the claim which is owed to him by the other claimant and his ownership interest in that claim must be clear and ascertained without inquiry.

What is the relevant time to determine mutuality

111 The issue raised by the JMs' first ground of challenge is *when* mutuality should be tested. The orthodox position is that for the purposes of insolvency set-off, mutuality must be present prior to the commencement of winding up (*Good Property* at [9]). However, the JMs argue that mutuality should be tested

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38 JMs' Submissions for SUM 2989 at paras 69–83.

at an earlier point in this case: they say that where a company in judicial management is wound up under the IRDA (as the Company was in this case), s 219(2) of the IRDA (see [96] above) requires mutuality to be present at the date of the application for judicial management.[39]

112 At the date of the application for judicial management on 6 May 2020, the Debtor had not yet obtained an assignment of any of the Assigned Claims. On the JMs' case, that is fatal to the exercise of insolvency set-off. Essentially, any claim assigned after the date of the application for judicial management would not be subject to insolvency set-off under s 219(2) of the IRDA.

113 There is one fundamental premise underlying the JMs' argument – that insofar as s 219(2) applies to judicial management, it encompasses not only judicial management under the *IRDA*, but *also* judicial management under the *Companies Act*. Unsurprisingly, that is not an understanding which the Debtor shares; to the contrary, the Debtor argues that s 219(2) applies only to judicial management under the IRDA. This turns on the interpretation of "judicial management" in s 219(1)(*a*).

114 It is well-established that the court takes a purposive approach to statutory interpretation. This entails ascertaining the possible interpretations of the provision, having regard not only to its text but also its context within the statute as a whole, ascertaining the legislative purpose or object of the provision and the part of the statute in which it is situated, and comparing the possible interpretations against the purpose. The interpretation which furthers the purpose of the written text should be preferred (*Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [54]).

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[39] JMs' Submissions for SUM 2989 at paras 74 and 79.

115 Given, however, that this case spans across the transition of the judicial management and liquidation regimes from the Companies Act to the IRDA, it is natural and proper to also have regard to the transitional provisions in the IRDA. I begin with s 526, which relates to amendments to the Companies Act:

> 526.—(1) Parts 3 to 12 and 22 do not apply to or in relation to the following, and despite section 451, the Companies Act as in force immediately before the appointed day continues to apply to or in relation to the following, as if Parts 3 to 12 and 22 and section 451 had not been enacted:
>
> …
>
> (*e*) any application made before the appointed day for a judicial management order under section 227B(1) of the Companies Act; …

116 Based on the plain meaning of s 526(1)(*e*), Parts 3 to 12 of the IRDA do not apply to a judicial management application made before the appointed day (*ie*, 30 July 2020, the date the IRDA came into operation), and the relevant provisions in the Companies Act continue to apply. This includes s 219, which is contained within Part 9 of the IRDA. The judicial management application in respect of the Company was made and the order granted before 30 July 2020. Thus, s 526(1)(*e*) suggests that s 219(2) of the IRDA does not apply to a company in judicial management under the Companies Act.

117 I then turn to the meaning of "judicial management" in s 219. Plainly, the term "judicial management" on its own can encompass judicial management both under the Companies Act and the IRDA. However, the analysis cannot end there. The words "judicial management" must be read bearing the relevant definition provided within the statute in mind. That definition is found in s 217(2)(*a*) of the IRDA, which in turn refers to s 88(2): "For the purposes of this Part…a company 'enters judicial management' or is 'in judicial management' within the meanings given to those terms in section 88(2)(*a*) to

(*e*)". Referring to s 88(2), one sees that the status of being in judicial management is tied to the "appointment of a judicial manager":

> (2) For the purposes of this Part —
>
> (*a*) a company is 'in judicial management' while the appointment of a judicial manager of the company has effect;
>
> (*b*) a company 'enters judicial management' when the appointment of a judicial manager takes effect;
>
> …

118 Thus, under s 88(2), a company is in judicial management or enters judicial management for the purposes of s 219 while "the appointment of a judicial manager" has effect or takes effect. The next question that naturally follows is what "judicial manager" means. The answer to that question is found in s 88(1), which states that a "judicial manager" is "a person appointed under *this Part* to manage the company and its affairs, business and property…" [emphasis added]; "this Part" clearly means Part 7 *of the IRDA*, which contains the provisions for judicial management. In other words, s 88(1) defines a "judicial manager" as one who is appointed *under the IRDA*. Putting it all together, a judicial manager appointed under the Companies Act would fall *outside* the definition of "judicial manager" in s 88(1) of the IRDA. This means there is no "appointment of a judicial manager" under s 88(2) and consequently, the company is not in judicial management as per s 217(2)(*a*), *ie*, it is not a "company in judicial management" under s 219.

119 It would be fair to say that the IRDA has defined the relevant terms in a somewhat tortuous manner. Nonetheless, when one follows the references and reads the relevant definitions carefully, the conclusion is clear – the Company, having been placed under judicial management under the *Companies Act*, does *not* fall within the definition of a "company in judicial management" in s 219(1)(*a*) of the IRDA. Therefore, insofar as s 219(2) mandates that mutuality

be tested at the date of the judicial management application, I find that that does not apply where the company is in judicial management under the Companies Act. My conclusion is consistent with the transitional provision in s 526 of the IRDA.

120 Mr Sreenivasan argues to the contrary and submits that s 219(2) does apply to a company in judicial management under the Companies Act. Mr Sreenivasan argues that this accords with the intention of the IRDA to ensure a seamless transition from judicial management to liquidation, evident from other provisions in Part 9 of the IRDA. In his written submissions, Mr Sreenivasan referred to s 226(1) of the IRDA,[40] which defines the relevant time period in which transactions entered into by a company in judicial management or winding up can be avoided, *inter alia*, as a transaction at an undervalue:

> 226.—(1) Subject to this section, the time at which a company enters into a transaction at an undervalue or gives an unfair preference is a relevant time if the transaction is entered into or the preference given —
>
> (a) in the case of a transaction at an undervalue — within the period starting 3 years *before the commencement of the judicial management or winding up (as the case may be) and ending on the date of the commencement of the judicial management or winding up, as the case may be*;
>
> …
>
> [emphasis added]

121 Mr Sreenivasan argues that under s 226(1), where a company is placed in liquidation immediately after judicial management, the liquidators may challenge a transaction at an undervalue made within a period before the commencement of the judicial management. This is distinct from the pre-IRDA position where the time period was calculated with reference to the

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40 JMs' Submissions for SUM 2989 at para 76.

commencement of liquidation, as explained in the *Report of the Insolvency Law Review Committee: Final Report* (Chairman: Lee Eng Beng SC) (2013) at p 130:

> The following provisions should be included in the New Insolvency Act to ensure a seamless transition from judicial management to liquidation:
>
> … The statutory time frames for avoidance provisions and officer liability should be revised to have reference to the point in time when the company is placed under judicial management, even if there is a subsequent winding up.

122 I do not disagree with Mr Sreenivasan that there is a clear intention under the IRDA to have a seamless transition between judicial management and liquidation, as evidenced in the provisions he cited. But that does not address the core issue, which is whether this seamless transition applies to a judicial management commenced *under the Companies Act*. All these provisions apply to a company "in judicial management" and are thus subject to the same definition sections as s 219 (see [117]–[118] above). Applying the same definition of "judicial management" in Part 9 of the IRDA as I have concluded above, the sections on transactions at undervalue and proofs of debt can equally be said to apply only to a company in judicial management under the IRDA, and not the Companies Act. To flip the analysis around and contend that the definition of "judicial management" should be determined by reference to these sections would put the cart before the horse. I am therefore not persuaded by Mr Sreenivasan's arguments.

123 In my view, it is clear from the text of the provision that s 219(2) of the IRDA does not apply to a company in judicial management under the Companies Act. The next question is whether the legislative purpose of the provision (as determined from the text and the relevant extrinsic materials) would point towards a different interpretation. At the hearing, both

Mr Sreenivasan and Mr Lok confirmed that there was no relevant guidance to be drawn from the extrinsic materials (*ie*, the explanatory statement to the IRDA and the Parliamentary debates). To my mind, this in itself is a strong indication. If Parliament had intended for a pre-IRDA judicial management to be subject to the IRDA, or conversely, for the IRDA provisions on insolvency set-off to be applicable to a pre-IRDA judicial management, then Parliament would have made its intentions clear given that this would have been a significant feature of the IRDA and its transitional provisions. In fact, s 526 is a clear indication of Parliament's intention that the Companies Act continues to apply to a judicial management commenced under the Companies Act. Any other interpretation would be a strained one which does violence to the plain words of s 526 and its purpose.

124 Mr Sreenivasan also relied on *Grimmett, Andrew and others v HTL International Holdings Pte Ltd (under judicial management) (Phua Yong Tat and others, non-parties)* [2022] 5 SLR 991 ("*Grimmett*") as authority supporting his case *sub silentio*. *Grimmett* involved a winding-up application under the IRDA made by judicial managers who were appointed under the Companies Act. The court proceeded on the basis that the judicial managers had standing to make the winding-up application. However, as fairly acknowledged by Mr Sreenivasan, there was no challenge to the judicial managers' standing in *Grimmett.* The shareholder who objected to the application in that case contested the application on its merits. The court was also focused on the standing of the judicial managers to make a winding-up application on just and equitable grounds, as opposed to their standing in general as judicial managers appointed under the Companies Act. Thus, the point was simply not argued in that case. In my judgment, *Grimmett* is not authority for the proposition that the provisions in the IRDA can apply to a pre-IRDA judicial management, and it does not really assist the JMs here.

125 In my judgment, it is the pre-IRDA position as expressed in *Good Property* (see [111] above) which continues to apply in this case – accordingly, the relevant time at which mutuality is to be assessed is immediately prior to the commencement of winding up of the Company.

126 To be clear, the conclusion I have reached does not mean that s 219 does not apply to the Company *in its entirety*. Section 219(1)(*a*) makes clear that insolvency set-off applies in relation to "a company in judicial management" as well as "an insolvent company that is being wound up". While the Company does not fall into the former category as I have concluded, it undoubtedly does fall within the latter. Therefore, the insolvency set-off provisions in s 219 are still applicable to the Company, *provided* they relate to *winding up*, and not judicial management. At the hearing, Mr Sreenivasan argued that it would be fictional to read s 219 as giving different treatments to judicial management under the Companies Act and under the IRDA, and that the section would essentially be applicable only partially where a company is in judicial management under the Companies Act. In my judgment, that is, however, the legislative intention as gleaned from the text of the relevant provisions, and from the transitional provisions of the IRDA. Further, Mr Sreenivasan does not argue that the interpretation I have arrived at renders the section unworkable; as I have explained in this paragraph, it does not.

Was there mutuality at the relevant time?

127 Having reached a landing on the relevant time at which to assess if mutuality exists, the key inquiry is this: immediately prior to the commencement of the Company's winding up *on 12 July 2021*, was the Company solely and personally liable on the *claim it owed* (*ie*, the Vessel [A] Claim as merged in the Default Judgment), and was it the sole beneficial owner

of the *claims it had* against the Debtor (*ie*, the claims for freight as pleaded in its counterclaim in the Arbitration)?

128 The JMs argue that there was no mutuality because upon the making of the judicial management order against the Company on 7 August 2020, its assets (including the freight claims) were held on a statutory trust for the benefit of its general pool of unsecured creditors, and thus ceased to be the beneficial owner of those assets.[41] The Debtor contends that the JMs' argument is wrong in law, as there is no statutory trust which arises when an order for judicial management is made.[42] For the avoidance of doubt, the only issue that arises before me is whether a statutory trust arises where a company is placed in judicial management *under the Companies Act*. Therefore, I do not consider and reach any conclusions on what the position is when a company is placed in judicial management under the IRDA as that question does not arise in the applications before me.

129 I begin with the concept of a statutory trust. Typically, upon the making of a winding up order, a company's assets are said to be impressed with a statutory trust for the purpose of discharging the company's liabilities. By virtue of the statutory trust coming into existence, the company loses all custody and control of its property, and all powers of dealing with its assets are transferred to the liquidator who is bound to act in accordance with the relevant statutory scheme (*Media Development Authority of Singapore v Sculptor Finance (MD) Ireland Ltd* [2014] 1 SLR 733 ("*Sculptor Finance*") at [43]).

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41 JMs' Submissions for SUM 2989 at paras 33–38.

42 Debtor's Submissions for SUM 2989 at paras 8–12.

130 The JMs say that a statutory trust similarly arises upon the making of a judicial management order, because the judicial managers of a company are similarly empowered to manage and administer the assets of the company. That is clear under s 227G(1) of the Companies Act, which provides for the judicial managers to take custody and control of the company's assets, and s 227(R)(1)(a), which provides that a creditor or member may seek recourse against the judicial managers if his interests have been unfairly prejudiced in the course of the judicial management. The JMs also make reference to *Bloom and others v Harms Offshore AHT "Taurus" GmbH & Co KG and another* [2010] Ch 187 ("*Bloom*"), and contend that the English Court of Appeal affirmed, in relation to the administration regime under English law, that the protections afforded to the assets of a company in liquidation also extend to administration.

131 I am not persuaded by the JMs' arguments. As a starting point, the JMs have not cited any authority which directly supports the proposition that the assets of a company in judicial management are similarly impressed with a statutory trust. The case of *Bloom*, which the JMs rely on, did not decide that a statutory trust applies to the equivalent administration regime in England. Rather, the court was dealing with the issue of its own jurisdiction to restrain acts committed abroad which interfered with the administration.

132 Indeed, the authorities appear to stand *against* the proposition that a statutory trust arises in respect of a company in judicial management. In *Re Lehman Bros Europe Ltd (in administration) (No. 9) and another* [2018] Bus LR 439, the English High Court made this exact point, and noted expressly that *Bloom* did not support the proposition the JMs now contend for:

> 80. As far as I am aware, there is no authority as to whether a statutory trust arises over the assets of a company in

> administration or, if so, what the scope and implications of that trust might be. I was referred to *Bloom v Harms Offshore AHT "Taurus" GmbH & Co KG* [2010] Ch 187, in which the Court of Appeal was asked to consider whether the assets of a company in administration are subject to the trust that justifies anti-suit injunctions against creditors of companies in liquidation. However, in the circumstances of that case, the Court of Appeal did not find it necessary to determine the wider question as to the existence of a statutory trust in an administration…

133 I note also that the Court of Appeal in *Sculptor Finance* held that it is only upon the making of a winding-up order that the statutory trust arises (*Sculptor Finance* at [43]).

134 Thus, it appears that there is no precedent supporting the JMs' argument that a statutory trust is similarly impressed upon the assets of a company in judicial management.

135 This seems to me to be correct as a matter of principle, particularly when one considers the purpose of a statutory trust. That purpose was set out in *Bloom* at [24] as follows:

> 24. It seems to me that the trust the existence of which was established in *In re Oriental Inland Steam Co* was a legal construct *created to achieve the equitable distribution of the proceeds of the realisation of the assets of the company wherever situated*…
>
> [emphasis added]

136 The Court of Appeal in *Ng Wei Teck Michael v Oversea-Chinese Banking Corp Ltd* [1998] 1 SLR(R) 778 (*"Michael Ng*") at [31] made similar observations:

> *A statutory scheme comes into place to preserve the assets of the company for pari passu distribution among the unsecured creditors*: see, inter alia, ss 258, 259, 260, 334 of the Companies Act; and the unsecured creditors of a company are in the nature of a cestui que trust with beneficial interests extending to all

> the company's property, including the subject matter of the unregistered charge.
>
> [emphasis added]

While *Michael Ng* was subsequently overruled by the Court of Appeal in *Sculptor Finance* on the issue of whether a statutory trust would arise upon the making of a winding-up *application* (as opposed to a winding-up *order*), the Court of Appeal did not disavow the general statement of principle reproduced at [136] above, which continues to stand as good law.

137 It is clear from *Bloom* and *Michael Ng* that the purpose of a statutory trust is to preserve the assets of the company for *pari passu distribution* to the unsecured creditors. As I have observed above at [58], while that is the central feature of the liquidation regime, the same cannot be said of the judicial management regime. In my view, this is a critical difference. A company in judicial management remains a going concern, and the judicial manager is tasked *to carry on the business of the company as a going concern* with a view to achieving one or other of the statutory objectives, which includes the *survival* of the company (or the whole or part of its undertaking) as a going concern (*Electro Magnetic (S) Ltd (under judicial management) v Development Bank of Singapore Ltd* [1994] 1 SLR(R) 574 at [33]). In fact, the piecemeal demolition of the company through liquidation and *pari passu* distribution is often the very thing that judicial managers want to avoid. Viewed through this lens, the purpose of a statutory trust simply does not cohere with the judicial management regime.

138 For the reasons above, it is my view that the assets of a company in judicial management under the Companies Act are not impressed with a statutory trust. As such, in this case, *the Company* was the beneficial owner of its assets (including the freight claims against the Debtor) immediately prior to

the commencement of the winding up application in CWU 117. It was also solely and personally liable to the Debtor for the judgment debt in respect of the assigned Default Judgment. Mutuality was therefore present at the relevant time.

139 For completeness, the parties had also submitted on the issue of whether a statutory trust would have the effect of negating mutuality for the purposes of set-off. Given my conclusion that no statutory trust arises at all, there is no need for me to decide this issue and I leave the question open.

Whether any of the exceptions in s 219(3) of the IRDA apply

140 I turn to the JMs' contention that the Vessel [A] Claim ought to be excluded pursuant to s 219(3) of the IRDA because it is either not a provable debt, or was assigned to the Debtor upon or after it had notice of the Company's imminent insolvency. For convenience, I set out s 219(3) again here:

> (3) There is to be excluded from any set-off under subsection (2) any debt or liability of the company which —
>
> > (*a*) is not a debt provable in judicial management or winding up; or
> >
> > (*b*) arises by reason of an obligation incurred at a time when the creditor had notice that an interim judicial manager had been appointed under section 94(3), or that the application for a judicial management order or the application for winding up (as the case may be) relating to the company was pending.

141 The JMs' argument in respect of s 219(3)(*a*) can be summarised as follows. A post-judicial management assigned claim is not a provable debt under s 219(3)(*a*). Section 218(2) provides that where an insolvent company is being wound up, a debt to which the company is subject at the commencement of the winding up is provable; the corollary is that a debt to which the company was not subject at the time is not provable. However, under s 217, where a

company is wound up while it is "in judicial management", the commencement of the winding up is deemed to be the time of the commencement of the judicial management. This would mean that any claim assigned after the company was placed under judicial management is, by definition, excluded from any insolvency set-off.

142 This argument faces the same obstacle the JMs' arguments faced in relation to s 219(2) – it begs the question as to what "judicial management" means, at least in Part 9 of the IRDA. I have decided that it must mean judicial management under the IRDA. That being the case, for the purposes of s 217, the Company should be treated merely as a company which has been wound up by an order of court, for which the commencement of winding up is deemed to be the time of the winding-up application. By that time (*ie*, 12 July 2021), the Company *was* subject to the Vessel [A] Claim which had already been assigned to the Debtor. That claim is therefore a provable debt under s 218(2), and hence, not excluded under s 219(3)(*a*).

143 The JMs further rely on s 219(3)(*b*) of the IRDA, which operates to exclude a claim from insolvency set-off if it arises by reason of an obligation which was incurred when the creditor had notice that (1) an interim judicial manager was appointed under s 94(3) of the IRDA, or (2) the application for a judicial management order or application for winding up in relation to the company was pending. Between the written and oral submissions made by counsel for the JMs, two distinct arguments appear to be made. The first is that the Debtor had obtained the assignments with notice of the judicial management application filed by the Company (under the Companies Act).[43] This argument can be disposed of quickly. The judicial management application in this case

[43] JMs' Submissions for SUM 2989 at paras 81–83.

was made under the Companies Act, and not the IRDA. It should be noted that under the Companies Act, only the notice of a *winding up application* would have sufficed to exclude a claim from insolvency set-off (see [92]–[95] above). Given that the IRDA came into operation only after the Company was placed under judicial management, it would not be fair on the Debtor to retrospectively enforce the new notice requirements in s 219(3)(*b*).

144 The second argument is that the Debtor had notice of HC/SUM 4537/2020 ("SUM 4537"), which was an application filed on 16 October 2020 by Mr O K Lim and Ms Lim Huey Ching for the judicial management order in respect of the Company to be discharged and for the Company to be wound up. In support of this, Mr Sreenivasan tendered a letter to the court dated 12 January 2021 written by Davinder Singh Chambers LLC (the "DSC Letter") regarding SUM 4537 and other matters. The DSC Letter indicated that the Assignor's solicitors would be attending the hearing of SUM 4537, and further that the Assignor objected to the application.[44] Therefore, the JMs contend that the Assignor (and by extension the Debtor) knew that a winding-up application against the Company was pending in January 2021, and were accordingly fixed with notice.

145 With respect, I disagree. It is not the position under s 219(3)(*b*) that notice of *any* winding-up application against the company will suffice to fix a creditor with notice. The clear words of the provision are that the creditor must have notice of *the* application for winding up in relation to the company – this must mean the application in respect of which the winding-up order was actually made. Therefore, the relevant application was not SUM 4537. Instead, it was CWU 117, which was only filed on 12 July 2021 (see [1] above). In fact,

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44 DSC Letter at p 11.

SUM 4537 was dismissed by the General Division of the High Court on 8 March 2021. This meant that between 8 March 2021 and 12 July 2021 (when CWU 117 was filed), there was *no winding-up application* which was pending. It was within this period that the Assignments were concluded and notices of assignment given to the Company. Thus, the exception under s 219(3)(*b*) does not apply since the Debtor would not have been fixed with the requisite notice of a winding-up application at the time of the Assignments.

Conclusion on SUM 2989

146 I find that insolvency set-off did take effect immediately prior to the commencement of the winding up of the Company on 12 July 2021. Since insolvency set-off has already taken effect, there is nothing left on which any potential *legal set-off* could bite. Accordingly, I do not need to consider or answer Question 2 insofar as it relates to legal set-off.

Conclusion

147 For the reasons I have explained above, these are my conclusions and orders for both applications. In respect of SUM 3297, I hold that the assignment of the Vessel [A] Claim (as merged in the Default Judgment) pursuant to the First Assignment is valid. However, the assignment of the Vessel [B] Claims pursuant to the Second Assignment is void and/or ineffective as a champertous assignment of bare rights to litigate. Accordingly, I grant the declaration sought by the JMs in prayer 1 of the application (see [4] above) but limited to the Second Assignment and the Vessel [B] Claims.

148 In respect of SUM 2989:

(a) I decline to answer Question 1. In sum, legal or independent set-off has yet to be given effect to by a court or arbitral tribunal, and the

Company is no longer in judicial management. Thus, Question 1 as framed is no longer a live issue for which the court's guidance is required.

(b) I answer Question 2 in the affirmative but only insofar as it is addressed to insolvency set-off and on the basis that the exclusions in s 219(3) of the IRDA are not applicable. Given that insolvency set-off takes effect automatically and in this case has taken effect (see [146]), it is not necessary to answer this question insofar as it relates to legal or independent set-off. Accordingly, I grant an order in terms of prayer 1(b) of the application but on the limited terms as set out above.

149 I shall hear the parties separately on the costs of both applications. I further direct that the time for filing any appeal(s) against my decision starts to run from the date of this judgment.

S Mohan
Judge of the High Court

Narayanan Sreenivasan SC, Muralli Rajaram, Jonathan Lim Jien Ming, Ranita Yogeeswaran and Tan Si Xin Adorabelle (K&L Gates Straits Law LLC) for the Applicant;
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