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

**[2023] SGHC 316**

Originating Application No 390 of 2023

In the matter of Section 29 of the Mutual Assistance in Criminal Matters Act 2000

And

In the matter of Paragraph 7(1) of the Third Schedule to the Mutual Assistance in Criminal Matters Act 2000

And

In the matter of Order 53 Rule 11 of the Rules of Court 2021

And

In the matter of oCap Management Pte Ltd (in liquidation)

Between

Attorney-General

… *Applicant*

And

Liquidators of oCap Management Pte Ltd (in liquidation)

… *Non-parties*

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# JUDGMENT

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[Insolvency Law — Winding up — Whether restraint order in relation to assets of company in liquidation should be granted — Extent to which company's assets may be restrained in view of liquidation process]

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# *Re* oCap Management Pte Ltd (in liquidation)

**[2023] SGHC 316**

General Division of the High Court — Originating Application No 390 of 2023
Aedit Abdullah J
13 July 2023

3 November 2023 Judgment reserved.

**Aedit Abdullah J:**

1 In the liquidation of a company, funds from the realised assets of the company are usually reserved for distribution as either the costs and expenses of the winding up or debts that are repaid to creditors. Claims against the company are subject to the liquidation process to facilitate the orderly distribution of assets. To carry out this process, the liquidators of a company would in turn need to have access to the company's funds. However, in the present originating application, the Attorney-General ("AG") seeks to effectively halt this process. He says that another interest intrudes: that of providing international assistance to another state in foreign criminal proceedings, as the assets of the company might be the subject of a confiscation order by a foreign court. The broad question in these proceedings thus concerns the extent to which the court should give weight to this interest.

2 This application is made by the AG under s 29(2)(*b*) of the Mutual Assistance in Criminal Matters Act 2000 (2020 Rev Ed) ("MACMA"), which

governs requests for the enforcement of a foreign confiscation order that may be made in judicial proceedings in another country. Pursuant to a request for assistance from the Federal Republic of Germany ("the German authorities"), the AG primarily seeks an order ("the Restraint Order") that oCap Management Pte Ltd ("the Company") and Citibank NA ("Citibank") be restrained, until further order, whether by themselves, their servants, agents or otherwise howsoever from disposing of, transferring, assigning, pledging, distributing, charging, diminishing the value of or otherwise dealing with their interest, in all or any part of the monies deposited with Citibank in two bank accounts (collectively, "the Bank Accounts"). The AG seeks to restrain up to €210m, which represents the value of the proceeds of criminal offences involving Wirecard AG and its subsidiaries (collectively, "the Wirecard Group").

3 Complicating this matter is the fact that the Company is in liquidation. While the liquidators of the Company ("the Liquidators"), who are non-parties to this application, do not oppose the order that the AG is seeking, their position is that the Restraint Order should be made with appropriate conditions and exceptions to allow the Liquidators to deal with a portion of the moneys in the Bank Accounts, in the amount of no less than S$2,705,000 so as to not: (a) inhibit the Liquidators from exercising their functions for the purpose of distributing any property to the Company's creditors; and/or (b) prevent the payment out of any property of expenses properly incurred in the winding up in respect of the Bank Accounts.[1]

4 While the AG and the Liquidators do not dispute that the statutory requirements for the grant of the Restraint Order have been met, they take differing positions in relation to the principles that should govern the scope of

[1] RWS at para 3.

any resulting order. As such, I indicated during the hearing that I will first rule on the applicable principles, with parties to make further submissions on the amount in the Bank Accounts with which the Liquidators should be allowed to deal; that amount would fall outside the scope of the Restraint Order. This judgment sets out those principles.

**Background: The Wirecard Fraud**

5 The genesis of this application relates back to the criminal offences involving the Wirecard Group. On 28 August 2020, the Local Court of Munich ordered the provisional seizure and attachment of the Company's assets up to €100m as there were reasons to believe that the Company had obtained at least that sum as proceeds from alleged criminal offences involving the Wirecard Group, and the conditions for the confiscation of the value of the proceeds of crime under German law had been fulfilled.[2]

6 In October 2020, the German authorities submitted a request to the AG pursuant to the MACMA seeking Singapore's assistance to restrain the dealing in any of the moneys in the Bank Accounts, up to €100m.[3] Subsequently, the German authorities ascertained that the proceeds of crime obtained by the Company amounted to the higher sum of €210m and accordingly clarified that their request seeks Singapore's assistance to restrain the dealings in any of the moneys in the Bank Accounts up to €210m.[4]

7 On 10 March 2022, the German authorities instituted criminal proceedings against Oliver Bellenhaus, Dr Markus Braun, and Stephan Egilmar

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2 AWS at para 6.

3 AWS at para 7.

4 AWS at para 8.

Hartmann Freiherr von Erffa in Germany for alleged criminal offences committed involving the Wirecard Group between 2015 and 2020. In particular, Braun was charged with offences of embezzlement through loans amounting to €210m from and/or through the companies in the Wirecard Group to the Company in relation to the Wirecard Group's purported dealings in the third-party acquirer and the merchant cash advance lines of businesses, which in truth did not exist. These non-existent businesses were instead used to disguise the Wirecard Group's true financial position and ultimately divert moneys out of the Wirecard Group via the Company. Among other things, the German authorities are seeking an order for confiscation against the Company for the value of the proceeds of crime obtained by the Company amounting to €210m ("the German Confiscation Proceedings").[5]

8 On 18 April 2023, this originating application was filed on a without notice basis under the MACMA. The Attorney-General Chambers ("AGC") notified the Liquidators' solicitors, BlackOak LLC, of this application as a matter of courtesy. Following the Liquidators' request, the AGC indicated that it would be prepared to proceed with this application on a *with notice* basis as requested by the Liquidators, provided that the Company and the Liquidators agreed to certain conditions. This was to manage the risk that the moneys in the Bank Accounts may be dissipated pending the disposal of this application. Parties eventually agreed on those conditions, and this application was thus heard on a with notice basis on 13 July 2023.[6]

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5 AWS at para 9.

6 AWS at para 10.

**The statutory requirements for the grant of the Restraint Order have been met**

9 I allow the application, being satisfied that all the statutory requirements for the granting of the Restraint Order have been met. Section 29(2)(*b*) of the MACMA, on which this application was based, read with s 29(1)(*b*), provides as follows:

> **Requests for enforcement of foreign confiscation order**
>
> **29.**—(1) The appropriate authority of a prescribed foreign country may request the Attorney-General to assist in —
>
> …
>
> (*b*) where a foreign confiscation order may be made in judicial proceedings which have been or are to be instituted in that country, the restraining of dealing in any property that is reasonably believed to be located in Singapore and against which the order may be enforced or which may be available to satisfy the order.
>
> (2) On receipt of a request under subsection (1), the Attorney-General may —
>
> …
>
> (*b*) in the case of subsection (1)(*b*) — act or authorise the taking of action under the provisions of the Third Schedule,
>
> and in that event the provisions of the Third Schedule apply accordingly.

10 Section 29 of the MACMA refers to the Third Schedule of the same Act ("Third Schedule"), to which I now turn. In this regard, paragraph 6 of the Third Schedule sets out four main legal requirements for the grant of a restraint order (see the Court of Appeal decision of *Steep Rise Ltd v Attorney General* [2020] 1 SLR 872 at [35]). For ease of reference, I set out paragraph 6:

> **Cases in which restraint orders and charging orders may be made**

> **6.**—(1) The powers conferred on the General Division of the High Court by paragraph 7(1) to make a restraint order … are exercisable where —
>
> (a) judicial proceedings have been instituted in a prescribed foreign country;
>
> (b) the proceedings have not been concluded; and
>
> (c) either a foreign confiscation order has been made in the proceedings or it appears to the General Division of the High Court that there are reasonable grounds for believing that such an order may be made in them.
>
> (2) Those powers are also exercisable where the General Division of the High Court is satisfied that judicial proceedings are to be instituted in a prescribed foreign country and that there are reasonable grounds for believing that a foreign confiscation order may be made in them.
>
> …
>
> (4) The General Division of the High Court shall not make an order under paragraph 7(1) … if it is of the opinion that it is contrary to the public interest for the order to be made.

11 As the AG correctly submits,[7] the above requirements as distilled mean that the court must be satisfied that:

(a) judicial proceedings have been instituted in a prescribed foreign country or are to be instituted in a prescribed foreign country;

(b) such proceedings have not concluded;

(c) a foreign confiscation order has been made in such proceedings or there are reasonable grounds for believing that a foreign confiscation order may be made in such proceedings; and

(d) it is not contrary to the public interest for the restraint order to be made.

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7 AWS at para 12.

12 On the first requirement, judicial proceedings have been instituted in the Federal Republic of Germany. While it is not a "prescribed foreign country" as declared by the Minister under ss 2(1) and 17 of the MACMA, any assistance under Division 5 of the MACMA (of which s 29 is part) may still be provided to a foreign country if the appropriate authority of that country has given an undertaking to the AG that that country will comply with a future request by Singapore to that country for similar assistance in a criminal matter involving an offence that corresponds to the foreign offence for which assistance is sought (see s 16(2) of the MACMA). The AG has provided the requisite undertaking from the German authorities, with which I am satisfied.[8]

13 The second requirement, that judicial proceedings have not concluded, has also been confirmed by the German authorities.[9]

14 Turning to the third requirement, I am satisfied that there are reasons to believe that a foreign confiscation order will be made in the German Confiscation Proceedings. Section 2(1) of the MACMA defines a "foreign confiscation order" as follows:

> "foreign confiscation order" —
>
> > (*a*) means an order made by a court in a foreign country, on or after the appointed date for that country, for the recovery, forfeiture or confiscation of —
> >
> > > (i) any payment or other reward received in connection with an offence against the law of that country, or the value of any such payment or reward; or
> > >
> > > (ii) any property derived or realised, directly or indirectly, from any payment or other reward

8 AWS at para 13.

9 AWS at para 14.

> mentioned in sub-paragraph (i), or the value of any such property; and
>
> (*b*) includes an instrumentality forfeiture order.

In this regard, the German authorities have issued a certificate dated 1 September 2022 confirming that the German confiscating proceedings have been instituted against Bellenhaus, Braun, and von Erffa (as mentioned at [7] above), and that the purpose of these proceedings is to prosecute them for offences under German law and to confiscate the proceeds of crime, or the value of the proceeds of crime, derived from the commission of the offences. These include assets of the Company in the amount of €210m, including the Bank Accounts.[10]

15 Fourth, I find nothing to suggest that it would be contrary to the public interest for the Restraint Order to be made. Indeed, the Liquidators also confirm that they are not aware of any evidence which suggests that the statutory requirements under the MACMA have not been fulfilled.[11]

**The scope of restrictions on the making of the Restraint Order**

16 However, even when the statutory requirements under the MACMA are satisfied, the court's power to grant a restraint order is subject to some restrictions, depending on the facts of each case. One such restriction is found in paragraph 14 of the Third Schedule, which governs the interaction between the court's power to grant a restraint order on one hand, and the liquidation of a company on the other. Broadly speaking, there are two situations contemplated in paragraph 14. The first situation is where a restraint order is granted before the winding up of a company, and this is governed by paragraph 14(1). The

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10 Chew Wei Chiang Benjamin's Affidavit dated 17 April 2023 at para 9.

11 RWS at para 11.

second situation is governed by paragraph 14(2) and is concerned with an application for a restraint order that is heard after the company has been wound up.

17 As the Company was already in liquidation at the time of the hearing of this application, it is paragraph 14(2) that is applicable here. However, the AG and the Liquidators disagree about the proper interpretation of this provision. Paragraph 14(2) reads:

> **Winding up of company holding realisable property**
>
> …
>
> (2) Where, in the case of a company, such an order has been made or such a resolution has been passed, the powers conferred on the General Division of the High Court by paragraphs 7 to 11 or on a receiver so appointed must not be exercised in relation to any realisable property held by the company in relation to which the functions of the liquidator are exercisable —
>
> > (*a*) so as to inhibit the liquidator from exercising those functions for the purpose of distributing any property held by the company to the company's creditors; or
> >
> > (*b*) so as to prevent the payment out of any property of expenses (including the remuneration of the liquidator or any provisional liquidator) properly incurred in the winding up in respect of the property.

Paragraph 14(5) of the Third Schedule makes clear that the "company" referred to above means "any company which may be wound up under the Insolvency, Restructuring and Dissolution Act 2018" ("IRDA"). As the Company is being wound up under the IRDA,[12] it is therefore undisputed that paragraph 14(2) is applicable here. The question, rather, is how paragraphs 14(2)(*a*) and 14(2)(*b*) should be interpreted.

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12 HC/ORC 1571/2021 dated 15 March 2021.

### *Paragraph 14(2)(a) of the Third Schedule*

*The AG's arguments*

18 The AG first notes, in relation to paragraph 14(2)(*a*), that this provision concerns the distribution of realisable property to be made to a company's creditors. It therefore applies when the grant of a restraint order over realisable property held by a company in liquidation will: (a) inhibit the liquidator in exercising his functions; and (b) those functions are being exercised specifically "for the purpose of distributing any property held by the company to the company's creditors".[13]

19 The AG's position is that paragraph 14(2)(*a*) only limits the court's power to grant a restraint order over realisable property when the liquidator is specifically seeking to make an actual distribution to a company's creditors.[14] The AG submits that this interpretation is "logical, workable, and wholly in line with the statutory language" of paragraph 14(2)(*a*), which focuses solely on the distributive function of this provision, and limits its scope to when there is actual property to be distributed to creditors.[15]

20 In support of its proposed interpretation, the AG makes several arguments. First, the AG says that construing paragraph 14(2)(*a*) narrowly would remove the uncertainty of possible speculation on the court's part as to whether, and how much, realisable property must be given to the company's

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13 AWS at para 24.

14 AWS at para 26.

15 AWS at para 31.

liquidator so as to facilitate a possible eventual distribution of property to the company's creditors.[16]

21 Second, it is contended that the general purpose of restraint orders under the MACMA is to preserve assets in Singapore that may be the subject of a foreign confiscation order so that, when the said order is made, assets would still be available to satisfy it. This is a facet of the MACMA's overarching aim of facilitating the provision of international assistance to other countries in criminal matters and obtaining reciprocal international assistance.[17]

22 Third, the AG submits that the specific purpose of paragraph 14(2)(*a*) is to strike a balance between the domestic insolvency regime and the MACMA regime, where the same realisable property is the subject of both. The AG further argues that only the proposed interpretation would result in this specific purpose being coherent with the general purpose of the MACMA.[18]

*The Liquidators' arguments*

23 The Liquidators, on the other hand, contend that the MACMA framework operates on the rule that the "first in time prevails". They argue that whether the insolvency legislation or the MAMCA take priority depends on whether orders are made under the MACMA before or after a winding up order is made.[19]

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16 AWS at paras 27(b) and 31.

17 AWS at para 33.

18 AWS at para 35.

19 RWS at para 23.

24 The Liquidators rely on the English Court of Appeal decision of *In re Stanford International Bank Ltd and another* [2010] 3 WLR 941 ("*In re Stanford*") interpreting ss 41 and 426 of the Proceeds of Crime Act 2002 (c 29) (UK) ("POCA"), which are provisions materially similar to paragraphs 7 and 14 of the Third Schedule. They submit that, notwithstanding that the POCA governs domestic confiscation and insolvency proceedings in the UK, the principles governing the interpretation of ss 41 and 426 of the POCA should nevertheless be followed in the interpretation of paragraphs 7 and 14 of the Third Schedule.[20]

25 It is also argued on behalf of the Liquidators that the "first in time prevails" rule provides a practical solution in resolving two sets of legislation operating simultaneously against the same property, and that the parliamentary debates in the UK support their interpretation.[21] In the round, the Liquidators submit that the "first in time prevails" rule represents the right balance to be struck between the competing interests of the public and of the creditors of the insolvent company.[22]

*The proper interpretation of paragraph 14(2)(*a*)*

26 I do not agree with either interpretation of paragraph 14(2)(*a*) that each side has put forward. The first in time does not prevail, but neither should this provision be interpreted as narrowly as the AG contends.

27 In *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 ("*Tan Cheng Bock*") at [37], a three-step framework for interpreting a statutory provision was

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20 RWS at para 27.

21 RWS at para 32.

22 RWS at para 33.

laid down as follows, requiring a court to:

(a) first, ascertain the possible interpretations of the provision, having regard not just to the text of the provision but also to the context of that provision within the written law as a whole;

(b) second, ascertain the legislative purpose or object of the statute; and

(c) third, compare the possible interpretations of the text against the purposes or objects of the statute.

28 Applying the first step of the framework, while it is clear that paragraph 14(2)(*a*) accords primacy to the liquidation process in certain situations, there is indeed some ambiguity as to when that provision applies. Specifically, what does it mean to "inhibit the liquidator from exercising those functions for the purpose of distributing any property held by the company"? As both the AG's[23] and the Liquidators' arguments[24] have highlighted, there are a few possible interpretations:

(a) a "first in time prevails" rule should apply. That is, whether the insolvency legislation or the MAMCA take priority depends on whether orders are made under the MACMA before or after a winding up order is made;

(b) paragraph 14(2)(*a*) only limits the extent of the court's power to grant a restraint order over realisable property when the liquidator is

[23] AWS at pars 25–26.

[24] RWS at para 23.

specifically seeking to make an actual distribution to a company's creditors; or

(c) paragraph 14(2)(*a*) extends to all intended action(s) of the liquidator that are directed towards the eventual goal of distributing property to the company's creditors. This would include any investigative work undertaken by the liquidator, the commencement of claims to potentially recover moneys owed/due to the company, and other functions of the liquidator, so long as there is some link between the liquidator's intended action(s) and the eventual goal of distribution.

29 With the different possible interpretations of paragraph 14(2)(*a*) in mind, I now turn to the second and third stages of the *Tan Cheng Bock* framework. It is important here to distinguish between the specific purpose underlying a particular provision and the general purpose or purposes underlying the statute as a whole or the relevant part of the statute (see *Tan Cheng Bock* at [40]). While the court generally presumes that any specific purpose does not go against the grain of the relevant general purpose, this is not to say that the specific purpose can never go against the grain of the general purpose (see *Tan Cheng Bock* at [41]). For instance, there will be situations that the specific purpose of a provision can be to delimit the range of circumstances to which the general rule and, indeed, the general purpose applies.

30 I find this case to be one of such situations. As the then Minister for Law Professor S Jayakumar said in the Second Reading of the Mutual Assistance in Criminal Matters Bill, the general purpose of the MACMA is to give effect to "Singapore's commitment to be part of the wider international network of cooperation in combating crime on a global scale" (see *Singapore Parliamentary Debates, Official Report* (22 February 2000), vol 71 at col 980).

Reinforcing this is the long title of the MACMA, which states that it is "[a]n Act to facilitate the provision and obtaining of international assistance in criminal matters".

31 It is evident, however, that paragraph 14(2)(*a*) – and indeed paragraph 14(2) more generally – imposes limitations on the extent to which Singapore should render international assistance in criminal assistance. By providing that the power of the court to grant a restraint order under paragraph 7 of the Third Schedule "must not" be exercised when either paragraphs 14(2)(*a*) or 14(2)(*b*) are satisfied, paragraph 14(2) makes clear that primacy is given to the liquidation process in certain situations where a restraint order is sought over realisable property after the company has entered into liquidation. Indeed, the conclusion that paragraph 14(2)(*a*) limits the powers of the court is one which "emanate[s] from its words" (see *Tan Cheng Bock* at [44]). Accordingly, I agree with the AG's submission[25] that the specific purpose of paragraph 14(2) generally (*ie*, both paragraphs 14(2)(*a*) and 14(2)(*b*)) is not entirely coterminous with the general purpose of the MACMA; rather, it is to strike a balance between the domestic insolvency regime and the MACMA regime, where the same realisable property is the subject of both.

(1) A "first in time prevails" rule does not apply

32 With this specific purpose in mind, I turn to consider the competing interpretations. It is apt to first consider the Liquidators' interpretation (at [28(a)] above), as their position is that the "first in time prevails" rule is broadly applicable across both paragraphs 14(2)(*a*) and 14(2)(*b*). There is thus the possibility that their interpretation might be dispositive of the entire application,

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[25] AWS at para 34.

rendering all other issues moot. However, having considered the matter, I am of the view that this interpretation should be rejected.

33 As mentioned above, the Liquidators rely on the English Court of Appeal decision of *In re Stanford* in support of this interpretation and, in particular, the speeches of Arden LJ at [129] and Hughes LJ at [181]. I however did not consider that these assisted the Liquidators. Arden LJ had stated in *obiter* that the policy of the POCA "prevent[s] a defendant using an insolvency proceeding commenced *after* a restraint order as a means of defeating a restraint order" [emphasis in original]. However, as against the Liquidators' interpretation, it was clear that Arden LJ also went on, in the same paragraph, to say that there is "no mention of extending this policy to insolvency proceedings commenced *before* a restraint order is made" [emphasis in original]. Indeed, she observed that the explanatory notes to the POCA make clear that, in situations where there is a prior insolvency proceeding, there are circumstances when the insolvency proceeding has priority over the public interest in restraint and confiscation. As such, in the present application where there has been a prior insolvency proceeding, I do not think that Arden LJ's statements indicate that a "first in time prevails" rule would apply even if *In re Stanford* were followed.

34 Importantly, it even appears that Hughes LJ had some reservations about the "first in time prevails" approach as it would enable a dishonest defendant to evade the prospect of a confiscation order by conniving to have an insolvency order made before there could be a restraint order, and the potential for that to be done with a view to preserving assets for persons claiming to be creditors but linked in some manner to the defendant would be considerable. This might result in "unseemly races between insolvency practitioners and prosecutors". Nevertheless, the learned Lord Justice ultimately concluded that he did not have

to decide on this question on the facts of that case. As such, given the *obiter* nature of the aforesaid statements in *In re Stanford* and the clear difficulties in adopting Arden LJ's approach, I do not think that these statements represent any definitive position in English law.

35 Even if English law adopts a "first in time prevails" rule, I do not think that this position can be directly transposed onto Singapore law. On the contrary, the starting point is that primacy must be given to the text of the provision and its statutory context (see *Tan Cheng Bock* at [43]). When deciding whether any extraneous material should be referred to and/or what weight should be given to such material, consideration must be given to the desirability of persons being able to rely on the ordinary meaning conveyed by the text and to the need to avoid prolonging legal proceedings (see *Tan Cheng Bock* at [45]). It is also obvious that, while foreign decisions may be of persuasive value, they are not binding on Singapore courts. Similarly, while the Liquidators have sought to rely on the parliamentary debates in the UK, I do not give much weight to those materials in the absence of any indication that our Parliament had considered them. Ultimately, fidelity must be had to the text and context of the statutory provision.

36 In the present application, while I have concluded that the "first in time prevails" rule is a possible interpretation, it does add an extra gloss to the wording of paragraph 14(2)(*a*) which is unsupported by the plain words of the statute. This all-or-nothing approach does not cohere with the specific purpose of paragraph 14(2) to strike a balance between the two regimes. On the contrary, it leaves the outcome of any case to whether the company had fortuitously entered into a winding up before the hearing of the restraint order. As Hughes LJ observed, the potential upshot of this approach is that there might be "unseemly races between insolvency practitioners and prosecutors" (see *In re*

*Stanford* at [181]). On this basis, I do not think that the Liquidators' interpretation of paragraph 14(2)(*a*) is correct.

(2) The court's power to grant a restraint order is not limited to cases where distribution to the creditors is imminent

37 I also reject the AG's proposed interpretation (at [28(b)] above) as being unduly underinclusive since it only restricts the court's power to grant a restraint order in the scenario where the liquidator is specifically seeking to make an actual distribution to the company's creditors. The result is that the only scenario where the court's power to grant a restraint order is limited is where the liquidation is at such an advanced stage that distribution would be imminent. Conversely, where distribution is not imminent, the court's power to grant a restraint order is not restricted by the consideration that without access to any funds, the liquidator would not be able to realise the property of the company in order to carry out her other functions, such as appointing a solicitor to assist in her duties, or bringing or defending any action or legal proceeding in the name and on behalf of the company (see s 144(1)(*f*) of the IRDA).

38 The AG's interpretation does not align with the text, context, and purpose of paragraph 14(2)(*a*). First, as regards the text and context of this provision, it bears emphasis that paragraph 14(2)(*a*) contains the words "inhibit the liquidator from *exercising those functions for the purpose of* distributing any property" [emphasis added], which is not necessarily coterminous with inhibiting the liquidator from the act of distribution. Indeed, as an anterior act can be done "for the purpose of" performing a subsequent act, it stands to reason that the liquidator can exercise other functions prior to distribution but which ultimately serve the purpose of distribution. Applying this reasoning, I do not think that the wording of this provision necessarily suggests that the court's

power to grant a restraint order is only restricted to situations where granting a restraint order would inhibit the liquidator from the imminent act of distribution. Had the legislature intended to limit it in the way argued for by the AG, other language would have been used.

39 Second, the AG's interpretation would also be inconsistent with the specific purpose of paragraph 14(2) to strike a balance between the winding up regime under the IRDA and the MACMA regime. It would effectively allow the MACMA regime to take precedence over the winding up regime in most situations, except when the liquidation process is almost complete. In my view, this unduly skews the balance in favour of the MACMA regime, resulting in an extreme outcome which must not have been intended by Parliament. More fundamentally, this interpretation would render otiose the qualifying words "for the purpose of" that are situated immediately before the mention of "distributing any property", which, when read together, encompass anterior acts prior to distribution but which are done with the end of distribution in mind. This is tantamount to an impermissible rewriting of paragraph 14(2)(*a*), contrary to the principle that the court should endeavour to give significance to every word in an enactment (see *Tan Cheng Bock* at [38]).

(3) The appropriate balance to be struck

40 Having considered the different interpretations, I am of the view that paragraph 14(2)(*a*) is not only applicable where granting a restraint order would inhibit the liquidator from performing the act of distribution itself, but also where it would inhibit the liquidator from performing other functions which serve the ultimate end of distribution.

41 I note, preliminarily, that the phrase "distributing any property" in paragraph 14(2)(*a*) is not entirely apposite; a liquidator does not, strictly speaking, distribute property directly. In a winding up, the liquidator takes in the property of the company, and sells off (or "liquidates") the assets of the company, among other things, to bring in funds for distribution to the various creditors, leaving any balance to the shareholders. Therefore, the phrase "distributing any property" in paragraph 14(2)(*a*) must be taken to refer, more generally, to the distribution of funds derived from the liquidated assets of the company to its creditors. From this, it is clear that paragraph 14(2)(*a*) limits the court's power to grant a restraint order where it would inhibit the liquidator from making the actual distribution of funds from assets which have been liquidated.

42 The question, however, is whether paragraph 14(2)(*a*) goes further in restricting the court's power to grant a restraint order in other circumstances. This is because the reference to the act of "distributing any property" does not stand in isolation; indeed, paragraph 14(2)(*a*) makes reference to the liquidator "exercising those functions *for the purpose of* distributing any property held by the company to the company's creditors" [emphasis added]. As explained above at [38]–[39], the phrase "for the purpose of" appears to extend the scope of paragraph 14(2)(*a*) to other functions exercised by the liquidator prior to distribution but which ultimately serve the purpose of distribution.

43 In my view, this broader interpretation must be correct as it is clearly consistent with the broad and wide-ranging functions of a liquidator conducting the winding up of a company. For instance, a liquidator may be required to, among other functions, compromise any debt due to the company; sell the immovable and movable property of the company; do all acts and execute in the name and on behalf of the company all deeds, receipts and other documents; appoint an agent to do any business which the liquidator is unable to do himself

or herself; and do all such other things as are necessary for winding up the affairs of the company and distributing its assets (see s 144(2) of the IRDA). Paragraph 14(2)(*a*) must therefore be taken to cover the entire liquidation process, at least up to the point of completion of distribution to the creditors (although, presumably, the distribution of any balance to the shareholders may fall outside the ambit of this paragraph). Accordingly, even if a restraint order is granted, the process of the liquidation would still continue; the liquidation process should not be allowed to be stymied indefinitely pending a foreign confiscation order. To my mind, this strikes the appropriate balance between the winding up regime and the MACMA regime as intended by Parliament.

44 The AG raises four objections against this interpretation, which I now address.

45 First, I disagree with the AG's characterisation of this interpretation as being "unworkable and impractical". In this regard, the AG contends that this interpretation would deprive the court of its power to grant a restraint order in virtually all circumstances as the liquidator can plausibly point to any future expenses or costs that may potentially be incurred in the general and ordinary course of the company's winding up, that may require the use of the company's existing funds.[26] In my view, this concern may be overstated as it does not deprive the court of its power to grant a restraint order in "virtually all circumstances". The court's power to do so is only restricted where it would prevent the liquidator from exercising her functions; accordingly, the court still has the power to grant a restraint order over the company's property to the extent that the liquidator is still able to carry out her functions.

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[26] AWS at para 27(a).

46 Second, I reject the AG's contention that this interpretation is unworkable in practice as the court is not apprised of the full facts and circumstances of the company's liquidation and is thus not in any meaningful position to adjudicate on any claims as to whether (and how much) realisable property must be given to the company's liquidator.[27]

47 This supposed problem is not insurmountable. At the time when the application for the restraint order is heard it is not necessary for the liquidator and the court to predict, with full certainty and precision, the future expenses that will be incurred. Given that the court has power to vary or discharge the restraint order (see paragraph 7(5) of the Third Schedule to the MACMA), it is always open for the court to assess the immediate expenses that are required for the foreseeable future. Provided that the requirements in paragraph 14 of the Third Schedule are met, a liquidator may subsequently apply to court to vary the restraint order to show that the restraint order against some of the restrained property needs to be lifted in order for the liquidator to perform his functions.

48 Third, notwithstanding the AG's argument to the contrary,[28] I do not think that this interpretation renders paragraph 14(2)(*b*) of the Third Schedule nugatory. In this regard, the AG submits that this interpretation would encompass all liquidation expenses, which the AG says is a matter that is properly the subject of paragraph 14(2)(*b*). While it is true that paragraphs 14(2)(*a*) and 14(2)(*b*) would both relate to liquidation expenses, the function of the two rules are different. While paragraph 14(2)(*b*) concerns the "payment out" of liquidation expenses, it presupposes that the company has sufficient assets from which to pay out to begin with. To ensure that this is so,

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27 AWS at para 27(b).

28 AWS at para 30.

the court's power to restrain the property of the company which could potentially be paid out as liquidation expenses must accordingly be circumscribed as well. If the company has insufficient unrestrained assets to begin with, it is unlikely that any liquidator would continue with her services if it were clear that she would not be reimbursed from the company's assets. Therefore, a liquidator would require assurance that she would be actually paid for her expenses, and paragraph 14(2)(*a*) serves precisely this function by restricting the court's power to grant a restraint order over property that should be reserved as liquidation expenses, that would be paid out in the future. This function can only be served by the adoption of this interpretation, where there is a complete coincidence between the types of expenses that are covered by paragraphs 14(2)(*a*) and 14(2)(*b*). As such, instead of rendering paragraph 14(2)(*b*) nugatory, this interpretation of paragraph 14(2)(*a*) complements paragraph 14(2)(*b*) and ensures that the latter can be given proper effect.

49 Lastly, the AG argues that this interpretation should be rejected on the basis that that it is at odds with paragraph 14(3) of the Third Schedule, which expressly stipulates that "[n]othing in the Insolvency, Restructuring and Dissolution Act 2018 is taken as restricting, or enabling the restriction of, the exercise of those powers mentioned in [paragraph 14(2)]". The AG says that this means that Parliament could not have intended for paragraph 14(2) to be construed so expansively.[29] I disagree. While it is stipulated that the provisions in IRDA do not restrict the court's power to grant a restraint order, that stipulation does not lead to any conclusion how the exceptions in MACMA, such as paragraph 14(2), should be construed.

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[29] AWS at para 28.

50 Accordingly, I am of the view that paragraph 14(2)(*a*) of the Third Schedule should be read broadly to limit the court's power to grant a restraint order over realisable property where it would inhibit the liquidator from performing the act of distribution to the company's creditors, as well as other functions which would serve that ultimate purpose.

### ***Paragraph 14(2)(b) of the Third Schedule***

51 I now consider the proper interpretation of paragraph 14(2)(*b*) of the Third Schedule, which limits the court's power to grant a restraint order over realisable property held by the company in relation to which the functions of the liquidator are exercisable "so as to prevent the payment out of any property of expenses (including the remuneration of the liquidator or any provisional liquidator) properly incurred in the winding up in respect of the property".

#### *The AG's arguments*

52 The AG argues that the use of the word "incurred", by its plain meaning and past tense, imposes a requirement that the reimbursement of expenses must be retrospective, rather than prospective. Such expenses must have already been incurred, the AG contends, relying on the decision of the General Division of the High Court ("the General Division") in *Carlos Manuel De São Vincente v Public Prosecutor* [2023] SGHC 143 ("*Carlos*") at [29] which, in the context of domestic restraint orders, interpreted s 35(8)(*b*)(i) of the Criminal Procedure Code 2010 (2020 Rev Ed) ("Criminal Procedure Code"). As such, the AG says that the court is only entitled to consider expenses incurred before the making of a restraint order in deciding the extent to which paragraph 14(2)(*b*) limits the court's power to make that order.

53 Furthermore, it is argued that the Liquidators must prove to the satisfaction of the court that the expenses had been properly incurred in order for paragraph 14(2)(*b*) to be engaged.[30] The AG also argues that a liquidator can only prove that expenses have been "properly" incurred after it has been incurred; and thus, it is argued that this further supports the AG's interpretation that the reimbursement of expenses must be retrospective, rather than prospective.

54 Furthermore, it was stressed by the AG during the hearing that these expenses must be incurred in the winding up "in respect of the property", and not the winding up generally. It is argued that, if Parliament had intended for paragraph 14(2)(*b*) to include expenses incurred in the winding up generally, the words "in respect of the property" would not have been added to qualify the ambit of the provision.

55 Thus, in sum, the AG takes the position there are three elements to be satisfied under paragraph 14(2)(*b*): (a) that the expenses have already been incurred before the making of a restraint order; (b) that these expenses were proper; and (c) that these expenses were in respect of the realisable property.

*The Liquidators' arguments*

56 In response, the Liquidators argued during the hearing that the word "incurred" in paragraph 14(2)(*b*) should not be read restrictively, that indeed, it should include costs which will be prospectively incurred in the winding up in respect of the property.

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30 AWS at para 38.

57 The Liquidators argued that if costs to be prospectively incurred could not be paid to the Liquidators, the Liquidators would be completely hamstrung and prevented from performing their role, including pursuing claims on behalf of the Company. This would mean that sums which could be potentially recovered by the Company would be foregone, as the underlying claims for these recoveries would soon be time-barred. Considering these practical difficulties, the Liquidators contended that the restricted interpretation that the AG advances is an extreme reading of the provision that is contrary to what Parliament would have intended.

*The proper interpretation of paragraph 14(2)(*b*)*

58 It will be recalled that paragraph 14(2)(*b*) limits the court's power to grant a restraint order where it would "prevent the payment out of any property of expenses (including the remuneration of the liquidator or any provisional liquidator) properly incurred in the winding up in respect of the property". Applying the first stage of the *Tan Cheng Bock* framework, I find that both the AG and the Liquidators have advanced possible interpretations of paragraph 14(2)(*b*).

59 In this regard, the AG has rightly argued that the use of the word "incurred" in this provision may suggest that the limitation on the court's power to grant a restraint order must be in respect of expenses already incurred before the making of the restraint order. As for the Liquidators, they have also advanced a possible interpretation; since there is no express cut-off date in respect of the expenses which must be properly incurred, it is possible that the court may also consider, when granting a restraint order, future expenses that will be properly incurred after the hearing of the restraint order application.

60 Given these competing interpretations, it is necessary to proceed to the second and third stages of the framework in *Tan Cheng Bock*. As with my discussion on paragraph 14(2)(*a*), I observe that there are similarly some issues with the language used in paragraph 14(2)(*b*). As noted above (at [41]), the assets of a company are not distributed directly to the creditors but are instead pooled and liquidated so that the proceeds can be distributed (see, for *eg*, the General Division's decision in *Lim Siew Soo v Sembawang Engineers and Constructors Pte Ltd (in compulsory liquidation) (Metax Eco Solutions Pte Ltd, intervener)* [2021] 4 SLR 556 at [119]).

(1) A liquidator is not restricted to claiming for expenses incurred before the restraint order is made

61 Nevertheless, it would seem clear that one specific purpose of paragraph 14(2)(*b*) is to reimburse a liquidator's expense in carrying out her work and to remunerate her for the value brought about by her work. Assessed against this purpose, the AG's interpretation would appear artificial. Given the tenor of paragraph 14(2)(*b*) to favour the payment of reimbursement to the liquidator for her expenses and to remunerate her for her work, it would be odd if the amount of remuneration she can claim is arbitrarily determined by the time at which a restraint order is made. Moreover, given my earlier conclusion that the liquidation process would still continue and not be stymied indefinitely even after the court grants a restraint order (at [43] above), it would be absurd to expect the liquidator to continue on with work even when she would not be paid for any work done, or reimbursed for her expenses incurred, after the making of the restraint order.

62 While the AG relies on the General Division's decision of *Carlos* in support of its interpretation, I do not regard this case as being relevant for the

purposes of this application. The case involved the interpretation of s 35(8)(*b*)(i) of the Criminal Procedure Code, which operates in a different context from the provisions under the MACMA. Even if the same word is used in two separate pieces of legislation, it does not always follow that they would carry the same meaning. The interpretation of a word would depend on the particular statutory context in question (see *Tan Cheng Bock* at [54(c)(ii)], and the meaning of the same word might vary in different contexts (see *Hossain Rakib* at [45]).

63 Thus, comparing s 35(8)(*b*)(i) of the Criminal Procedure Code with paragraph 14(2)(*b*) of the MACMA, it is evident that the word "incurred" is used in different contexts. In s 35(8)(*b*)(i) of the Criminal Procedure Code, the word "expenses incurred" is used in the context where property has already been seized, as can be seen below:

> **35.**—(1) A police officer may seize, or prohibit the disposal of or dealing in, any property …
>
> …
>
> (8) The court may only *order a release of property* under subsection (7) if it is satisfied that —
>
> …
>
> (*b*) such release is necessary exclusively for —
>
> (i) the payment of reasonable professional fees and the reimbursement of any expenses incurred in connection with the provision of legal services; …
>
> [emphasis added]

As s 35(8) of the Criminal Procedure Code governs the situation where property *already seized* is released for the purposes of reimbursement, and one must prove the sum to be reimbursed, the conclusion in *Carlos* that the "reimbursement of expenses be retrospective rather than prospective" (at [29]) is understandable. This is quite different from the context of the MACMA,

where paragraph 14(2)(*b*) restricts the court's power to grant a restraint order *at the outset*, and which possibly contemplates that any restraint order granted should not be scoped so widely in the first place where it would prevent the payment of future expenses properly incurred in the winding up in respect of the property.

64 In any event, there was no issue of the expenses allegedly incurred in *Carlos* being prospective; therefore, I do not think that the statement contained in that case was intended to conclusively set out a position of law in Singapore. Indeed, I do not think that *Carlos* is authority for the proposition that the expenses referred to in paragraph 14(2)(*b*) must be retrospective rather than prospective.

(2) A liquidator's claim for proper expenses incurred throughout the liquidation is not affected by a restraint order

65 To give effect to the purpose of paragraph 14(2)(*b*), which is to reimburse a liquidator's expense in carrying out her work and to remunerate her for the value brought about by her work, I am of the view that it should be read as restricting the court's power to grant a restraint order over realisable property to which the functions are exercisable, if the following elements are satisfied:

(a) expenses were, or will be, incurred in the winding up in respect of the property (*ie,* in the liquidation of realisable property); and

(b) the incurring of such expenses must be proper.

I am more in agreement with the Liquidators' interpretation of this provision.

(A) EXPENSES MUST HAVE BEEN, OR WILL BE INCURRED IN THE WINDING UP

66 As regards the first element, by reading paragraph 14(2)(*b*) more broadly to include expenses that have not been incurred but which will be properly incurred in the liquidation of realisable property, liquidators would be provided with greater comfort in knowing that they would be reimbursed for their expenses, and for the value of their work. This is especially given the nature of liquidation: that of an ongoing process. It would be unfair to expect liquidators to carry on with the liquidation process on one hand, and on the other hand deny their claims for expenses incurred after a particular point in time, when it is entirely possible that the bulk of the liquidator's work and expenses might only be incurred after that point. Thus, I am of the view that the protection accorded by paragraph 14(2)(*b*) to liquidators should not be read so restrictively to the extent that any protection would depend on the timing at which the restraint order application is brought. Instead, to give full effect to the protective aim of paragraph 14(2)(*b*), a restraint order must also not be granted in relation to expenses that will be properly incurred in the future. Ultimately, this goes back to the overarching purpose of paragraph 14(2), which is to strike a balance between the winding up regime under the IRDA and the MACMA regime (see [31] above). I am satisfied that this interpretation achieves that balance.

67 Although some concerns were raised during the hearing about the appropriateness of assessing a liquidator's future expenses, I do not think that this problem is insurmountable or poses serious difficulties. The court routinely engages in exercises of estimation in many types of proceedings that come before it. To provide an example in the context of an insolvent winding up application by a creditor, the Court of Appeal in *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd (formerly known as Tong Teik Pte Ltd)* [2021] 2 SLR 478 has adopted a cash flow test that incorporates factors which inherently involve

some degree of projection and estimation. This includes determining whether the company would receive any other income or payment in the reasonably near future, whether any debts are due to the company in the reasonably near future, and whether payment is likely to be demanded for those debts. Another area where the court has to engage in some degree of projection is when deciding on the quantum of security for costs; indeed, the court would consider factors that would aid in its estimation as to the "probable cost to which the applicant will be put" (see the General Division's decision of *Cova Group Holdings Ltd v Advanced Submarine Networks Pte Ltd and another* [2023] SGHC 178 at [69], citing Jim Delany, *Security for Costs* (Law Book Company, 1989) at p 121).

68 Returning to the context of the MACMA, a few non-exhaustive factors that a court might consider in assessing the projected future expenses of the liquidator include:

(a) the necessary anticipated work to be done for the remainder of the liquidation;

(b) whether there is any access to third-party funding; and

(c) whether the past expenses of the liquidator have been reasonable.

69 First, as paragraph 14(2)(*b*) is meant to provide reassurance that the liquidator's expenses will be reimbursed and that her work would be remunerated, the anticipated work of the liquidator must inform the court's assessment of the value of the company's realisable property that is to be shielded against a restraint order. Nevertheless, the liquidator must show that such anticipated work is necessary. Indeed, the requirement of necessity lends expression to the balance that must be struck between the interest in not bringing the liquidation process to a complete halt, and the interest in facilitating the

provision and obtaining of international assistance in criminal matters (see s 3 of the MACMA).

70 Second, the question of whether the liquidator has access to third-party funding informs the court's assessment of what is necessary to keep the liquidation process afoot. If there is access to third-party funding, it follows that the value of the company's realisable property that is to be shielded from a restraint order would be adjusted downwards. This is because the company would need to liquidate less of its own realisable property in order to pay for the expenses of the liquidation process.

71 Third, the reasonableness of the past expenses of the liquidator should be considered as well. Where it can be shown that the liquidator has incurred significant expenses in the past without making good progress in the liquidation, the court might infer that the anticipated expenses provided by the liquidator is not an accurate estimate of what is necessary to conduct the liquidation. The court might then make a downward adjustment to the estimated cost provided. This ensures that the interest in facilitating the provision and obtaining of international assistance in criminal matters would not be unduly hampered a liquidator's unnecessary expenses.

### (B) THE INCURRING OF SUCH EXPENSES MUST BE PROPER

72 I now turn to the second element, which requires that the incurring of the aforesaid expenses must be proper. This applies to both past and future expenses. In relation to future expenses, it can be said that there is overlap between this element and the factors set out at [67]–[71] above which are relevant in the application of the first element. Nevertheless, the two elements are conceptually distinct. The first element relates to the quantum of expenses

that will be incurred, while the second relates to whether such expenses are justified. It might however be unnecessary to consider these factors twice over in applying paragraph 14(2)(*b*), as the determination of what expenses are necessary in the future will inevitably involve an implicit consideration of whether such expenses are proper.

73 As for past expenses, the principles governing the remuneration and reimbursement of a liquidator would apply. In deciding on whether the claimed expenses are appropriate, factors to consider include: (a) the time spent by the liquidator on the matter; (b) the value brought to bear by the liquidator; (c) the reasonableness of the charge out rate; (d) the complexity of the matter; (e) the effectiveness of what was done; and (f) the functions and responsibilities of the liquidator (see the High Court decision of *Re Econ Corp Ltd (in provisional liquidation)* [2004] 2 SLR(R) 264 ("*Re Econ*") at [45], [47], [50] to [60]). As aptly encapsulated by Steven Chong J (as he then was) in the High Court decision of *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn and others* [2016] 1 SLR 21, the test for whether the claimed remuneration is proper is whether the sum is a fair, reasonable and proportionate reflection of the value of the services rendered. The expression "fair, reasonable and proportionate" should be read holistically: it means that the remuneration awarded should be commensurate with the nature, complexity and extent of the work undertaken (at [31] and [38]). I would also add that the standard that a liquidator has to meet in this inquiry should also be the same as that taken when the court decides whether reimbursement and remuneration should be granted to a liquidator in a typical scenario.

74 I also consider the procedure by which an application involving paragraph 14(2)(*b*) is to be conducted. While there was some discussion during the hearing about whether a taxation should always be ordered, I do not think

that this is necessary. In this regard, I note that V K Rajah JC (as he then was) had opined in *Re Econ* at [70] that the "taxing master [*ie*, the Registrar] is in the best position to determine remuneration or at any rate in a better position than a judge". The learned judge had referred to the statement of Hoffmann J (as he then was) in *In re Potters Oils Ltd* [1986] 1 WLR 201 at 207 that "the court is ill-equipped to conduct a detailed investigation of receivers' charges on an itemised basis. A judge could not do so without being expensively educated by expert evidence". While this may be true in many cases, I do not think that Rajah JC had intended to impose an absolute rule; indeed, the learned judge did not go so far to say that it is mandatory for the court to order taxation. Neither is such a requirement found in the IRDA or the Insolvency, Restructuring and Dissolution (Corporate Insolvency and Restructuring) Rules 2020.

75 Instead, the situation here is not much different from other situations where the court may determine the sum to be awarded to a party without a procedure that is similar to that of taxation or an assessment of damages. To draw an analogy, where the material factual circumstances surrounding costs to be awarded are not in dispute, it is trite that the court may fix costs without requiring parties to attend a taxation hearing. It is likewise the case for damages that may be awarded to a party in the action. By parity of reasoning, where the material facts concerning the reimbursement and/or remuneration of a liquidator are not in dispute, the court may determine the expenses to be awarded to the liquidator without a taxation procedure.

76 Turning to another issue, I would also observe that, where a liquidator seeks to rely on paragraph 14(2)(*b*), it is insufficient for her to solely rely on the statutory grounds in the IRDA to justify her claim. She must still satisfy the court that the expenses claimed are proper, even if the grounds on which she

relies do not typically require the court's intervention. Such grounds are set out in ss 139(3)(*a*) and 139(3)(*b*) of the IRDA:

> (3) A liquidator, other than the Official Receiver, is entitled to receive such salary or remuneration by way of percentage or otherwise as is determined —
>
> (*a*) by agreement between the liquidator and the committee of inspection, if any;
>
> (*b*) failing such agreement, or where there is no committee of inspection, by a resolution passed, at a meeting of creditors convened in accordance with subsection (4), by a majority of not less than 75% in value and 50% in number of the creditors present and voting (in person or by proxy) at the meeting and whose debts have been admitted for the purpose of voting; or
>
> (*c*) failing a determination in a manner mentioned in paragraph (*a*) or (*b*), by the Court.

77 There are at least two reasons for this additional requirement. First, additional considerations apply where a liquidator seeks to rely on paragraph 14(2)(*b*). In such situations, the court would not merely be concerned with the interest in ensuring that the liquidator is properly remunerated for her work and indemnified for her expenses. The court would also have to consider the interest in facilitating the provision of international assistance to other countries in criminal matters and to obtain reciprocal international assistance. Second, it is clear that even in relation to those provisions, the court retains a supervisory function to confirm or vary the amount that is to be paid to a liquidator (see ss 139(5) and 139(6) of the IRDA). This much was made clear by Rajah JC in *Re Econ* at [37], where the learned judge referred to *Re Medforce Healthcare Services Ltd (In Liquidation) (No 2)* [2001] 3 NZLR 158 at [8] for the proposition that "[s]ome guidance can indeed be derived from the taxation of solicitors' costs as solicitors, like provisional liquidators, are officers of the Court whose costs are fixed as part of the supervisory function of the Court". This function is especially important when restraint order applications are made

against the assets of a company, as this indicates that the creditors of the company are not the only group of persons interested in the assets of the company. Accordingly, I am of the view that, in the context of paragraph 14(2)(*b*), the fact that a liquidator has shown that the requirements in ss 139(3)(*a*) or 139(3)(*b*) are satisfied is not conclusive of the question of whether the expenses claimed are proper. The court must be the final arbiter of the matter.

***Summary of the applicable principles***

78 I now summarise the applicable principles in an application under the MACMA involving paragraph 14(2) of the Third Schedule:

(a) paragraph 14(2)(*a*), which restricts the court's power to grant a restraint order, is not only applicable where granting a restraint order would inhibit the liquidator from performing the act of distribution itself, but also where it would inhibit the liquidator from performing other functions which serve the ultimate end of distribution;

(b) paragraph 14(2)(*b*) restricts the court's power to grant a restraint order over realisable property to which the functions are exercisable, if expenses were, or will be, incurred in the winding up in respect of the property (*ie,* in the liquidation of realisable property), and the incurring of such expenses was or would be proper;

(i) in relation to the first element, non-exhaustive factors that a court might consider in assessing the projected future expenses of the liquidator include: (A) the necessary anticipated work to be done for the remainder of the liquidation; (B) whether

there is any access to third-party funding; and (C) whether the past expenses of the liquidator have been reasonable;

(ii) the second element applies to both past and future expenses. In relation to future expenses, it might be unnecessary to consider the second element separately from the first, as there is overlap. In relation to past expenses, the principles governing the remuneration and reimbursement of a liquidator would apply. Factors to consider include: (A) the time spent by the liquidator on the matter; (B) the value brought to bear by the liquidator; (C) the reasonableness of the charge out rate; (D) the complexity of the matter; (E) the effectiveness of what was done; and (F) the functions and responsibilities of the liquidator. The test for whether the claimed remuneration is proper is whether the sum is a fair, reasonable and proportionate reflection of the value of the services rendered, which must be assessed holistically.

(iii) the court may determine the expenses to be awarded to the liquidator without a taxation procedure; and

(iv) where a liquidator seeks to rely on paragraph 14(2)(*b*), it is insufficient for him to solely rely on the statutory grounds in the IRDA to justify his claim. He must still satisfy the court that the expenses claimed are proper, even if the grounds on which she relies do not typically require the court's intervention.

**Conclusion**

79 In the premises, I am satisfied that the Restraint Order should be granted in principle as the statutory requirements for such grant have been fulfilled.

Before the order is granted however, I will give directions on the filing of submissions specifically on the amount with which the Liquidators should be allowed to deal.

80 I make no order as to costs.

Aedit Abdullah
Judge of the High Court

Andrea Gan Yingtian and Goh Sue Jean (Attorney-General's Chambers) for the applicant;
Balakrishnan Ashok Kumar, Teo Zhiwei Derrick Maximillian, Shu Kit and Nee Hoong Yi Adriel (BlackOak LLC) for the respondent.