IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 202

Originating Summons No 453 of 2017

In the Matter of TYC Investment Pte Ltd and Amstay Properties Pte Ltd

And

In the Matter of the Deed of Settlement dated 9 April 2010, and Agreement for Amendment to Deed of Settlement dated 9 April 2010, and Settlement of Litigation dated 15 May 2012, made between Henry Tay Yun Chwan and Chan Siew Lee; and the TYC Deed dated 11 June 2012 made between Henry Tay Yun Chwan, Chan Siew Lee and TYC Investment Pte Ltd

And

In the Matter of Section 148 of the Companies Act

Between

TYC Investment Pte Ltd

… *Plaintiff*

And

(1) Jannie Chan Siew Lee
(2) Henry Tay Yun Chwan

… *Defendants*

JUDGMENT

[Companies] – [Directors] – [Disqualification] – [Effect of bankruptcy on directorship]

[Companies] – [Memorandum and articles of association] – [Effect]

[Insolvency law] – [Bankruptcy] – [Bankruptcy order] – [Effect of setting aside bankruptcy order]

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TYC Investment Pte Ltd
v
Chan Siew Lee Jannie and another

[2017] SGHC 202

High Court — Originating Summons No 453 of 2017
Audrey Lim JC
22 June; 12 July 2017

Judgment reserved.

15 August 2017

Audrey Lim JC:

1 The first defendant, Jannie Chan ("JC"), and the second defendant, Henry Tay ("HT"), established the plaintiff company, TYC Investment Pte Ltd ("TYC"), and were its two directors. JC was made a bankrupt in September 2016 by a third party, and the bankruptcy order was subsequently set aside. The dispute essentially centres on the effect of the bankruptcy, and the subsequent setting aside of it, on JC's directorship in TYC.

Background

2 This is one of the many disputes involving the same parties. Although background facts pertaining to the parties have been set out in *TYC Investment Pte Ltd v Tay Yun Chwan Henry* [2014] 4 SLR 1149 ("*TYC Investment*") and in

Chan Siew Lee v TYC Investment Pte Ltd and others and another appeal [2015] 5 SLR 409 ("*Chan Siew Lee v TYC*"), I repeat some of the relevant facts here for ease of reference.

3 TYC is a family holding company incorporated in 1979 by JC and HT (previously wife and husband). Pursuant to Article 8 of TYC's articles of association ("the TYC Articles"), JC and HT were appointed the "permanent Governing Directors" of TYC. JC and HT each hold a founder share giving them 44% and 46% of the voting rights in TYC respectively. Their three children, Michael Tay, Audrey Tay and Sabrina Tay, own ordinary shares, with 5%, 2.5% and 2.5% voting rights respectively.

4 Pursuant to JC and HT's divorce, they entered into a deed of settlement dated 9 April 2010 ("the DOS") to settle the division of their matrimonial assets and JC's claim for maintenance. They subsequently entered into another agreement dated 15 May 2012, which was an agreement for amendment to the DOS and settlement of litigation between them ("the SSD"). The SSD made amendments to the DOS and stipulated matters relating to the management of TYC. In particular, clause 10 of the SSD states:

> 10. Payment voucher system for all future payments for TYC. Neither HT nor JC will sign a cheque on TYC's bank accounts unless the other has signed a voucher approving.

5 TYC was not a party to the SSD. However, JC and HT thereafter entered into a deed agreement on 11 June 2012 ("the TYC Deed"), the effect of which was to confer on TYC all rights and benefits and impose on TYC all obligations, provisions, covenants and conditions "under the [DOS] as amended in accordance with the terms set out in the SSD", as if it were a party thereto.

6 On 29 September 2016, JC was made a bankrupt pursuant to an application by the Australia and New Zealand Banking Group Ltd ("ANZ Bank") (see B323/2016). The bankruptcy application was premised on a judgment debt obtained by ANZ Bank against JC in Suit 885 of 2013. JC appealed against the bankruptcy order made, but by the time the appeal was heard on 1 December 2016, ANZ Bank and JC had already reached a settlement agreement. By consent of the parties, the appeal against the bankruptcy order was allowed, the bankruptcy order was set aside and leave was granted to withdraw the bankruptcy application.[1] Meanwhile, on 7 October 2016, TYC lodged a notification ("the Notification") with the Accounting and Corporate Regulatory Authority ("ACRA") that JC had been disqualified as a director pursuant to her being made a bankrupt on 29 September 2016.

TYC's claim and JC's counterclaim

7 TYC claimed that as a result of JC's bankruptcy, her directorship in TYC had been vacated by reason of Article 72(*b*) of Table A to the Fourth Schedule of the Companies Act (Cap 50, 2006 Rev Ed) ("Table A"), which was incorporated into the TYC Articles by virtue of Article 1 of the TYC Articles. It took the position that although the bankruptcy order against JC was subsequently set aside on appeal, there was also no provision in the TYC Articles that entitled her to be reinstated as a director. Further, by reason of JC's bankruptcy, clause 10 of the SSD has been frustrated by operation of law or illegality. As TYC requires a minimum of two directors for its management, HT sought the following reliefs:

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[1] See B 323/2016 and ORC 8168/2016 dated 1 December 2016.

(a) a declaration that the remaining director of TYC, namely HT, be at liberty to appoint another director of TYC pursuant to Article 8 of the TYC Articles;

(b) alternatively, that TYC be at liberty to convene an extraordinary general meeting ("EGM") to pass a resolution to appoint a new director;

(c) a declaration that clause 10 of the SSD is frustrated by reason of operation of law or illegality as a result of the bankruptcy order made against JC; and

(d) a declaration that TYC be at liberty to reimburse Amstay Pte Ltd ("Amstay"), a company wholly-owned by HT, for any payments made by Amstay on TYC's behalf in the ordinary course of TYC's business.

8 JC in turn counterclaimed as follows:[2]

(a) a declaration that she was and still is a permanent Governing Director of TYC;

(b) a declaration that Article 72 of Table A contradicts or conflicts with the TYC Articles, in particular Article 8, and that Article 72 is inapplicable;

(c) a declaration that clause 10 of the SSD remains applicable and binding despite the bankruptcy order in B323/2016;

(d) a declaration that by reason of Article 16 of the TYC Articles, TYC cannot amend, vary or waive any of its rights or obligations under

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[2] JC's affidavit dated 22 May 2017, para 14.

or pursuant to the TYC Deed or any clauses of the SSD except with the unanimous consent of all its shareholders;

(e) a declaration that the Notification filed on 7 October 2016 with ACRA on HT's instructions is null, void and illegal;

(f) an order that TYC file with ACRA, a "Local Company Change of Particulars of Company Officers or Auditors" notification, indicating that JC is a director of TYC; and

(g) if the court finds that JC was no longer a director of TYC because of the bankruptcy order, that she be reinstated to the office of permanent Governing Director.

EGM of 11 April 2017

9 Initially, HT, on TYC's behalf, commenced Originating Summons 1029 of 2016 ("OS 1029") seeking the same reliefs as in this Originating Summons. When OS 1029 was before me, I was of the view that it was inappropriate for TYC to bring those proceedings. As the main issue to be determined in OS 1029 (and the present one) was whether JC was still a director of TYC, it was not appropriate for HT alone to act on TYC's behalf in commencing proceedings as that presupposed that JC's position as a director of TYC had already been vacated. In addition even assuming that HT was the sole director, TYC's articles did not seem to permit HT to conduct or manage the affairs of TYC on his own (including commencing proceedings on TYC's behalf). Hence the proper way to proceed was for HT to convene an EGM (under Article 44 of Table A) for TYC's shareholders to pass the appropriate resolution to authorise TYC to appoint solicitors to commence such legal proceedings. Both TYC's and JC's counsel (Mr Chu and Mr Singh respectively) agreed to this approach. I thus

dismissed OS 1029 with liberty to TYC to commence a fresh OS once the necessary shareholders' resolution was passed.

10 TYC's EGM was held on 11 April 2017, with the relevant resolution passed by all shareholders present (*ie*, HT, Michael Tay and Sabrina Tay's proxy). JC and Audrey Tay were not present at the EGM and did not appoint a proxy. Before me, Mr Singh confirmed[3] that JC is not disputing that the present originating summons has been properly commenced by TYC.

The issues

11 The prayers sought by TYC were premised on JC no longer being a director of TYC, such that HT is the sole remaining director. The main issues that I have to consider are therefore whether JC's position as a director of TYC was automatically vacated when the bankruptcy order was made, and if so, whether the subsequent setting aside of that order on 1 December 2016 automatically reinstated JC as a director of TYC.

Effect of bankruptcy order on JC's directorship in TYC

12 The provisions in the TYC Articles that are relevant to this issue are set out below.

> Article 1
>
> The regulations in Table "A" in the Fourth Schedule to the Companies Act, Cap 50 as may be from time to time amended, revised or supplemented, shall apply to the Company, *except insofar as they contradict or conflict with any of the provisions stated hereunder*.
>
> Article 3A

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[3] Hearing of OS on 22 June 2017.

> Subject to Table "A", the directors shall not be less than two and not more than ten, and the first directors shall be [HT] and [JC].
>
> Article 8
>
> Subject to Article 3, the said *[HT] and [JC] shall be the permanent Governing Directors of [TYC] until they resign from the office*, ***that is*** *they will not whilst they hold such office be taken into account in determining the rotation of retirement of directors and the provision of Section 153 of the Companies Act will not apply to them* and whilst they retain the said office, they will have authority to exercise all the powers, authorities and discretion by these Articles expressed to be vested in the directors generally including the power to convene a general meeting of [TYC], and of all the other directors, if any, for the time being of [TYC], shall be under their control and shall be bound to conform to their discretion in regard to [TYC's] business.
>
> Subject to Article 3, the said [HT] and [JC] whilst they hold the office of Governing Directors may from time to time, and at any time, appoint any other persons to be alternate Governing Directors of [TYC] and may define, limit and restrict their powers and may fix and determine their remuneration and duties and may at any time, remove any alternate Governing Directors howsoever appointed. Every such appointment or removal must be in writing under the hands of the said Governing Directors.
>
> Subject to Article 3, the said [HT] and [JC], whilst they hold the office of Governing Directors, may from time to time, and at any time appoint any other persons to be directors of the Company, and may define, limit and restrict their powers and may fix and determine their remuneration and duties and may at any time, remove any director howsoever appointed. Every such appointment or removal must be in writing under the hands of [HT] and [JC].
>
> Subject to Article 7, in the event of the death of any of the two Governing Directors, the surviving person shall be entitled to exercise all or any of the powers previously held by the Governing Directors jointly.
>
> Subject as aforesaid and to these Articles, the rights of all the shareholders shall be the same in every respect.
>
> [emphasis in italics and bold italics]

13 Additionally, Article 72 of Table A states as follows:

> The office of director *shall become vacant* if the director –
>
> (*a*) ceases to be a director by virtue of the Act;
>
> (*b*) becomes bankrupt or makes any arrangement or composition with his creditors generally;
>
> (*c*) becomes prohibited from being a director by reason of any order made under the Act;
>
> (*d*) becomes disqualified from being a director by virtue of section 148, 149, 154 or 155;
>
> (*e*) becomes mentally disordered and incapable of managing himself or his affairs or a person whose person or estate is liable to be dealt with in any way under the law relating to mental capacity;
>
> (*f*) subject to section 145, resigns his office by notice in writing to the company;
>
> (*g*) for more than 6 months is absent without permission of the directors from meetings of the directors held during that period;
>
> (*h*) without the consent of the company in general meeting, holds any other office of profit under the company except that of managing director or manager; or
>
> (*i*) is directly or indirectly interested in any contract or proposed contract with the company and fails to declare the nature of his interest in manner required by the Act.
>
> [emphasis added]

14 Mr Singh submitted that s 148 of the Companies Act ("the CA") does not automatically disqualify JC from being a director.[4] This misses the point. TYC is not relying on s 148 of the CA, but Article 72 of Table A, to support its case that JC's directorship was automatically vacated upon the making of the bankruptcy order against her. Be that as it may, I will make some brief observations on s 148. Section 148 makes it an offence for an undischarged bankrupt to act as a director of, or to take part in or be concerned in the management of, any corporation, except with the leave of the court or the written permission of the Official Assignee. Section 148 is a penal provision.

[4] First defendant's written submissions ("D1 Submissions"), para 134.

Although a person who contravenes s 148 is guilty of an offence, that section does not state that an undischarged bankrupt lacks capacity to be a company director or that his acts on behalf of the company are invalid (see Tan Cheng Han SC *et al*, *Walter Woon on Company Law* (Sweet & Maxwell, revised 3rd ed, 2009) at para 7.40). Mere contravention of s 148 does not, on its own, cause an automatic vacation of office by a director, and I do not consider s 148 to be relevant in the present case.

15 On the other hand, Article 72(*b*) of Table A states that the office of director "shall become vacant" if the director "becomes bankrupt". The effect of a similarly worded provision was considered in *Re The Bodega Company Limited* [1904] 1 Ch 276 ("*Re Bodega*"). In that case, the company's articles of association provided that the office of a director "shall be vacated" on the occurrence of several triggering events, the event in point being that "if he be concerned in or participate in the profits of any contract with the company not disclosed to and authorised by the board". One of the other triggering events (which was not the issue in that case) is if the director "becomes bankrupt". Farewell J held that it was plain from the wording of the article that the director automatically vacates his office on the occurrence of a triggering event; there was no need for the other directors or the members of the company to consider the matter or to adopt a resolution in order for the director in question to vacate his position. At 283, Farewell J stated as follows:

> … it is quite plain on the words of the article that he *ipso facto*, or automatically, vacates his office on the act being done: there is no distinction between this and the other events mentioned in the article, e.g., bankruptcy … The office is vacated automatically and if his co-directors wish him still to act, he has to be re-elected in the usual way; or the casual vacancy has to be filled up under the article to that effect. …

16 In *Samuel Tak Lee v Chou Wen Hsien* [1984] 1 WLR 1202 ("*Samuel Tak Lee*"), Article 73(d) of the company's articles of association provided that the office of a director "shall be vacated … [i]f he is requested in writing by all his co-directors to resign". A written notice was sent to the appellant pursuant to that article, and the appellant commenced proceedings to declare the notice invalid and that he remained a director of the company. The Hong Kong Court of Appeal held as follows:

> … The language of the article leaves no room for doubt or uncertainty. The office *shall* be vacated once any event therein mentioned occurs. That vacation must take place immediately. The position would otherwise be intolerable. No one would know who really constituted the board. [emphasis in original]

The Privy Council, in agreeing with the decision of the Hong Kong Court of Appeal, further stated as follows (at 1207A–B):

> … In order to give business sense to [A]rticle 73(d), it is necessary to construe the article strictly in accordance with its terms without any qualification, and to treat the office of director as vacated if the specified event occurs. If this were not the case, and the expelled director challenged the *bona fides* of all or any of his co-directors, the management of the company's business might be at a standstill pending the resolution of the dispute by one means or another, in consequence of the doubt whether the expelled director ought or ought not properly to be treated as a member of the board. …

That automatic vacation of a directorship occurs upon the happening of a certain event as provided in the articles of a company is also supported by the case of *Norakhmar bt Baharom v Lee Ming Leong* [2007] 8 MLJ 50 at [13] to [15], where the relevant article of the company's articles of association was similar to Article 72(*b*) of Table A in the present case.

17 *Re Bodega* and *Samuel Tak Lee* can be contrasted with *Glossop v Glossop* [1907] 2 Ch 370. In that case, the articles of association of the company

in question provided that the office of a director shall be vacated on the occurrence of certain specified events "provided that … the vacation of office shall not take effect unless the directors shall pass a resolution to the effect that the director has vacated his office, such resolution to be passed within six calendar months from the happening of the event whereby such director has vacated his office". Neville J held (at 375) that upon the happening of one of the specified events, the director "has vacated his office, although by the proviso the effect of that vacation is not immediate, but is suspensory, and does not take effect until a resolution has been passed by the directors". The key point is that the effect of a particular article in a company's articles of association depends on its true construction.

18 In the present case, the words of Article 72 of Table A are clear. The office of a director "shall become vacant" upon the happening of one or more of the events mentioned in that article. The articles in Table A do not require any additional steps to be taken upon the happening of one of the events in Article 72 in order for the position of a director to be vacated, and so nothing more needs to be done for that purpose. As the bankruptcy order was made against JC on 29 September 2016, she became a bankrupt on that day: see s 2 of the Bankruptcy Act (Cap 20, 2009 Rev Ed) ("BA"). Article 72(*b*) of Table A, if it applies, would operate such that JC's office as a director of TYC was automatically vacated on 29 September 2016.

19 The question then, is whether Article 72(*b*) of Table A applies in the light of Article 1 of the TYC Articles, which provides that the regulations in Table A shall apply to TYC only if they do not contradict or conflict with any of the provisions stated in the TYC Articles. JC submitted that Article 72(*b*) of Table A does not apply because it contradicts Article 8 of the TYC Articles which provides that she and HT are to be the "permanent" Governing Directors

of TYC until they resign from the office. In other words, the "permanence" of their office was such that JC and HT will remain as Governing Directors of TYC forever unless they resign or die. TYC and HT contend that Article 72(*b*) of Table A has been incorporated into and applies as part of the TYC Articles pursuant to Article 1 of the TYC Articles, as it does not contradict Article 8. Article 8 must be construed such that JC's and HT's offices as Governing Directors are "permanent" only in so far that they will not be considered for the rotation of retirement of directors or be subject to the age limit of 70 years for directors of public companies (as provided in s 153 of the CA, which has since been repealed).

20 In my view, Article 72 of Table A is not inconsistent with and does not contradict Article 8 of the TYC Articles, and the interpretation adopted by JC is untenable. I accept TYC's argument that, based on the express words of Article 8 (see [12] above), the scope of "permanence" is specifically limited by the words "that is", which have the effect of defining JC's and HT's positions as "permanent" Governing Directors in only so far that they will not, whilst they hold such office, be taken into account in the rotation of retirement of directors, and that the 70-year age limit would not apply to them. Article 8 itself recognises that the permanence of a Governing Director can come to an end in certain circumstances, namely death or resignation, as provided in that article. It does not expressly exclude other circumstances in which the permanence of the directorship can be ended. I also find persuasive the authority of *Holmes v Keyes* [1959] 1 Ch 199 ("*Holmes v Keyes*"), where Lord Justice Jenkins stated (at 215):

> …[T]he articles of association of the company should be regarded as a business document and should be construed so as to give them reasonable business efficacy, where a construction tending to that result is admissible on the

> language of the articles, in preference to a result which would or might prove unworkable …

21 JC submitted that the TYC Articles were drawn up to make sure that TYC would be run during JC's and HT's lifetime by both of them jointly and that all decisions of the company should be made jointly by them. JC also claimed that she had made clear, when the relevant articles were being drafted, that "the usual conditions for disqualification as a director shall not apply to either [JC or HT]".[5] If that were the case, it is not borne out by Article 8, which merely mentions the limited circumstances in which the directorship cannot be affected, *ie*, that JC and HT will not be considered for the rotation of retirement of directors and will not be subject to the provision of the now-repealed s 153 of the CA. Article 8 does not go on to expressly mention that other circumstances (such as those set out in Article 72 of Table A), which would normally cause the office of a director to be vacated, do not apply to affect JC's and HT's positions as Governing Directors of TYC.

22 Based on JC's interpretation of Article 8, she and HT would remain permanent Governing Directors of TYC even if they should become mentally disordered (contrary to Article 72(*e*) of Table A) or have been disqualified from being or to act as a director under s 149 or 154 or other provisions of the CA. Such provisions found in an Act of Parliament cannot be overridden by a company's articles (unless the Act provides for this), even if JC and HT had so intended. In any case, the interpretation of Article 8 that JC now advances could not have been JC and HT's intent at the time the TYC Articles were drafted, as that interpretation is simply an unreasonable one. As stated in *Holmes v Keyes*, the articles of association of a company should be construed to give them reasonable business efficacy, unless that construction is inadmissible on the

[5] JC's affidavit of 15 November 2016, para 62.

express language of the articles. There is nothing in the TYC Articles that expressly prohibits a narrower interpretation of the scope of the "permanence" embodied in Article 8. Quite the contrary, Article 8 expressly qualifies the scope of "permanence".

23 JC also relied on Article 7 of the TYC Articles, which states that "Article 7 may only be amended, varied or repealed with the unanimous consent of all the shareholders of [TYC]", and that Article 7 fortifies JC's and HT's positions as directors of TYC with joint control until either of them dies.[6] In my view, Article 7 is irrelevant. It is concerned with JC's and HT's rights as shareholders of TYC, and not with the issue of their office as directors of TYC.

24 Hence, I am of the view that Article 72 of Table A, in particular Article 72(*b*), is not inconsistent with and do not contradict any provisions in the TYC Articles. It is therefore incorporated into and applies as part of the TYC Articles, pursuant to Article 1 of the TYC Articles. JC's position as Governing Director of TYC therefore became automatically vacated on 29 September 2016 when the bankruptcy order was made against her.

Effect of setting aside of bankruptcy order

25 Having held that JC's directorship was automatically vacated by reason of her bankruptcy, is her directorship automatically reinstated when the bankruptcy order was set aside on 1 December 2016? TYC and HT submitted that the order setting aside the bankruptcy order did not have the effect of retrospectively annihilating JC's bankruptcy for the purpose of rendering the vacation of her office as director void, whereas JC argued otherwise.

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6 D1 Submissions, paras 154 to 162.

26 The bankruptcy order was set aside pursuant to an appeal brought under s 8 of the BA, and by consent between the applicant creditor and JC. Hoo JC, who set aside the bankruptcy order, had not made an annulment of the bankruptcy order or ordered a discharge of JC from bankruptcy pursuant to Part VIII of the BA. Hoo JC had also not decided or considered the effect of setting aside the bankruptcy order as it was not an issue before her. This is, however, a key issue that I have to consider for the purpose of the current matter before me.

27 There are no locally decided cases on the effect of setting aside a bankruptcy order on appeal. However, in *De Robillard v Carver* [2007] FCAFC 73 ("*De Robillard*"), the Federal Court of Australia considered the effect of setting aside a sequestration order on appeal and held (at [150]) that:

> … the appellant is not to be treated as bankrupt from the pronouncement of the sequestration order, notwithstanding the effect of s 43(2) of the Bankruptcy Act: see *Commissioner for Railways (NSW) v Cavanagh* (1935) 53 CLR 220 at 224–5; [1935] ALR 304 at 305.

Similarly, in *Rangott v Marshall* (2004) 139 FCR 14 ("*Rangott*"), the Federal Court of Australia held (at [29]) that the effect of the appeal decision was that the sequestration order and the consequent appointment of the trustee were set aside, and "it is as if the sequestration order had never been made and the respondent had never been a bankrupt".

28 I also consider the effect of annulment of a bankruptcy, which was dealt with in *Tan Teck Guan v Mapletree Trustee Pte Ltd (trustee of Mapletree Industrial Trust)* [2011] 3 SLR 1031 ("*Tan Teck Guan*"). In that case, Chan Seng Onn J had to consider whether annulment of a bankruptcy order had a retrospective effect *vis-à-vis* s 65(7)(*b*) of the BA. After consideration of the

Commonwealth authorities, Chan J held (at [9] and [14]) that, as a general proposition, the effect of an annulment of a bankruptcy order was retrospective, such that it would wipe out the bankruptcy altogether and put the bankrupt in the same position as if he had not been adjudicated a bankrupt. However, Chan J also held (at [15] and [17]) that this general proposition does not apply for all intents and purposes and is subject to exceptions, such as where exceptions are expressly provided for in the BA. The principle enunciated in *Tan Teck Guan* was affirmed by the Court of Appeal in *Lim Lye Hiang v Official Assignee* [2012] 1 SLR 228 at [47].

29 I turn to the case of *Union Club v Lord Andrew Charles Robert Battenberg* [2006] NSWCA 72 ("*Battenberg*"), which TYC and HT relied on. In *Battenberg*, the appellant was a company limited by guarantee that was incorporated to acquire and take over the assets and liabilities of a social club. Article 16(b) of the company's articles of association provided that:

> A member shall cease to be a member if he becomes bankrupt or enters into a deed of assignment, a composition or a scheme of arrangement with his creditors under Part X of the Bankruptcy Act 1966 (as amended).

On 19 May 1997, the respondent was adjudicated a bankrupt, but that was subsequently annulled on 23 March 2000. Nonetheless, the appellant company wrote to the respondent thereafter, on 16 August 2001, to inform him that pursuant to Article 16(b), he had ceased to be a member of the club on 19 May 1997. The issue before the New South Wales Court of Appeal was whether the fact that the bankruptcy was subsequently annulled meant that the respondent had not ceased to be a member of the club, or whether the cessation of membership remained notwithstanding the annulment. The majority of the Court (Bryson JA dissenting) took the latter position.

30 Giles JA considered (at [56]) that there were two issues. First, as a matter of bankruptcy law, did annulment of the respondent's bankruptcy reverse the fact that he had become bankrupt? Second, even if the first issue was answered in the affirmative, as a matter of contract law, did Article 16(b), on its proper construction, nonetheless bring about cessation of his membership?

31 On the first issue, Giles JA held (at [81]) in the affirmative, so that the respondent's membership would have been retrospectively restored to him. However, on the second issue, Giles JA was of the view that Article 16(b) of the company's articles should be interpreted to mean that, despite the general position under bankruptcy law, the contractual agreement embodied in the company's articles was such that the respondent ceased to be a member of the club upon his being adjudicated a bankrupt, regardless of whether the bankruptcy order was subsequently annulled. It was not for the appellant and the other members to investigate the circumstances of a member becoming bankrupt and foresee annulment because the member should never have been made bankrupt, or indeed to investigate the prospects of a successful appeal by the member. Further, the member who should never have been made bankrupt or who successfully appealed could reapply for membership. Santow JA also preferred the position that the contract was to be construed as embodying an agreement that termination of membership was triggered once and for all by an order adjudicating the respondent as a bankrupt irrespective of whether annulment later followed.

32 The authorities show that the effect of annulment of a bankruptcy and setting aside on appeal of a bankruptcy order are in general similar, in that the bankruptcy is treated as not having occurred. The decisions of *Tan Teck Guan* and *Battenberg*, in relation to annulment, are also consistent as authority for the general proposition that annulment of a bankruptcy order has retrospective

effect, such that the individual who was subject to the order is restored to his original position as though no bankruptcy order has ever been made against him. Such a general proposition does not, however, apply for all intents and purposes, such as where the statutes expressly set out exceptions (as was observed in *Tan Teck Guan*), or where parties contractually agree to depart from that proposition and to take the contrary position that the annulment of a bankruptcy order was *not* to operate retrospectively for the purposes that they have identified (as in *Battenberg*). In other words, whether a subsequent annulment of a bankruptcy order has the effect of voiding an earlier disqualification pursuant to that bankruptcy order is to be approached as a matter of construction of the relevant statutory or contractual provisions, as the case may be. This is bearing in mind the default general position under bankruptcy law, that annulment of a bankruptcy order operates retrospectively to restore the individual who was subject to the order to his original position as though no bankruptcy order has ever been made against him.

33 Turning to the present case, in my view, the fact that the bankruptcy order has been set aside on appeal should have the effect of restoring JC to her original position as though no bankruptcy order has ever been made against her. Thus, when the bankruptcy order was set aside on 1 December 2016, JC ought to have been automatically reinstated as a director of TYC. I would have arrived at the same conclusion even if I applied the principles relating to annulment of a bankruptcy. Ms Chia (counsel for HT) conceded that setting aside and annulment of a bankruptcy order generally puts the bankrupt in a position as if the order had never been made. However, Ms Chia submitted that in this case, the retrospective effect of setting aside or annulment did not apply because when the bankruptcy order was made, JC was indebted to ANZ Bank, and although the order has been set aside by consent, JC has not paid or secured her

debt to ANZ Bank. She has, however, not cited any authority for how the effects of a setting aside or an annulment were to vary depending on the reason for which the bankruptcy order was set aside or annulled.

34 Mr Chu and Ms Chia also highlighted that the appeal was allowed, not because Hoo JC was of the view that the Assistant Registrar who had made the bankruptcy order had made an error in fact or in law in making that order. Rather, it was because by the time of the appeal, JC had reached a settlement with the applicant creditor and thus the bankruptcy order was set aside by consent. It is, however, not this court's function to look behind Hoo JC's order allowing the appeal and setting against the bankruptcy order against JC, or to inquire into the circumstances which led Hoo JC to allow that appeal. The focus here is on the *effect* of that setting aside of the bankruptcy order. The authorities support the position that, in general, the effect of an appeal decision setting aside a bankruptcy order is that it restores the individual who was subject to the bankruptcy order to his original position as though no bankruptcy order has ever been made against him: see *De Robillard* and *Rangott* as cited at [27] above. This is consistent with the principle that the result of a successful appeal reversing or setting aside an order made by a lower court or tribunal is that, in general, the effects of the earlier order are unwound.

35 I am aware that in certain circumstances, the general principle of relation-back on reversal of an order cannot be fully applied. For instance, when parties have acted in reliance of the earlier order before it is set aside on appeal, it may not be possible or may even be unjust to unwind wholly the effects of the earlier order, and exceptions should be made after taking into account the prejudice caused to various parties and the practicalities of unwinding the effects of the earlier order. In *Commissioner for Railways (NSW) v Cavanough* (1935) 53 CLR 220, the High Court of Australia held, in the context of a reversal

of a conviction of a felony on appeal, that "the consequence of the reversal of a judgment or conviction is that it is annulled and held for nothing, and the party is restored to all things which by reason of the judgment he has lost", but also recognised that acts done in execution of a judgment prior to it being set aside are protected despite the subsequent reversal of the court order (on which the execution was premised). In *Wiseman v Wiseman* [1953] 2 WLR 499 ("*Wiseman v Wiseman*"), a matrimonial case, the Court of Appeal held (at 510) that when a decree absolute is set aside, the marriage automatically became void from that moment but the avoidance did not relate back so as to the render the child in the marriage illegitimate. The facts of the present case do not, however, call for such exceptions (see also [47] to [50] below). No evidence has been proffered by TYC or HT that they or any other party had acted in reliance of the 29 September 2016 bankruptcy order such that its effects cannot be or ought not be unwound in their entirety.

36 Mr Chu and Ms Chia further argued that an interpretation that there is no automatic reinstatement of JC as a director of TYC not only gives rise to commercial certainty, but also takes into account that members are likely to have the presumed intention that they would want a choice whether to reinstate a director, taking into account the circumstances of his earlier bankruptcy. TYC and HT relied on *Battenberg* to support their contention.

37 In my view, the case of *Battenberg* (discussed at [29] to [31] above) does not assist TYC or HT's case. The majority in *Battenberg* had concluded that, as a matter of contractual interpretation, the relevant parties did not intend to incorporate the effect of annulment under bankruptcy law (that the annulment applies retrospectively to automatically reinstate the respondent as a member), but instead contractually agreed to depart from that position such that a member ceased to become a member once he became a bankrupt even though his

bankruptcy was subsequently annulled. The majority reasoned as follows (see *Battenberg* at [105]–[106]). First, the appellant company was set up to manage a social club and the club's finances necessarily depended on its members being financially capable of meeting their obligations to pay their fees. A member who has had his bankruptcy annulled upon the entry into of a scheme of arrangement or composition with his creditors nonetheless posed a greater financial risk to the club than a member who has not entered into such arrangements. Second, the stigma of a member's bankruptcy was material to the reputation of a social club, even if the bankruptcy were annulled. Third, members were more likely to want a choice as to whether to reinstate the membership of one whose bankruptcy has been annulled, taking into account the circumstances of the bankruptcy. Likewise the member concerned may well want to have a choice whether or not to be re-admitted, since reinstatement may mean that he may become liable to pay past subscriptions.

38 The court in *Battenberg* further stated (at [107]) that certainty was important to both the club and the members, and they needed a clear-cut test on whether a member has or has not retained his membership following a bankruptcy order, rather than to be caught by the possibility and difficulties of annulment causing membership to "spring up again". Were it otherwise, anomalous consequences may follow. For instance, a retroactively reinstated membership brought about by annulment would carry with it a reinstated obligation to pay a subscription for the whole of the period of the former bankruptcy prior to annulment, and this was arguably so even though the member concerned was, prior to annulment, excluded from any of the rights or privileges of a member. The question then arose as to whether the retroactively reinstated member could complain that he had been earlier wrongly denied his rights and privileges as a member, and it was unlikely that that the club would

have wanted to be at risk of such an argument succeeding: see [124] of *Battenberg*. On the other hand, if there was no automatic reinstatement of the member, he could still reapply for membership (see [87] of *Battenberg*), and so any prejudice that might be caused to him was reduced.

39 The majority of the court in *Battenberg* were therefore of the view that, on a proper construction of the company's articles in question, the parties must have intended to depart from the general position under bankruptcy law that annulment applies retrospectively to restore the affected individual to his original position, but instead contractually agreed that a member ceased to become a member once he became a bankrupt regardless of whether or not the bankruptcy was subsequently annulled.

40 It bears reiterating that an annulment of a bankruptcy order has the effect of restoring the person who was subjected to the order to his original position, and that whether or not this general position is to be departed from in a specific case is to be approached *as a matter of construction of the relevant statutory or contractual provision*. In the present case, there is nothing in the TYC Articles (or Table A) that evinces a contractual agreement to depart from the general position under bankruptcy law of retrospective operation of annulment or setting aside. Further, the considerations that led the majority in *Battenberg* to infer that there was a contractual agreement to depart from the default position do not arise here. Unlike the social club in *Battenberg* which depended on contributions by its members for its finances, TYC is a family holding company with considerable assets and does not, in any way, depend on any financial contributions by JC as a director (or even as shareholder) of TYC. The consideration in *Battenberg*, that damage to reputation caused by a continuing stigma upon a member who had once been adjudicated bankrupt would be very

material to a social club, is not material in this case (and no evidence has been led to the contrary).

41 As to the consideration in *Battenberg* that members of the company in that case would likely have intended to want to have a choice whether or not to reinstate the position of the individual whose bankruptcy order has been annulled, it cannot be objectively construed from the TYC Articles that there was an intention to give the members of TYC such a choice. Quite the contrary, Article 8 makes it clear that the intention was for JC and HT to be able to remain as Governing Directors who have control over the management of the company for as long as they wish, subject to, as I have earlier held, the provisions in the TYC Articles and in Table A. In addition, while the prejudice suffered by the member in *Battenberg* was merely that he may lose his membership in the social club if his membership was not automatically reinstated upon the annulment of the bankruptcy order and his subsequent re-application to be a member was rejected, the prejudice that JC would suffer in the present case would be much more severe. She would lose management powers over a company, with considerable assets, that she had co-founded. In the light of the prejudice to her that may arise, it cannot be lightly be inferred in this case that the parties intended to depart from the general position under bankruptcy law with respect to the retrospective operation of a setting aside (or even of an annulment) of a bankruptcy order.

42 Next, HT argued that commercial certainty favours an interpretation of the TYC Articles that there should be no automatic reinstatement of JC's position as a director of TYC following the setting aside of the bankruptcy order. To that, it suffices to say that the mere consideration of commercial certainty cannot give rise to an inference that the parties intended to

contractually depart from the general position under bankruptcy law, especially in the light of the considerations that I have set out above.

43 Mr Chu also submitted that if a construction of Article 72 of Table A is such that the setting aside of the bankruptcy order results in an automatic reinstatement of a director to the company, all companies would be held hostage to such a construction.[7] This is not the case. It is clear from the decided authorities, and from my reasoning above, that whether such an effect results is to be approached as a matter of construction of the relevant statutory or contractual provision. Hence, each case turns on its facts.

44 It must be remembered that TYC is no ordinary company. It is a family holding company set up to hold shares in The Hour Glass Limited (of which HT and JC are founders) and other family assets, which are not insubstantial, and was set up essentially for the benefit of JC and HT's children. As a private company, TYC only has five members (*ie*, JC, HT and their three children[8]) who would benefit from the company. The TYC Articles were drawn up to give effect to the intent of the founding members of TYC (*ie*, HT and JC), including how TYC was to be managed and how its assets were to be dealt with. Pursuant to Article 7 of the TYC Articles, JC and HT each hold a founder share in TYC giving them 44% and 46% of the voting rights in TYC respectively. No other persons may hold these founder shares in TYC. They were also the first directors of TYC (see Article 3A of the TYC Articles), and Article 8 of the TYC Articles provides that they are the only "permanent" Governing Directors. Indeed, Mr Chu admitted that it was envisaged that JC and HT would be the controlling shareholders of TYC and would be the governing directors who

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7 Plaintiff's Submissions, para 59(a).

8 HT's first affidavit dated 7 October 2016, exhibit HT-1 at paras 9 and 11.

would wield extensive powers in appointing directors of TYC.[9] HT also stated that, in setting up TYC, he and JC intended in their lifetime to be custodians of the family assets (under TYC) and the *key decision making powers* were thus vested in both of them.[10] Further, the payment voucher system that was implemented via clause 10 of the SSD essentially vests in JC and HT jointly, as directors of TYC, the decision-making power for payments to be made from TYC's bank accounts.

45 Hence, on the facts and on the construction of the relevant provisions of the TYC Articles and Table A, it is evident that JC and HT were meant to be "permanent" Governing Directors of TYC except upon the occurrence of certain events, such as those specified in Article 8 of the TYC Articles and Article 72 of Table A. Given the manner in which the TYC Articles were structured, and the relevant background as set out above, once the bankruptcy order was set aside, it cannot be likely inferred that the parties intended to depart from the general position with respect to the retrospective effect of the setting aside (or annulment) of the bankruptcy order which would result in the reinstatement of JC to her position as a permanent Governing Director of TYC. To hold otherwise would lead to an unreasonable outcome inconsistent with the intention of JC and HT when they drew up the terms of the TYC Articles, and would severely prejudice JC's position.

46 Finally, TYC submits that if the setting aside of the bankruptcy order were to result in JC's directorship being reinstated, every company whose director is adjudged a bankrupt runs the risk that the director's office may be restored (however long it takes), even though the constitution of the board or

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9 Plaintiff's Submissions, paras 4 and 5.

10 HT's third affidavit dated 14 December 2016, paras 7 and 8.

the company's business may have undergone radical changes. I reiterate that the effect of a setting aside or annulment of a bankruptcy order on a directorship of the person who had been subjected to the order is to be determined on a case by case basis as a matter of construction of the relevant provisions. In any event, there is no evidence that TYC had undergone any "radical changes" since JC's bankruptcy and the setting aside of the bankruptcy order.

47 I thus consider whether there would be any prejudice to TYC or third parties as a result of automatically reinstating JC as a director of TYC (see also [35] above). I first note that, unlike a public company which has to take into account shareholders' and investors' interests, TYC is a private company and a family holding company set up primarily to benefit only a small group of individuals. TYC submitted that the setting aside of the bankruptcy order should not have retrospective effect to reinstate JC's directorship, as TYC had relied on the bankruptcy order to regulate its affairs. To hold otherwise would place an undue burden on TYC to investigate, go behind the order of court, and hold its operations in abeyance after the bankruptcy order has been made and pending the final outcome of the appeal against that order. TYC cites *Smallcombe v Olivier* (1844) 13 M & W 77 ("*Smallcombe*"), in which the court held that an order for annulling a fiat in bankruptcy does not invalidate previous proceedings under the fiat. It also cites *Wiseman v Wiseman*, where the Court of Appeal held that "the doctrine of relation back has never been applied so as to render unlawful that which was originally lawful".

48 It is unclear how *Smallcombe* and *Wiseman v Wiseman* apply to the present case. There is no evidence as to what acts TYC had *lawfully* taken (presumably, under the management of its remaining director, HT, after JC was made a bankrupt) since the bankruptcy order, in reliance of the fact that a bankruptcy order had been made against JC before it was subsequently set aside,

that the doctrine of relation back ought not affect. TYC has not shown how it has relied on the bankruptcy order or has been regulating its affairs after the order was made against JC, such that, if the effects of the order are unwound and JC were to be automatically reinstated as a director, TYC or any third party would suffer prejudice.

49 Article 3A of the TYC Articles states that there must be at least two directors in TYC – this is not disputed by HT.[11] Hence, even assuming that HT was the sole director after JC was made a bankrupt, TYC would have had to rely on the TYC Articles read with Table A to appoint at least one other director in order for TYC's board to exercise its powers of management, including authorising Amstay to make payments on TYC's behalf.

50 Thus, TYC and HT have not shown me what powers TYC could have, or had, lawfully exercised on its own, via HT as the sole director of TYC, during the period of JC's bankruptcy order being in force. This was recognised by TYC and HT, and is precisely why TYC has, by this originating summons, sought reliefs such as the appointment of another director and for reimbursement of payments made by Amstay on TYC's behalf. In any event, even if HT claimed that he was entitled to appoint another director of TYC[12] pursuant to Article 8 of the TYC Articles (an issue which I will deal with later), it remains that no other director has been appointed. HT also recognised that in view of the bankruptcy order, TYC had not been able to, and did not, make payments in the ordinary course of business.[13]

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11 HT's second affidavit dated 14 December 2016, para 32.

12 HT's first affidavit dated 7 October 2016, para 13.

13 HT's first affidavit dated 7 October 2016, para 19.

51 Thus, in conclusion, I am of the view that the setting aside of the bankruptcy order had the effect of automatically reinstating JC as a permanent Governing Director of TYC.

Declaration for HT to appoint another director of TYC, or alternatively for TYC to convene an EGM to pass a resolution to appoint a new director

52 Given my decision that JC remains a Governing Director of TYC, I dismiss TYC's first and second prayers. Although it is thus not necessary to discuss those prayers, I will do so briefly for completeness.

53 If JC were no longer a Governing Director of TYC, I would not have granted a declaration for HT to unilaterally appoint another director pursuant to Article 8 of the TYC Articles. Article 8 provides that the appointment of alternate Governing Directors or directors of TYC must be made by JC and HT acting in their capacities as Governing Directors. Whilst the exercise of this power is qualified by the words "whilst [HT and JC] hold the office of Governing Directors", Article 8 further states that "in the event of the *death* of any of the two Governing Directors, the surviving person shall be entitled to exercise all or any of the powers previously held by the Governing Directors *jointly*" [emphasis added]. Hence, Article 8 must be read such that the power to appoint another director, via Article 8 itself, must be done jointly by JC and HT and it is only in the event that one of them dies that the power can be exercised singly by the surviving Governing Director. The articles of TYC is a contract between the shareholders of TYC and TYC, and between the shareholders *inter se* (see *Chan Siew Lee v TYC* at [36] and s 39(1) of the CA). It is not for the court to rewrite the express provisions of this contract such that contrary to it, HT can unilaterally appoint new directors via Article 8.

54 Instead, had I decided that JC was no longer a director of TYC, I would have allowed (by way of an amended prayer 2 of the Originating Summons, as suggested by Mr Chu[14]) the remaining director, HT, to convene an EGM of members for the passing of a resolution to appoint a new director, as provided for in Article 44 of Table A. Alternatively, pursuant to s 177(1) of the CA (read with Articles 43 and 67 of Table A), TYC's members can call an EGM of the company for the purposes of appointing another director.

Whether clause 10 of the SSD is frustrated by reason of the bankruptcy order made against JC

55 Likewise, given my earlier findings, I also dismiss TYC's third prayer. However, I will deal with it briefly for completeness. TYC submits that there is an implied term that clause 10 is only operable if both JC and HT remain directors of TYC, and that in the alternative, clause 10 has been frustrated by the vacation of JC's office as director of TYC. I agree that there is an implied term that clause 10 is only operable if both JC and HT remain directors of TYC. Clause 10 was the subject of a previous dispute between the parties in *TYC Investment*, where the High Court held (at [192]) that the clause was a contractual promise by HT and JC to each other *in their capacities as directors of TYC*. This part of the decision was not disturbed on appeal, and I have no reason to disagree with it. Clause 10 pertains to payments by TYC, and JC's and HT's capacities to sign cheques on TYC's bank accounts or to approve the payments must be in exercise of their management powers as directors of TYC. The powers of management of a company rest with its board of directors and not with its shareholders (see s 157A of the CA and *Chan Siew Lee v TYC*).

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14 Hearing of OS on 22 June 2017.

56 Hence, had I held that JC was no longer a director of TYC, clause 10 would have been frustrated as the very capacities in which she and HT had contemplated their bargain in respect of that clause would no longer exist. Clause 10 would become impossible to perform as JC would not have the power to sign cheques on TYC's bank accounts or vouchers approving the payments.

Declaration that TYC be at liberty to reimburse Amstay for payments made by Amstay on TYC's behalf

57 At the hearing before me, parties agreed that I need not deal with the fourth prayer sought by TYC, namely for a declaration that it be at liberty to reimburse Amstay for payments made by it on TYC's behalf in the ordinary course of TYC's business. In my view, TYC should first attempt to utilise the mechanisms already available to resolve this. The parties agreed. In the present case, given that I have held that JC is reinstated as a director of TYC, the approval mechanism under clause 10 of the SSD should first be employed. Failing that, the Court of Appeal in *Chan Siew Lee v TYC* has held that shareholders have, in certain limited circumstances, the reserve power to authorise payments where there is a deadlock within the board which cannot be broken by the appointment of additional directors and/or the removal of directors. Likewise, even if I had decided that JC was not reinstated to the board and that clause 10 of the SSD had been frustrated, TYC should first deploy mechanisms under its articles to resolve the issue of reimbursement or payments by Amstay. I make no comments on whether and how TYC can or should resolve this issue, as this is no longer a live issue before me.

58 Suffice to say, the relief prayed for by TYC is, in my view, premature. The court should only step in when the company cannot resolve the matter after having employed the appropriate powers and mechanisms given under its articles and by law, and even then, there are limits to the types of relief that the

court can grant. It is not the task of the court to manage the affairs of a company (*Shuttleworth v Cox Brothers and Company* [1927] 2 KB 9 at 23), such powers being the preserve of the board of directors (*Chan Siew Lee v TYC* at [1]).

Declaration that JC be reinstated as permanent Governing Director, in the event that there is no automatic reinstatement or that JC was no longer a director

59 Again, the issue of whether JC should be reinstated, by the court, as a permanent Governing Director of TYC, if she were found to be no longer a director or that there is no automatic reinstatement despite setting aside the bankruptcy order, need not be dealt with in view of my findings above.

60 However, if I had to deal with this, I would not have granted this relief. The TYC Articles read with Table A provides for the appointment of directors. JC is at liberty to stand for re-election as a director, in accordance with those provisions. The court has no power to alter a company's articles, save on limited grounds such as under s 216 of the CA (*Chan Siew Lee v TYC* at [36]). There is also no express power (statutory or otherwise) conferred on the court to make a reinstatement in such circumstances. Thus, it is not appropriate for the court to depart from provisions in the TYC Articles pertaining to the appointment of directors and reinstate JC as a director of TYC on its own discretion. This would amount to rewriting the company's articles. I would add that this is also not a case in which TYC or HT had procured JC's ouster from the board, and hence the issue of *bona fides* on the part of TYC or HT does not arise. JC's office of director was vacated as a result of her bankruptcy, which had nothing to do with TYC or HT.

Conclusion

61 In conclusion, I make the following orders:

(a) I dismiss prayers (1), (2) and (3) of TYC's application (see [7(a)], [7(b)] and [7(c)] above) and make no order on prayer 4 of TYC's application (see [7(d)] above).

(b) I also dismiss JC's counterclaim in [8(a)] and [8(b)] above, but allow her counterclaim in [8(g)] above, in that she is automatically reinstated as a permanent Governing Director of TYC. JC was not, during the time when the bankruptcy order subsisted, a director of TYC, as her office of director became vacant upon the bankruptcy order being made. Article 72 of Table A did not contradict Article 8 of the TYC Articles. However, by reason of the setting aside of the bankruptcy order, JC is automatically reinstated as a permanent Governing Director of TYC. I wish to emphasise that, had JC's bankruptcy order remained in force and had not been set aside, JC's office of director would have remained vacated.

(c) As for clause 10 of the SSD, this remains operable because of JC's reinstatement as a permanent Governing Director of TYC. Hence I make no order on JC's counterclaim in [8(c)] and [8(d)] above.

62 As for a declaration that the Notification filed on 7 October 2016 with ACRA on HT's instructions is null, void and illegal (see [8(e)] above), I dismissed this prayer. I find that the Notification was properly filed since as at 7 October 2016, JC's bankruptcy order was still in force. However, as I hold that JC's office as director is reinstated, in relation to JC's claim in [8(f)], TYC is to do the necessary and file the relevant information with ACRA on JC's reinstatement as a director.

63 I will hear the parties on costs.

Audrey Lim
Judicial Commissioner

Chu Hua Yi and Michelle Lee Ying-Ying (Dentons Rodyk & Davidson LLP) for the plaintiff;
Bachoo Mohan Singh (Bachoo Mohan Singh Law Practice) for the first defendant;
Chelva Retnam Rajah, S.C., Chia Ru Yun Megan Joan and Perry Elizabeth Wong (Tan Rajah & Cheah) for the second defendant.
