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

[2023] SGHC 19

Companies Winding Up No 192 of 2020 (Summons No 4037 of 2022)

In the matter of Section 125(1)(*i*) of the Insolvency, Restructuring and Dissolution Act (Act 40 of 2018)

And

In the matter of Kirkham International Pte Ltd (in compulsory liquidation)

Medora Xerxes Jamshid
Liquidator of Kirkham International Pte Ltd
(in compulsory liquidation)

… *Applicant*

JUDGMENT

[Insolvency Law — Winding up]

TABLE OF CONTENTS

Re Kirkham International Pte Ltd (in compulsory liquidation)

[2023] SGHC 19

General Division of the High Court — Companies Winding Up No 192 of 2020 (Summons No 4037 of 2022)
Goh Yihan JC
5 January 2023

25 January 2023 Judgment reserved.

Goh Yihan JC:

1 The Applicant, Mr Medora Xerxes Jamshid, was appointed as the liquidator of Kirkham International Pte Ltd ("the Company") on 22 November 2020. The Applicant's appointment followed the Company's winding up on the ground that it was just and equitable to do so pursuant to s 125(1)(*i*) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA").

2 This is the Applicant's application to appoint solicitors from Selvam LLC to, generally speaking, assist him in his duties as liquidator of the Company. The Applicant is asking for such appointment to take effect from 28 April 2021 instead of the date of the present application. This is because the Applicant did not seek the court's authorisation to appoint solicitors from Selvam LLC in April 2021. This application therefore raises, among others, the issue of whether the court has the power to retrospectively authorise the appointment of a solicitor pursuant to s 144(1)(*f*) of the IRDA.

Background facts

3 I begin with the relevant background facts to the present application. Following the Applicant's appointment as liquidator of the Company on 22 November 2020, he engaged KPMG Service Pte Ltd ("KPMG") to conduct forensics investigations on 6 September 2021. The Applicant had decided not to convene a meeting of creditors or a committee of inspection ("COI") before September 2021 because he believed that he would not be able to adjudicate on who the true creditors of the Company were until he had the benefit of KPMG's report.

4 As a meeting of creditors or a COI was not convened, the Applicant did not obtain authorisation when he appointed solicitors from Selvam LLC in respect of the following matters. First, on or around 28 April 2021, solicitors from Selvam LLC advised the Applicant of his duties as liquidator of the Company and assisted him in responding to letters from various entities or individuals. Second, the Applicant appointed Mr Gabriel Lee, a solicitor who was formerly from Selvam LLC, to act for the Company in Originating Summons No 430 of 2021 ("OS 430"), which was an application by a former employee of the Company for leave to commence proceedings against the Company. OS 430 was dismissed by the High Court on 12 July 2021. The Applicant also did not, in the alternative, obtain authorisation from the court in respect of his appointments of solicitors for these matters because he had intended to convene a creditors' meeting to appoint a COI to retrospectively approve the appointments as soon as KPMG's investigations were completed.

5 While KPMG's investigations are still ongoing, the Applicant has filed the present application because, on 20 October 2022, DB International Trust (Singapore) Limited ("DB") commenced an originating application in

HC/OA 707/2022 in the General Division of the High Court ("OA 707"). The application sought, among others, an order to remove the Applicant as liquidator of the Company or an order that the Applicant calls a creditors' meeting to decide on the formation of a COI. Following DB's application in OA 707, the Applicant filed the present application on 8 November 2022 to appoint solicitors from Selvam LLC to advise him in his duties as liquidator. On 1 December 2022, the Applicant formally appointed the present solicitors from Selvam LLC to act for him with effect from 20 October 2022, subject to the court's authorisation. It is obvious that the Applicant cannot seek authorisation from a COI because of his decision to wait for KPMG's report before convening a creditors' meeting to appoint one.

6 The present application was originally fixed to be heard on 29 November 2022. However, at the hearing on 29 November 2022, Ms Chew Ee Ling ("Ms Chew"), who is the joint official liquidator of RF Investment Holdings Limited (In Official Liquidation), a shareholder of the Company, informed the court that she wished to object to the present application. In light of Ms Chew's objection, the present application was refixed to be heard on 5 January 2023 before me. Following a series of correspondence between Ms Chew and Selvam LLC, Ms Chew withdrew her objection to the present application. There is thus no objection from any interested party to the present application.

The relevant issues

7 Notwithstanding the absence of any objection to the present application, counsel for the Applicant, Mr Daniel Soo ("Mr Soo"), rightly points out that the Applicant still bears the burden of satisfying the court that he should be granted

authorisation to appoint solicitors to assist him in his duties as liquidator of the Company with effect from 28 April 2021.

8 I am grateful to Mr Soo for his comprehensive submissions, which have helpfully identified the following relevant issues for my consideration:

(a) first, whether, and on what principles, I should authorise the Applicant's appointment of solicitors;

(b) second, and in connection with the first issue, whether the Applicant's failure to obtain the court's authorisation prior to appointing solicitors in April 2021 should be a reason not to authorise the appointment now; and

(c) third, whether I have the power to retrospectively authorise the Applicant's appointments of solicitors from 28 April 2021 to assist him in his duties as liquidator of the Company and to defend OS 430 in the Company's name, and the consequences if I decide that I do not have such power.

9 I will deal with issues (a) and (b) collectively, and then discuss issue (c).

Whether the court should authorise the Applicant's appointment of solicitors

The applicable law

The relevant legislative provisions and the issues raised

10 The requirement for a liquidator to obtain the authorisation of the court or the COI before appointing a solicitor is provided for by ss 144(1)(*e*) and 144(1)(*f*) of the IRDA, which state as follows:

> **Powers of liquidator**
>
> **144.**—(1) The liquidator may, after authorisation by either the Court or the committee of inspection —
>
> …
>
> (*e)* bring or defend any action or legal proceeding in the name and on behalf of the company;
>
> (*f*) appoint a solicitor —
>
> (i) to assist the liquidator in the liquidator's duties; or
>
> (ii) to bring or defend any action or legal proceeding in the name and on behalf of the company; …

The powers conferred on the liquidator by s 144(1) of the IRDA must be contrasted with those conferred by s 144(2), the latter of which do not require authorisation by either the court or the COI.

11 As Mr Soo rightly submits, the IRDA does not state the principles which the court or the COI should consider in deciding whether to grant authorisation or the basis for any interested party to object. However, what is clear is that s 144(1) of the IRDA, in contrast to s 144(2), is drafted to make the authorisation of the court or the COI mandatory before the liquidator can, among others, exercise his power to appoint a solicitor. This much is clear by the provision in s 144(1) that the liquidator may only exercise his powers under the section "*after* authorisation by either the Court or the [COI]" [emphasis added].

12 The legislative history of s 144(1) of the IRDA does not shed light on the principles that the court or the COI should consider in deciding whether to grant authorisation for the liquidator to appoint a solicitor. However, it does show that the present approach taken in the IRDA is a deliberate departure from the previous approach encapsulated in the Companies Act (Cap 50, 2006

Rev Ed) ("Companies Act"). Prior to the commencement of the IRDA on 30 July 2020, the liquidator's power to appoint a solicitor was provided for by s 272(1)(*e*) of the Companies Act. This section provided as follows:

> **Powers of liquidator**
>
> **272.**—(1) The liquidator may with the authority of either of the Court or of the committee of inspection —
>
> …
>
> (*e*) appoint a solicitor to assist him in his duties.

At the same time, however, s 272(2)(*a*) of the same Act provided that the liquidator may, without the authority of either the court or the COI "bring or defend any action or other legal proceeding in the name and on behalf of the company".

13 When read together, ss 272(1)(*e*) and 272(2)(*a*) of the Companies Act therefore provided that the liquidator may (a) appoint a solicitor to assist him in his duties but only with authorisation, and (b) bring or defend any action or other legal proceeding in the name and on behalf of the company without such authorisation. However, given that the liquidator is likely to appoint a solicitor to bring or defend any action in the name of the company and on behalf of the company, how did ss 272(1)(*e*) and 272(2)(*a*) interact with each other? In the Malaysian High Court decision of *Subterranean Natural Mineral Water Sdn Bhd v Kho Boon Kwang* [2002] 2 MLJ 439 ("*Subterranean Natural Mineral Water*"), Zakaria Sam JC had to interpret ss 236(1)(*e*) and 236(2)(*a*) of the Companies Act 1965 (No 79 of 1965) (M'sia) ("Malaysian Companies Act 1965"), which are substantively similar to ss 272(1)(*e*) and 272(2)(*a*) of the Companies Act. The learned judge held that since the liquidator had the power under s 236(2)(*a*) (which is similar to s 272(2)(*a*)) to bring or defend an action in the company's name without authorisation, and a company must be

represented by counsel to do so, the liquidator did not require the court's sanction to appoint a solicitor *for this purpose*. However, given the presence of s 236(1)(*e*) (which is similar to s 272(1)(*e*)), the liquidator must still obtain the court's authorisation in respect of the appointment of a solicitor to assist in the day-to-day management of the company.

14 Assuming that the reasoning in *Subterranean Natural Mineral Water* applied to ss 272(1)(*e*) and 272(2)(*a*) of the Companies Act, the local position then would have required a liquidator to obtain the authorisation of the court or the COI to appoint a solicitor to advise him on the day-to-day management of the company, but such authorisation would *not* be required to appoint a solicitor to bring or defend any action or other legal proceeding in the name and on behalf of the company. However, it is clear the IRDA has departed from this assumed position because ss 144(1)(*e*) and 144(1)(*f*) require the liquidator to obtain the prior authorisation of the court or the COI in both situations. I pause here to note that s 144(1)(*e*) appears to contemplate the liquidator bringing or defending any action or legal proceeding in the name and on behalf of the company *without* any legal representation, in contrast to s 144(1)(*f*)(ii) which governs the situation where the liquidator wishes to appoint a solicitor for that purpose. While the situation contemplated in s 144(1)(*e*) may be uncommon in practice, it must be assumed that Parliament does not legislate in vain and so ss 144(1)(*e*) and 144(1)(*f*)(ii) must each be taken to contemplate different scenarios.

15 It is not clear why Parliament chose to depart from the previous approach encapsulated in ss 272(1)(*e*) and 272(2)(*a*) of the Companies Act. As Mr Soo submits, there is nothing in the Senior Minister of State for Law's speech in the Second Reading of the Insolvency, Restructuring and Dissolution Bill (Bill No 32/2018) on 1 October 2018 that explained this apparent departure. Further, there is also no explanation in the *Report of the Insolvency Law Review*

Committee (2013) (Chairman: Lee Eng Beng SC) ("*Report of the Insolvency Law Review Committee*"), on which the IRDA is primarily based. Since the Insolvency Law Review Committee indicated that it had considered the approaches taken in other relevant jurisdictions, it would be apposite to examine those jurisdictions both to understand the apparently new approach taken in the IRDA with respect to the power of the liquidator to appoint a solicitor and to set out the applicable principles for the court or the COI to consider in deciding whether to authorise such appointment.

The approaches in other jurisdictions

16 As I will now explain, a review of the legislative provisions in the relevant jurisdictions reveals that the majority of them do not impose the same requirement in the IRDA that a liquidator is to obtain the authorisation of the court or the COI before he or she appoints a solicitor.

17 I turn first to the approach taken in the United Kingdom ("UK"). Before 2015, s 167 of the Insolvency Act 1986 (c 45) (UK) ("UK Insolvency Act") divided the liquidator's powers into those specified in Parts I and II of Schedule 4 (which required the sanction of the court or the liquidation committee), and those in Part III of Schedule 4 (which could be exercised without such sanction). Relevantly, Part II of Schedule 4 included the power to "bring or defend any action or other legal proceeding in the name and on behalf of the company". The phrasing used is consistent with that used in the Companies Act and the IRDA, even if the approach may be different. The UK Insolvency Act was amended in 2015 by s 120 of the Small Business, Enterprise and Employment Act 2015 (c 26) (UK) ("SBEE Act"), which removed the need for a liquidator to obtain the sanction of the court or the liquidation committee in order to exercise his powers under Schedule 4. The Explanatory Notes to

the SBEE Act explained that this requirement was removed to bring the provisions for liquidations in line with those for administration. Accordingly, s 167 of the present version of the UK Insolvency Act provides that a liquidator in a court-ordered winding up may exercise any of the powers specified in Parts 1 to 3 of Schedule 4, including the power to bring or defend any action or other legal proceeding in the name and on behalf of the company, without the need for the sanction of the court or the liquidation committee.

18 The approaches taken in Australia and New Zealand are similar to that taken in the UK. Section 477(2) of the Australian Corporations Act 2001 (Cth) provides that a liquidator of a company may "(a) bring or defend any legal proceeding in the name and on behalf of the company" and "(b) appoint a solicitor to assist him or her in his or her duties". In contrast to the powers spelt out in ss 477(2A) and 477(2B), the powers in s 477(2) are not subject to the approval of the court, the COI, or a meeting of creditors. Similarly, in New Zealand, s 260(2) of the Companies Act 1993 (NZ), read with (a) and (c) of Schedule 6, provides that a liquidator of a company has the powers to "(a) commence, continue, discontinue, and defend legal proceedings" and "(c) appoint a solicitor". There is no requirement that the liquidator needs to obtain any prior authorisation before exercising such powers.

19 Turning then to Canada, s 222(1)(a) of the Canada Business Corporations Act, RSC 1985, c C-44 (Can) provides that a liquidator may "(a) retain lawyers, accountants, engineers, appraisers and other professional advisers" and "(b) bring, defend or take part in any civil, criminal or administrative action or proceeding in the name and on behalf of the corporation". Similar to the approaches taken elsewhere, there is no requirement for the liquidator to obtain prior authorisation before exercising these powers.

20 As I alluded to above in relation to the discussion about *Subterranean Natural Mineral* (see [13] above), the approach in Malaysia before 2016 was that a liquidator required the authorisation of the court or the COI for the appointment of a solicitor to assist in the day-to-day management of the company, but not to bring or defend an action in the company's name. However, the seeds of change had already been sown in 2003, when the Companies Commission of Malaysia established the Corporate Law Reform Committee ("CLRC") to review the Malaysian Companies Act 1965. The CLRC eventually recommended, among others, the abolition of the requirement of prior authorisation before a liquidator could appoint a solicitor. Indeed, as part of its review, the CLRC had published a consultation document in March 2006 proposing such abolition as it "hinder[ed] the smooth running of the liquidation process as a solicitor is required to assist the liquidator in areas that he is unable to do himself": see Corporate Law Reform Committee for the Companies Commission of Malaysia, *Company Liquidation – Reforms and Restatement of the Law* (Consultative Document, 2006) at para 6.7 ("*Consultative Document*"). The *Consultative Document* also noted that the insolvency regimes of the UK, Australia, and New Zealand did not require a liquidator to obtain such prior authorisation (at para 6.8). Following the CLRC's recommendations, the Malaysian Companies Act 1965 was replaced with the Companies Act 2016 (No 777 of 2016) (M'sia). Section 486(1)(*a*) of this latter Act, read with Parts I and II of the Twelfth Schedule, makes it clear that a liquidator may "(*a*) bring or defend any action or other legal proceedings in the name or on behalf of the company" and "(*k*) appoint an advocate to assist him in his duties" without the authorisation of the court or the COI. However, s 486(2) provides a safeguard in that any creditor or contributory may apply to the court with respect to any exercise or proposed exercise of these powers.

21 As such, the approaches taken in the jurisdictions discussed so far are different from that taken in the IRDA, which still requires a liquidator to obtain the authorisation of the court or the COI before he appoints a solicitor. Indeed, as Mr Soo submits, the (seemingly) only significant common law jurisdiction that has retained such a requirement is Hong Kong. Following various amendments to its Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) (HK) in 2017, s 199 read with Schedule 25 now provides that a liquidator in a court-ordered winding up: (a) may bring or defend any action or other legal proceedings in the name and on behalf of the company *only with* the sanction of the court or the COI; and (b) may employ a solicitor to assist the liquidator in performing the liquidator's duties *without* the sanction of the court or the COI, but only if the liquidator has, before exercising the power, given at least 7 days' notice of his intention to exercise such power to the COI or creditors in the absence of a COI. While the respondents to a consultative exercise launched by the Hong Kong Financial Services and the Treasury Bureau ("FSTB") in April 2013 opined that liquidators should be allowed to commence or continue legal proceedings without the sanction of the court, the FSTB thought that a decision to do so was sufficiently important to the estate as a whole so as to require prior sanction.

22 In summary, the current approach taken in ss 144(1)(*e*) and 144(1)(*f*) of the IRDA, which requires a liquidator to obtain the authorisation of the court or the COI before appointing a solicitor, is an outlier across the various relevant jurisdictions surveyed above. Indeed, most jurisdictions have dispensed with the need for the liquidator to obtain any such authorisation. In so far as Malaysia and Hong Kong have retained certain safeguards in relation to the appointment of a solicitor, the starting position remains that the liquidator can do so but that appointment is then subject to some degree of oversight. The same can be said

of the liquidator's more specific power to appoint a solicitor to begin or continue an action in the name or on behalf of the company. In this regard, only Hong Kong has retained the need for the liquidator to obtain prior authorisation before doing so. Given the lack of express consideration in either the parliamentary debates or the *Report of the Insolvency Law Review Committee*, and the inconsistency with other relevant jurisdictions, the relevant authorities may wish to reconsider whether it is necessary for a liquidator to obtain the authorisation of the court or the COI before appointing a solicitor, as is currently provided for in ss 144(1)(*e*) and 144(1)(*f*) of the IRDA. That said, it may well be the case that there are good policy reasons behind ss 144(1)(*e*) and 144(1)(*f*) of the IRDA, in which case they should remain as they are.

Summary of the relevant principles

23 However, for present purposes, it is clear from ss 144(1)(*e*) and 144(1)(*f*) of the IRDA that a liquidator must obtain the authorisation of the court or COI before appointing a solicitor either to assist him in the discharge of his duties, or to bring or defend any action or legal proceeding in the name and on behalf of the company.

24 While s 144(1) of the IRDA does not provide any principles for a court or COI to consider in deciding whether to authorise a liquidator to exercise his powers under the section, it is obvious that a court or COI must make its decision in a principled manner. In this regard, and without intending to limit the relevant factors for consideration, the main factors that a court or COI should take into account in deciding whether to authorise the appointment of a solicitor include (a) the general need to appoint a solicitor, (b) the impact of legal fees on the assets of the estate, (c) whether the proposed solicitor is in a position of conflict, and (d) any objection raised by members of the COI or creditors.

25 Also, while I would not go so far as to say, as Mr Soo suggests, that authorisation should be granted as a matter of course if the creditors do not object, I will say that the threshold for the liquidator to cross before authorisation is granted for him to exercise the powers under ss 144(1)(*e*) and 144(1)(*f*) of the IRDA is not a high one.

My decision: the Applicant's appointment of solicitors should be authorised in principle

26 Applying these principles to the present case, I am of the view that the Applicant's appointment of solicitors should be authorised. I say so for the following reasons.

27 First, given Ms Chew's withdrawal of her objection, there is no objection from any interested party to the present application. Second, I do not think that it is material that the Applicant had failed to obtain authorisation when he appointed solicitors on previous occasions. I agree with Mr Soo that, generally, the Applicant's failure should not affect the present interests of the creditors or shareholders for solicitors to be appointed to properly manage the affairs of the Company. Third, I can see good reasons for the appointment of solicitors, especially since the Company faced and presently faces a number of applications taken out against it.

28 However, while I agree that the Applicant should be authorised to appoint solicitors in principle, the Applicant has sought for my authorisation to take effect retrospectively from 28 April 2021. This therefore requires me to consider if I have such a power under the IRDA.

Whether the court has the power to authorise the Applicant's appointments of solicitors retrospectively with effect from 28 April 2021

The court has no power to retrospectively authorise the appointment of a solicitor

29 Mr Soo candidly submits that the use of the word "after" in s 144(1) of the IRDA, in the context of a liquidator being able to appoint a solicitor only after authorisation, suggests that any appointment before such authorisation must be invalid and cannot be ratified. However, Mr Soo then submits that a better interpretation would be that s 144(1) allows the court to retrospectively authorise past appointments by the liquidator. Indeed, he suggests that such an interpretation would make practical sense since an application may take some time to be granted. As such, a court should be willing to make a retrospective authorisation in most cases where the liquidator has acted promptly and within reasonable time in applying for authorisation. Accordingly, Mr Soo submits that I should authorise the Applicant's appointment of solicitors from Selvam LLC in respect of DB's application, since the Applicant applied for authorisation from the court shortly after having so appointed solicitors.

30 However, where the liquidator has not acted promptly and within reasonable time, Mr Soo submits that I should still authorise such appointment where it was objectively made in the company's interests and no objection from any interested party has been raised. Mr Soo makes these submissions in relation to the Applicant's failure to apply for authorisation promptly and within reasonable time in relation to his appointments of solicitors in April 2021 and to defend OS 430 shortly thereafter. He points out that it was objectively in the interest of the Company's creditors for the Company to defend OS 430 as its assets would be diminished had OS 430 not been successfully defended. Further, Mr Soo also submits that there has been no objection by any creditors

or persons claiming to be creditors to the Applicant's prayer for the authorisation of the appointment to take effect from 28 April 2021.

31 While I can understand the reasons behind Mr Soo's submissions, the difficulty I have with them is that they require a court to draw a distinction between when a liquidator has sought authorisation promptly and within reasonable time, and when he or she has not. This may be a matter of judgment, but it also introduces an unnecessary complication into what is clear legislative language in s 144(1) of the IRDA. Indeed, the use of the word "after" in s 144(1) makes it clear that a liquidator can only appoint a solicitor after authorisation by the court or the COI. There is no suggestion, explicit or otherwise, in the IRDA that a court can grant a retrospective authorisation despite such clear statutory language.

32 Although Mr Soo does not raise them, I also consider some further relevant authorities that may favour the position for which he argues. In *Re Moulin Global Eyecare Trading Ltd* [2019] 4 HKLRD 643, the liquidators applied for the court's retrospective sanction of the appointment of solicitors under ss 199(4)(a) and 200(3) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) (Hong Kong) ("the Ordinance") which provide as follows:

> **199. Powers of liquidator in winding up by court**
>
> …
>
> (4) A liquidator (other than the Official Receiver) may only exercise the power specified in item 8 of Part 3 of Schedule 25—
>
> > (a) with the sanction of the court or the committee of inspection; …
>
> …

> **200. Exercise and control of liquidator's powers**
>
> …
>
> (3) The liquidator may apply to the court in manner prescribed for directions in relation to any particular matter arising under the winding up.

33 The Hong Kong Court of First Instance observed that several decisions have taken the position that the court has power to grant retrospective sanction to a liquidator's appointment of solicitors to assist him in the performance of his duties (at [4]). In coming to this conclusion, the court cited cases such as *Re Curruthers Limited* (23 February 2005, Court of First Instance) (Hong Kong) at [11]; *Re Newsweb International Limited* (20 April 2007, Court of First Instance) (Hong Kong) ("*Re Newsweb*") at [24] and [29]; and *In re Associated Travel Leisure and Services Ltd (in liquidation)* [1978] 1 WLR 547 ("*Re Associated Travel Leisure*") at 549-550.

34 As for the source of the Hong Kong courts' power to grant retrospective sanction, the Hong Kong Court of First Instance in *Re Newsweb* explained that this was grounded in s 200(3) of the Ordinance and held that this section "permits the court to authorise whether prospectively or retrospectively a variety of payments…" (at [24]). The court in *Re Newsweb* also observed that the Hong Kong courts' reliance on s 200(3) of the Ordinance was in turn based on the English High Court decision of *Re Associated Travel Leisure*, in which Templeman J justified the court's power to grant retrospective sanction in relation to the appointment of a solicitor by reference to s 246(3) of the Companies Act 1948 (UK) (which is similar to s 200(3) of the Ordinance) and the inherent power of the court. Templeman J reasoned that the court had the power, pursuant to either s 246(3) of the Companies Act 1948 (UK) or the inherent power of the court, to direct the liquidator to make a variety of payments, which included the power to direct that remuneration be paid to a

liquidator (at 549H). Therefore, given that the liquidator had, by appointing solicitors, incurred a liability which was necessary, reasonable and which benefitted the creditors, Templeman J authorised and directed the liquidator to retain out of the assets of the company a sum as an indemnity against the claim of the solicitors (at 550A). The Hong Kong cases I have referred to above have (seemingly) construed this decision to mean that Templeman J gave "retrospective sanction" to the liquidator's exercise of its power under s 245(1) of the Companies Act 1948 (UK) to appoint a solicitor.

35 In my view, even if Mr Soo had raised these cases, it would not have persuaded me that I have the power to grant a retrospective authorisation. First, while s 145(3) of the IRDA is similar to s 200(3) of the Ordinance and s 246(3) of the Companies Act 1948 (UK), I do not think that a provision which gives the liquidator the right to apply for directions in relation to any particular matter arising under the winding up gives the court the power to grant a retrospective authorisation. Indeed, the application for directions is not quite the same as the grant of retrospective authorisation. Second, even if s 145(3) of the IRDA could be construed to give the court such a power, it must yield to clear statutory language that is even more forcefully expressed compared to the Ordinance or the Companies Act 1948 (UK). In this regard, I reiterate that s 144(1) of the IRDA uses the word "after" to strongly suggest that the liquidator is permitted to appoint a solicitor *after* he or she has obtained the authorisation by either the court or the COI. Third, I also think that a court's inherent power to grant a retrospective authorisation, even if such a power exists, must yield to clear statutory language that suggests otherwise.

36 Apart from the statutory provisions, I would also, with respect, question the authoritativeness of the foreign cases which alluded to a court's power to grant retrospective authorisation. In this regard, the Hong Kong cases have

seemingly based their conclusion that the Hong Kong courts can grant retrospective authorisation on Templeman J's views in *Re Associated Travel Leisure*. However, in my respectful opinion, Templeman J's views should *not* be taken to mean that the court has power to grant retrospective authorisation. In this regard, when Templeman J referred to "retrospective sanction" (at 550B), he did not mean that the court had the power to retrospectively sanction acts made in the exercise of the liquidator's powers as if sanction had been granted under s 245(1) of the Companies Act 1948 (UK) from the outset. Rather, as I explained earlier (see [34] above), the power that Templeman J exercised, under either s 246(3) of the Companies Act 1948 (UK) or the inherent power of the court, was one that empowered the court to direct that remuneration be paid to a liquidator. Given that Templeman J had allowed the expenditure of the liquidator to be paid out of the assets of the company in that case, his mention of "retrospective sanction" must be understood as merely reflecting the practical effect that his decision would have had by putting the liquidator in a position the liquidator would have been if prior authorisation had been obtained to appoint solicitors. Accurately understood, he did not purport to exercise any power under s 245(1) of the Companies Act 1948 (UK) to retrospectively sanction the liquidator's exercise of its powers. Therefore, I do not think that *Re Associated Travel Leisure* provides the legal reasoning in support of a power to grant retrospective authorisation for the purposes of s 144(1) of the IRDA.

37 Accordingly, I am of the view that the Applicant should have obtained authorisation from the court or the COI (which has not been appointed yet) before he appointed solicitors. For the purposes of s 144(1) of the IRDA, the Applicant's appointment of solicitors should therefore only be deemed to have been authorised from the date of the resulting order in the present application.

The effect of the failure to obtain authorisation

38 However, this does not mean that the Applicant's appointments of solicitors in April 2021, to defend OS 430, and to respond to OA 707, were invalid prior to the resulting order in the present application. In the Malaysian High Court case of *Kang Wah Construction Sdn Bhd v Chan Ai Min Property Sdn Bhd* [1999] 4 MLJ 262, Ian Chin J held that a liquidator could still appoint a solicitor without the authorisation of the court or the COI and the absence of such authority does not render the action incompetent nor deny the solicitor of standing. Rather, the absence of such authorisation only goes towards the question of whether the liquidator is entitled to costs out of the estate or that he should personally bear the costs. I respectfully agree and adopt this approach in the present application.

39 I also observe that decisions involving the exercise of the liquidator's powers in other contexts further support the proposition that the absence of court authorisation does not invalidate the exercise of such powers. In the English Court of Appeal decision of *Re The English and Scottish Marine Insurance Company (Limited)* (1870) 23 LT (NS) 685, it was argued that a compromise entered into by a liquidator was not binding because the consent of the court had not been obtained beforehand. James LJ held that the compromise was nevertheless binding. He reasoned that the court's sanction was for the protection of liquidators and the liquidators took the risk of making the agreement if they did not obtain the court's sanction (at 685). However, the lack of the court's sanction did not invalidate the compromise. This decision was followed in the English High Court decision of *Cyclemakers' Co-operative Supply Company v Sims* [1903] 1 KB 477, where a liquidator in a voluntary liquidation compromised a claim by the company. Subsequently, the company went into compulsory winding up and the official liquidator sought to repudiate

the compromise on the ground that it had not been authorised. Lord Alverstone CJ rejected this argument, and said (at 480–481):

> That case clearly shews that a compromise between a creditor of a company and its liquidator, which is otherwise binding on both, cannot be objected to by the creditor merely on the ground that the liquidator did not obtain the sanction of the Court to the compromise; and if the liquidator can say that the other party to such a compromise is bound by it, it follows the liquidator himself must also be bound.

40 Accordingly, in the present case, the Applicant had properly engaged the solicitors in his capacity as liquidator of the Company. Put another way, the Applicant did not lack capacity to do so simply because he had not sought prior authorisation from the court or a COI. These appointments had taken effect, albeit without the requisite authorisation, on the respective dates when the solicitors had been engaged.

41 The remaining question is whether the legal fees incurred before such authorisation was given should be paid out of the assets of the Company. In my view, while the Applicant should have sought authorisation prior to appointing solicitors, he had good reasons for not having done so for the purposes of this application.

42 First, in relation to his appointments of solicitors in April 2021 and for OS 430, I accept that the Applicant was waiting for KPMG's report before appointing a COI from which he could then have sought authorisation for those appointments. Also, I accept that there was some urgency in appointing solicitors to defend OS 430 in the interests of the Company. Second, in relation to the Applicant's appointment of solicitors for OA 707, I accept that the Applicant had to do so to respond to the application and that he had, promptly and within reasonable time, made an application to court for authorisation

thereafter. In sum, I am satisfied that the Applicant had acted in good faith in the discharge of his duties as liquidator of the Company, even though on hindsight he should have sought authorisation prior to making the various appointments. I therefore do not order that the Applicant bears the costs of the legal fees so incurred. Instead, the legal costs incurred in respect of the appointment of solicitors in the present application since April 2021 should be paid from the assets of the Company.

43 However, I should add that while I have not ordered the Applicant to bear the legal costs personally despite not having sought prior authorisation pursuant to s 144(1) of the IRDA, this should not be interpreted as condoning such conduct. As I have mentioned already, it is clear from the present legislative framework that the Applicant should have sought such authorisation before appointing solicitors. Any liquidator who chooses not to do so in the future would run a similar risk of having to incur the legal costs personally, unless there are, as in the present case, good reasons why this should not be ordered.

Conclusion

44 In conclusion, I authorise the Applicant to appoint solicitors from Selvam LLC to assist and advise him in his duties. This authorisation, however, takes effect only from the date of the resulting order from the present application. Despite this, I do not order the Applicant to bear the legal costs incurred in respect of the appointments concerned since April 2021. Instead, these legal costs should be paid from the assets of the Company.

45 I further order that the costs of the present application, fixed at $4,500 excluding disbursements, to be borne out of the assets of the Company.

46 Finally, I express my gratitude once again to Mr Soo for his comprehensive submissions.

Goh Yihan
Judicial Commissioner

Soo Ziyang Daniel and Cumara Kamalacumar (Selvam LLC) for the applicant;
Ammani Mathivan (Oon & Bazul LLP) for the third party (watching brief).