IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 28

Civil Appeal No 202 of 2020

Between

Hin Leong Trading (Pte) Ltd
(in liquidation)

… *Appellant*

And

Rajah & Tann Singapore LLP

… *Respondent*

In the matter of High Court Originating Summons No 704 of 2020
(Summons No 4318 of 2020)

In the matter of
Rajah & Tann Singapore LLP
acting for the Interim Judicial Managers of Hin Leong Trading (Pte) Ltd
and/or other relevant parties

Between

Hin Leong Trading (Pte) Ltd
(in liquidation)

… *Applicant*

And

Rajah & Tann Singapore LLP

… *Respondent*

Civil Appeal No 203 of 2020

Between

Ocean Tankers (Pte) Ltd
(under Interim Judicial
Management)

… *Appellant*

And

Rajah & Tann Singapore LLP

… *Respondent*

In the matter of High Court Originating Summons No 666 of 2020
(Summons No 4317 of 2020)

In the matter of
Rajah & Tann Singapore LLP
acting for the Interim Judicial Managers
of Ocean Tankers (Pte) Ltd
(under Interim Judicial Management)
and/or other relevant parties

Between

Ocean Tankers (Pte) Ltd
(under Interim Judicial
Management)

… *Applicant*

And

Rajah & Tann Singapore LLP

… *Respondent*

JUDGMENT

[Companies — Directors — Powers]
[Companies — Receiver and manager — Judicial management order]
[Civil Procedure — Pleadings — Striking out]

Hin Leong Trading (Pte) Ltd (in liquidation)
v
Rajah & Tann Singapore LLP and another appeal

[2022] SGCA 28

Court of Appeal — Civil Appeal Nos 202 and 203 of 2020
Sundaresh Menon CJ, Andrew Phang Boon Leong JCA, Judith Prakash JCA, Belinda Ang Saw Ean JAD and Chao Hick Tin SJ
23 November 2021

4 April 2022 Judgment reserved.

Judith Prakash JCA (delivering the judgment of the court):

Introduction

1 The directors of a company instruct a law firm to act on the company's behalf. Consequently, the law firm files an application for the company to be put under judicial management and for interim judicial managers to be appointed. The court then places the company under interim judicial management and appoints interim judicial managers. The interim judicial managers thereafter retain the legal services of the same law firm. The directors of the company object and cause an action to be commenced in the name of the company, seeking to injunct the law firm from acting for the interim judicial managers and the company. Do the directors have the legal standing to authorise such an action in the company's name? What is the legal effect of an order placing the company under interim judicial management? Do the directors

retain thereafter a common law power to commence such an action? These, in essence, are the legal issues that the present appeals raise for our determination.

2 We heard these appeals together with CA/CA 20/2021 and CA/CA 21/2021. Our decision on those two appeals may be found in *Lim Oon Kuin and others v Rajah & Tann Singapore LLP and another appeal* [2022] SGCA 29 (the "CA Joinder Judgment"). That judgment being released simultaneously with this, we adopt all terms of reference and abbreviations employed therein for this judgment as well.

3 The present appeals arise from the decision in *Ocean Tankers (Pte) Ltd (under judicial management) v Rajah & Tann Singapore LLP and another matter* [2021] SGHC 47 (the "Striking Out Judgment"). In the Striking Out Judgment, the High Court judge (the "Judge") allowed the applications by Rajah & Tann Singapore LLP ("R&T") for the Injunction Applications to be struck out, on the basis that Mr Lim Chee Meng ("Mr CM Lim") and Ms Lim Huey Ching ("Ms HC Lim") (together, "the Lims") did not have the requisite authority to cause Hin Leong Trading (Pte) Ltd ("HLT") and Ocean Tankers (Pte) Ltd ("OTPL") (collectively, "the Companies") to commence the actions as they had been divested of their managerial powers as directors of the Companies upon the appointment of the Interim Judicial Managers ("IJMs").

Background

4 As the factual background is set out in depth in the CA Joinder Judgment, we shall summarise only the facts salient to the present appeals.

5 On 27 April 2020, the Judge placed HLT under interim judicial management and appointed the IJMs over HLT. On 12 May 2020, the Judge

placed OTPL under interim judicial management and appointed the IJMs over OTPL. After their appointment, the IJMs of both the Companies retained the legal services of R&T.

6 At the material time, the Lims were directors of both the Companies. On 9 and 21 July 2020, the Lims caused the Injunction Applications to be commenced in the names of the Companies. The Injunction Applications were to (a) restrain R&T from advising and acting for the Companies in High Court Originating Summons No 452 of 2020 ("OS 452") and High Court Originating Summons No 417 of 2020 ("OS 417"), which were the pending applications for judicial management orders against the Companies; and to (b) restrain R&T from advising and acting for the IJMs of the Companies, as well as for the Companies' Judicial Managers ("JMs") should they be appointed subsequently. On 7 August 2020, the Judge granted OS 452 and OS 417. The Companies were placed under judicial management and their respective IJMs became their JMs. The JMs of the Companies continued to retain the services of R&T.

7 It bears pointing out that despite the appointment of the IJMs over the Companies, neither of the Lims had sought their approval in relation to the filing of the Injunction Applications, either before or after the filing of the applications. Likewise, neither of the Lims sought the consent of the JMs to proceed with the Injunction Applications following the court order placing the Companies under judicial management. Rather, the Lims purported to act *unilaterally on behalf of the Companies* in filing and proceeding with the Injunction Applications. The significance of this fact shall become apparent.

8 On 5 October 2020, R&T filed the Striking Out Applications seeking to strike out the Injunction Applications in their entirety. The Lims and their father,

Mr OK Lim, responded by commencing the Joinder Applications on 12 October 2020, seeking to join themselves as parties to the Injunction Applications in their personal capacities.

9 On 4 November 2020, the Judge heard the Applications. He dismissed the Joinder Applications but allowed the Striking Out Applications. In respect of the latter, he considered that neither Mr CM Lim nor Ms HC Lim possessed managerial powers *qua* directors to commence the Injunction Applications in the names of the Companies. They consequently had no standing and the Injunction Applications were taken out without due authority. In making this finding, the Judge rejected the Lims' argument that notwithstanding the Companies having been placed under interim judicial management, the Lims continued to possess residual powers of management as directors under common law that empowered them to commence the Injunction Applications in the Companies' names (see the Striking Out Judgment at [45]).

10 On 27 and 30 November 2020, the present appeals against the Judge's decision allowing the Striking Out Applications were filed on behalf of the Companies.

11 Subsequently, on 5 February 2021, the JMs of HLT filed an application for HLT to be wound up. On 8 March 2021, the Judge allowed the application and placed HLT in compulsory liquidation. The JMs were also appointed as HLT's liquidators. On 16 August 2021, OTPL was placed in compulsory liquidation, with its JMs being appointed as its liquidators. No appeal has been filed against either winding up order.

Issues in the present appeals

12 To determine whether the Judge erred in striking out the Injunction Applications on the basis of lack of authority, the legal issues that need to be determined as are follows:

(a) Does an interim judicial management order operate so as to divest the directors of a company of all their powers of management, including the power to commence an action in the company's name?

(b) Even if the answer to the above is in the affirmative, what is the scope of any power that the directors retain at common law?

Our decision

The law on striking out

13 R&T brought the Striking Out Applications under O 18 r 19(1)(*a*), (*b*) or (*d*), or alternatively, under O 92 r 4 of the Rules of Court (2014 Rev Ed) ("the Rules"), contending that the Injunction Applications should be struck out because:

(a) The Lims, as directors of the Companies, did not have the requisite standing, power or authority to cause the Companies to commence and proceed with the Injunction Applications; and

(b) the Injunction Applications disclosed no reasonable cause of action and/or were scandalous, frivolous or vexatious and/or were an abuse of the process of the court.

14 It is common ground that the Rules grant the court the power to strike out the whole or part of an originating summons. The threshold for striking out is a high one, to the extent that the claim must be "obviously unsustainable, the pleadings unarguably bad and it must be impossible, not just improbable, for the claim to succeed" (*Singapore Civil Procedure 2021* vol 1 (Cavinder Bull gen ed) (Sweet & Maxwell, 2021) ("*Singapore Civil Procedure*" at para 18/19/6). The principles relating to the specific grounds under O 18 r 19(1)(*a*), (*b*) and (*d*) are well-established:

(a) The ground under O 18 r 19(1)(*a*) of the Rules refers to a cause of action (or defence, as the case may be) with no chance of success, having regard only to the averments made in the pleadings (see *Singapore Civil Procedure* at para 18/19/10).

(b) The ground under O 18 r 19(1)(*b*) of the Rules captures cases that are obviously frivolous or vexatious or obviously unsustainable (*Singapore Civil Procedure* at para 18/19/12).

(c) The ground under O 18 r 19(1)(*d*) of the Rules refers to instances where the court's machinery is used improperly or not *bona fides* (*Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 at [22]).

There may be a significant degree of overlap between these grounds. They also largely mirror and share a consistent juridical basis with the court's inherent jurisdiction to strike out proceedings, as contained within O 92 r 4 of the Rules (*Chee Siok Chin and others v Minister for Home Affairs and another* [2006] 1 SLR(R) 582 at [29] and [35]).

15 In this vein, it is clear that striking out is warranted when there is an absence of legal standing owing to a lack of authority because such proceedings ought not, and indeed could not validly, have been brought at all (see *United Investment and Finance Ltd v Tee Chin Yong and others* [1965-1967] SLR(R) 349 at [51]–[58]). Hence, the sole point of contention is simply whether the Lims were legally entitled to commence the Injunction Applications in the Companies' names. In turn, the enquiry as to whether they had authority to commence the Injunction Applications entails ascertaining the exact *scope* of a director's powers, residual or otherwise, upon the appointment of insolvency officeholders, such as provisional liquidators, interim judicial managers, liquidators, and judicial managers.

The effect of an interim judicial management order

16 We begin with a few observations regarding the general powers of directors. It is important in this context to bear in mind the essential features of a corporation. First, there is the separation of *legal personality* between the corporate body and its shareholders. This means that each company is a separate legal entity, as are its shareholders; correspondingly, the acts of the former will not be imported to the latter, as a general rule. Second, and more important for our purposes, is the separation between *ownership and management*. This is because the shareholders (and owners) of the company can but need not necessarily be involved in the management of the company. This – the day-to-day management of the company – is ordinarily the responsibility of the board. Section 157A of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") provides that the "business of a company shall be managed by, or under the direction or supervision of, the directors" and to this end, directors may exercise all the powers of a company except any power that the Act or the company's

constitution requires the company to exercise in general meeting. It is these very powers conferred on directors that form the nub of the present appeals.

17 We move on to the treatment of a director's powers by the judicial management regime. The judicial management scheme was conceived in the wake of the 1987 Pan-Electric crisis, in which Pan Electric Industries Limited, a publicly listed company, collapsed owing to mismanagement by its directors. The inauguration of the judicial management scheme was heralded as a "major innovation in the general structure of the insolvency procedure and will provide an interregnum during which the affairs of the company can be sorted out … [and] provides an opportunity for the company and its creditors to reach some sort of compromise or accommodation" (see *Singapore Parliamentary Debates: Official Report* (5 May 1986), vol 48 at cols 55–56). In order to allow companies in financial distress to obtain the breathing space needed to work out a rescue, arrangement or controlled asset realisation, it was considered necessary to, among other things, divest the errant directors of their powers of management and transfer the same to an independent management acting as officers of the court (see *Law and Practice of Corporate Insolvency* (Andrew Chan Chee Yin gen ed) (LexisNexis, 2014) at pp 136–137). This is important in understanding the limited scope of powers which directors retain upon the making of a judicial management order.

The statutory provisions

18 Pending the making of an order for judicial management, the court has the power to appoint interim judicial managers over the company. The reason for such power is easily understood. Judicial managers may only be appointed by a court order made after a hearing, which is to take place not less than seven clear days after the notice of the filing of the application is published. This

means that there is an interim period during which the company is in management limbo. As has been pointed out, in an application for interim relief in the context of judicial management, the *raison d'être* is the "protection of the assets and business of a company" such that the "court's determination of whether or not an order for [interim judicial management] should be ordered will depend at least in part on the nature and imminence of the risks facing the company's business and assets" (*Re KS Energy Ltd and another matter* [2020] 5 SLR 1435 at [16]). For example, in *Re a Company (No 00175 of 1987)* [1987] 3 BCC 124, Vinelott J observed, in relation to the making of an interim order for administration (on which the judicial management regime was based), an order for interim relief would be appropriate where there is a *prima facie* case for the making of an order for administration and where the assets or businesses of the company are in jeopardy (at 128):

> … I can see no reason why, *if satisfied that the assets or business of a company are in jeopardy, and that there exists a prima facie case for the making of an administration order, the court should not abridge the time for service of the petition*, and if at the hearing a person with power to appoint a receiver seeks further time in which to consider whether to exercise that power, should not adjourn the hearing and *appoint the proposed administrator or some other suitable person to take control of the property of the company and manage its affairs pending the hearing.* Such an appointment would be analogous to the appointment of a receiver of a disputed property which is in jeopardy. If the court cannot make such an order the court might be placed in an unenviable position in a case where an adjournment for a period sufficient to enable the person with power to appoint a receiver to make up his mind whether to make the appointment, *might result in the destruction of a company although the survival of the company was the purpose for which the administration order was sought.* …
>
> [emphasis added]

19 Such power is provided for under s 227B(10)(*b*) of the Act, which was repealed and re-enacted as s 92 of the Insolvency, Restructuring and Dissolution

Act 2018 (Act 40 of 2018) ("IRDA") with effect from 30 July 2020. The provision reads as follows:

> **Power of Court to make a judicial management order and appoint a judicial manager**
>
> …
>
> (10) Nothing in this section shall preclude a Court –
>
> …
>
> (*b*) from appointing, after the making of an application for a judicial management order and on the application of the person applying for the judicial management order, *an interim judicial manager,* pending the making of a judicial management order, and such interim judicial manager may, if the Court sees fit, be the person nominated in the application for a judicial management order. *The interim judicial manager so appointed may exercise such functions, powers and duties as the Court may specify in the order.*
>
> [emphasis added]

Due regard must thus be had to the court orders appointing the IJMs over the Companies ("the IJM Orders") in order to determine the scope of the IJMs' powers (and as a corollary, any power that the directors may continue to have). We note here that the position in respect of the appointment of interim judicial managers over a company is the same under s 92 of the IRDA. Specifically, ss 92(1) and 92(4) expressly provide that the court "may, on the application of the person applying for the judicial management order, the company or any creditor of the company, appoint an interim judicial manager to act as such pending the making of a judicial management order" and that the interim judicial manager "so appointed may exercise such functions, powers and duties as the Court may specify in the order".

20 In this regard, the IJM Orders for the Companies were phrased in similar terms, and stated as follows:

> It is ordered that:
>
> …
>
> 2. The affairs, business and property of the Company [*ie*, HLT/OTPL] be managed by the Interim Judicial Managers during the period in which the Order for the appointment of the Interim Judicial Managers is in force;
>
> 3. *The Interim Judicial Managers be empowered and authorised to exercise all powers and entitlements of a judicial manager and all powers and entitlements of directors of the Company conferred by the Companies Act (Cap. 50) (the "Act") and/or by the memorandum and articles of association of the Company, or by any other applicable law in force*, but nothing in this Order shall require the Interim Judicial Managers to call any meetings of the Company;
>
> …
>
> [emphasis added]

The IJMs of the Companies were therefore granted the general powers and entitlements of a judicial manager under the Act. We accordingly turn to that.

21 Section 227G(2) of the Act is clear: for the duration of a judicial management order, "*all* powers conferred and duties imposed on the directors by this Act or by the constitution of the company shall be *exercised and performed by the judicial manager and not by the directors*" [emphasis added]. This is a significant point, and one that is consistent with the rationale of the judicial management regime, as we highlighted above. This point is in stark contrast to "debtor-in-possession" proceedings, such as the scheme of arrangement regime, which will ordinarily allow the management of the insolvent company to remain in control of the company's assets and business until a plan or reorganisation has been approved by the court (see *Re Pacific*

Andes Resources Development Ltd and other matters [2018] 5 SLR 125 ("*Pacific Andes*") at [24] and [61] and *Re IM Skaugen SE and other matters* [2019] 3 SLR 979 at [38] and [91]). As the learned authors of *Walter Woon on Company Law* (Tan Cheng Han SC gen ed) (Sweet & Maxwell, Revised 3rd Ed, 2009) ("*Walter Woon on Company Law*") put it at para 16.42:

> Upon the making of a judicial management order, the board of directors becomes *functus officio*. All their functions, powers and duties are transferred to the judicial manager, except that he does not have to call meetings. Nowhere is it suggested that the directors actually vacate office and indeed it is not necessary for them to do so. *However their power to manage the company is at an end until the judicial management order is discharged and it is difficult to see what residual powers are reserved for them given the expansive formulation in s 227G(2).*
> …
>
> [emphasis added]

22 What then are the powers conferred by the Act on judicial managers? The relevant provisions are ss 227G(3) and 227G(4) of the Act:

> **General powers and duties of judicial manager**
>
> …
>
> (3) The judicial manager of a company —
>
> (*a*) shall do all such things as may be necessary for the management of the affairs, business and property of the company; and
>
> (b) shall do all such other things as the Court may by order sanction.
>
> (4) Without prejudice to the generality of subsection 3(*a*), the powers conferred by that subsection shall include the powers specified in the Eleventh Schedule.

23 In addition, the relevant portions of the Eleventh Schedule of the Act read:

ELEVENTH SCHEDULE

POWERS OF JUDICIAL MANAGER

The judicial manager may exercise *all or any of the following powers*:

…

(*e*) *power to bring or defend any action or other legal proceedings in the name and on behalf of the company*;

….

(*i*) power to do all acts and to execute in the name and on behalf of the company any deed, receipt or other document;

…

(*u*) power to make or defend an application for the winding up of a company.

[emphasis added]

24 Accordingly, having regard to the terms of the IJM Orders, the IJMs possessed the power, *exclusively*, to bring or defend any action or other legal proceedings in the name and on behalf of the Companies. The effect of s 227G(2) read with the Eleventh Schedule of the Act, is that pursuant to the IJM Orders, the directors of the Companies were effectively divested of their management and control of the Companies. These powers instead lay with the IJMs, such powers being exercisable at their sole discretion. This position remained after the Companies were placed under judicial management, as the judicial management orders were worded almost identically to the IJM Orders:

It is ordered that:

1. The Applicant, [*ie,* OTPL/HLT], is placed under judicial management to achieve one or more of the following purposes stated in Section 227B of the Companies Act (Cap. 50) (the "Act"):-

(1) the survival of the Company, or the whole or part of its undertaking, as a going concern; …

…

> 3. The affairs, business and property of the Company [*ie*, OTPL/HLT] shall be managed by the Judicial Managers during the period in which the Order for judicial management is in force;
>
> 4. The *Judicial Managers are empowered and authorised to exercise all powers and entitlements of a judicial manager and all powers and entitlements of directors of the Company conferred by the Act* and/or by the memorandum and articles of association of the Company, or by any other applicable law in force;
>
> …
>
> [emphasis added]

25 Thus, as the Judge held, the contention by the Lims that they had power as directors of the Companies to commence and maintain the Injunction Applications, notwithstanding the lack of any sanction by the IJMs or the JMs, is simply a "non-starter as long as the companies were under judicial management" (Striking Out Judgment at [29]). We respectfully agree with the Judge.

26 For completeness, we observe that the position is similar in the context of an order placing a company in liquidation and the consequent appointment of liquidators, as *Walter Woon on Company Law* elaborates at para 17.122:

> On the appointment of a liquidator in a voluntary winding up (whether members' or creditors'), *the powers of the directors cease except so far as is allowed by the liquidator* or by the members (or the committee of inspection or the creditors, in the case of a creditors' voluntary winding up) with the consent of the liquidator. Although there is no express provision in the Act, powers of the directors cease when the court orders the winding up of the company [citing the Supreme Court of New South Wales (Equity Division) decision of *Re Country Traders Distributors Ltd* [1974] 2 NSWLR 135 at 138]. The court may,

> however, appoint the directors as special managers to assist the liquidator.
>
> [emphasis added]

That the appointment of a provisional liquidator or a liquidator renders the directors *functus officio* is a well-established principle of law (*Petroships Investment Pte Ltd v Wealthplus Pte Ltd and others and another matter* [2016] 2 SLR 1022 at [65]). Further, as the authors of Tan Lay Hong, *The Annotated Singapore Companies Act* (Sweet & Maxwell, 2017) point out at para 227B.09, an "analogy can be drawn from the appointment of a provisional liquidator pending [a] final winding up order" to the making of an interim judicial management order. We agree with this observation. That the directors lose their power to manage the company is also clearly the position in England (see *Ayerst (Inspector of Taxes) v C. & K. (Constructions) Ltd* [1976] AC 167 at 177).

27 For all intents and purposes, the appointment of judicial managers over a company effectively entails a usurpation, substitution and supplantation of the powers ordinarily vested in the board of directors. This is why neither the judicial management regime nor the liquidation regime under the Act bears the hallmarks of debtor-in-possession proceedings. So that puts paid to any argument that the IJM Orders did not operate to divest the Lims of their powers as directors.

The residual powers of directors at common law

28 The above notwithstanding, the Lims claim that their conduct in procuring the commencement of the Injunction Applications was unimpeachable, due to residual powers that continued to be vested in them as directors of the Companies.

29 While the Lims say that there are no local cases that expressly deal with the scope of the residual powers of a director of a company that is placed under judicial management or is wound up, this is somewhat of an overstatement. The High Court in *Pacific Andes* did in fact consider the proposition of law that "the appointment of a provisional liquidator effectively displaces management save for some residuary responsibilities" as a well-established one (at [74], citing *Re Union Accident Insurance Co Ltd* [1972] 1 WLR 640 ("*Re Union*") and *Walter Woon on Company Law* at para 17.98). The relevant extract from *Walter Woon on Company Law* states that:

> … The provisional liquidator may exercise all the powers of a liquidator, subject, however, to such limitations and restrictions as may be set in the order appointing him. Upon the appointment of a provisional liquidator, the powers of the directors to act as such are determined, although they retain residual powers to oppose the winding-up application when it comes for hearing [citing *Re Union Accident Insurance Co Ltd* [1972] 1 WLR 640, *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1991] 3 MLJ 325 and *Taman Sungai Dua Development Sdn Bhd v Goh Boon Kim* [1997] 2 MLJ 526]. …

Thus, there is at the very least, *some* authority pointing to towards such residual powers existing under Singapore law. In any event, we proceed to examine the authorities, in order to understand the contours of such residual powers.

The position in England

30 In support of their argument, the Lims cite the following English cases: (a) *Re Union*; (b) *Shanks v Central Regional Council* [1987] SLT 410 ("*Shanks*"); and (c) *In re Lehman Bros Europe Ltd (in administration) (No 9) and another* [2018] Bus LR 439 ("*Lehman Brothers*"). We consider them in turn.

(1) *Re Union*

31 The decision in *Re Union* is significant because this appears to be the basis of the concept of a director's residuary powers. In *Re Union*, the directors of the company instructed the solicitors to file an application to discharge the provisional liquidator of the company. Plowman J, sitting in the English High Court, dismissed the application, considering that the appointment had been properly made. He then proceeded to consider the issue of costs, and specifically, whether costs ought to be ordered against the directors' solicitors personally for bringing the application. This necessitated consideration of whether the directors did in fact have powers to procure the filing of the application on behalf of the company. He answered this in the affirmative and held that costs ought not to be ordered against the directors' solicitors personally.

32 According to Plowman J, such powers were residual powers: powers which the directors retained even upon the appointment of the provisional liquidator. He explained as follows (at 642):

> … *It is of course well settled that on a winding up the board of directors of a company becomes functus officio and its powers are assumed by the liquidator* … No doubt that is so, but it is common ground that notwithstanding the appointment of the provisional liquidator, *the board* has some residuary powers, for example it can unquestionably instruct solicitors and counsel to oppose the current petition and, if a winding-up order is made, to appeal against that order.
>
> The issue is to the extent of those residuary powers, and in particular whether they extend to the launching of the present motion. I think that it may sometimes be helpful to test the matter by considering the other side of the coin, namely to *inquire whether the power which the board is said to have lost is one which can be said to have been assumed by the liquidator.* If the answer is that it cannot, that may be a good reason for saying that the board still retains it. Clearly, for example, as I have already indicated, *the power to instruct solicitors and*

> *counsel on the hearing of the winding-up petition is not a power which anyone could suggest has passed to the provisional liquidator and therefore the board retains it.*
>
> If that is true in regard to the petition itself, it is, in my judgment, equally true of interlocutory proceedings which are such that it would not be appropriate for the provisional liquidator to give instructions on behalf of the company. …
>
> [emphasis added]

33 At least two key propositions of law may be distilled from the above passage.

34 The first concerns the effect of a liquidator's appointment on a director's powers. Subsequent cases have taken *Re Union* to stand for the "well settled" principle that the appointment of an official liquidator by the court has the effect of rendering the board of directors *functus officio*, with the latter's powers to be assumed by the liquidator (see *Re Swedex Windows & Doors Ltd (in liquidation) and another* [2010] IEHC 237 at [21]; *Andronics Communications Ltd v AIB Group (UK) t/a First Trust Bank* [2020] NIQB 64 ("*Andronics*") at [9]). In the decision of the Northern Ireland High Court in *Andronics*, Horner J observed that "[t]his makes good sense" as the liquidator's task of realising the assets of the company for the benefits of the creditors and shareholders would be "made impossible if directors of the company were able of their own initiative to launch legal proceedings on behalf of a company which was being wound up" (at [9]). He held that a former director who had purported to act on behalf of the company, including by applying to set aside a cause of action which had been disclaimed by the liquidator, was not legally entitled to do so. This is uncontroversial, and *Lightman & Moss on the Law of Administrators and Receivers of Companies* (Sweet & Maxwell, 6th Ed, 2017) ("*Lightman and Moss*") observes that it has been accepted at least since *Re Oriental Inland Steam Co Ex p Scinde Railway Co* (1874) 9 Ch App 557 that a winding up order

has the effect of bringing directors' powers to an end (at para 2-063, footnote 199).

35 The second concerns the scope of residual powers that directors of a company in liquidation may continue to possess. *Re Union* has been accepted for its holding that despite the appointment of a liquidator or provisional liquidator (as the case may be), the company's board retains a residual power to instruct solicitors and counsel to oppose the winding-up petition, as well as to appeal against any such order. *Re Union* was also applied in *Stephen, Petitioner* [2012] BCC 537, in the context of administration, to permit the board of directors to challenge "the appointment of a provisional liquidator, receiver or administrator as the case may be" (at [5]). Likewise, it was applied in *Closegate Hotel Development (Durham) Ltd and another v Mclean and others* [2014] Bus LR 405 ("*Closegate*"), which was a decision of the English High Court that concerned an application by the companies' directors to declare as invalid the appointment of administrators over two companies by a creditor bank. Citing *Re Union*, Snowden QC observed that there is "long-standing authority to the effect that even after the appointment of a provisional liquidators [*sic*], the board of directors of a company retains a residuary power to instruct lawyers to challenge the appointment of the provisional liquidator, to oppose the petition and, if a winding up order is made, to appeal against the making of that order" (at [7]). In this respect, the statement of a director's residual powers in *Re Union* has found approval in other common law jurisdictions, including Australia (see the Supreme Court of Victoria decision in *Brinds Ltd and others v Offshore Oil NL and others (No 2)* [1985] 10 ACLR 242) as well as South Africa (see *O'Connell Manthe & Partners v Vryheid Minerale (Edms) Bpk* 1979 (1) SA 553 (T)).

36 Various academic commentaries have described the holding in *Re Union* in these terms as well. For example, in his treatise *The Law of Insolvency* (Sweet & Maxwell, 5th Ed, 2017) at para 22-102, Prof Ian F Fletcher describes *Re Union* as standing for the proposition that "[t]he directors retain the residual power to instruct solicitors and to appeal against the order and also to act in interlocutory proceedings, including a motion to discharge the provisional liquidator". In *Lightman & Moss,* the learned authors cite *Re Union* as authority for the proposition that "the directors retain the power to instruct solicitors and counsel in the name of the company to appeal against the order" (at para 2-063, footnote 200).

37 This too, is the position in Singapore. We recently held in *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd (formerly known as Tong Teik Pte Ltd)* [2021] 2 SLR 478 ("*Sun Electric*"), that a company has a right to appeal against an order for winding up, and the company's directors have the right to control the conduct of the appeal as a necessary corollary of the fact that its directors have control of the defence to the winding-up application at first instance. As we observed, "[i]t would be illogical to entrust the conduct of the appeal to the liquidator because the very object of the appeal is to revoke the winding-up order and discharge the liquidator, causing the liquidator to lose his position and remuneration if the appeal succeeds" (at [37] and [43]).

(2) Shanks

38 In *Shanks*, the Outer House of the Scottish Court of Session observed that while the directors of a company under receivership could not interfere with the proper discharge of the receiver's function in gathering the assets of the company, "[i]t is not inconceivable that a legitimate conflict of interests could arise making it appropriate or even necessary for the company through its directors to

institute proceedings even although [*sic*] the company was subject to receivership" (at 413I *per* Lord Weir).

39 The Judge deemed the reliance on *Shanks* to be misplaced, namely, because *Shanks* was "decided in a different context", having been decided in a receivership context that "differed in material respects from the judicial management regime under the [Act]" (Striking Out Judgment at [42]). On appeal, the Lims submit that the Judge erred in distinguishing *Shanks*, and in particular, raise the following points:

(a) that the Judge erroneously considered that *Shanks* was decided on the basis of Scottish statutory provisions that do not provide that a director's powers to cause a company to bring proceedings upon the appointment of a receiver cease, unlike s 227G(2) of the Act, which clearly provides for the powers of the directors to be vested in the judicial managers to the exclusion of the directors;

(b) the legislative scheme in Singapore concerning liquidation does not expressly provide for the cessation of a director's powers to cause a company to bring proceedings upon the appointment of a liquidator; and

(c) the court's observations in *Shanks* concerning the possibility of a conflict of interest, which made it appropriate or necessary for the directors to institute proceedings, were of general application.

40 In our view, these are captious objections without merit. Instead, we respectfully agree with the Judge's analysis. In *Shanks*, Lord Weir observed that the "[Companies (Floating Charges and Receivers) (Scotland) Act 1972 (c 67) (UK)] does not provide that the powers of a company to raise proceedings cease

upon the appointment of a receiver" (at 413I). This was *clearly* material to his decision as to whether the directors of a company could commence proceedings in a receivership context. Indeed, Lord Weir applied the decision in *Newhart Developments Ltd v Co-operative Commercial Bank Ltd* [1978] QB 814, which establishes the principle that a provision in a debenture empowering the receiver to bring an action in the name of the company did not divest the company's directors of that power.

41 In contrast, s 227G(2) of the Act expressly provides for the powers of the directors to be vested in the judicial managers exclusively. Further, it is well-established that the appointment of a provisional liquidator or liquidator renders the directors *functus officio*. *Shanks*, having been decided in a receivership context, in which directors are not *functus officio*, thus simply does not assist, nor can any principle used there be appropriately extrapolated to the present context of judicial management (or liquidation for that matter).

(3) *Lehman Brothers*

42 In *Lehman Brothers*, the English High Court considered the application of the UK Insolvency Act 1986 (the "UKIA"). The case concerned a situation where a company in administration had a substantial surplus after paying all debts proved in the administration. The administrators wished to distribute the surplus to the sole member of the company. The UKIA, however, did not provide a mechanism for this to take place. The administrators thus sought to appoint a director of the company to effect the distribution pursuant to "management powers" to be sanctioned by the administrators pursuant to paragraph 64 of Schedule B1, which specifically provided that the administrators could consent to a company's "management powers" being exercised by the directors. The issue was whether the court ought to approve the

distribution. Hildyard J held at [45] that:

> … It is clear from paragraph 64 of Schedule B1 [of the UK Insolvency Act 1986] that directors and shareholders can do things which are not inconsistent with the administration, and may exercise "management powers" (defined by paragraph 64(2)(a) as "a power which could be exercised so as to interfere with the exercise of the administrator's powers"), though only with the administrators' consent, and any residual powers which are not "management powers". …

The Lims contend that the above extract means directors and shareholders can do things which are not inconsistent with the administration of the company and may exercise any residual powers which are not management powers. In our judgment, their reliance on *Lehman Brothers* is misplaced. We say so for three reasons.

43 First, and as the Judge observed (Striking Out Judgment at [44]), the powers of the directors and shareholders to do things which were not inconsistent with the administration arose from para 64 of Schedule B1 of the UKIA, which reads as follows:

> 64 (1) A company in administration or an officer of a company in administration may not exercise a management power without the consent of the administrator.
>
> (2) For the purpose of sub-paragraph (1)—
>
> (a) "management power" means a power which could be exercised so as to interfere with the exercise of the administrator's powers,
>
> (b) it is immaterial whether the power is conferred by an enactment or an instrument, and
>
> (c) consent may be general or specific.

It is undisputed that there is no equivalent provision in the Act. Thus, the observations of Hildyard J, made in the context of the UKIA, are not relevant to us.

44 Secondly, even assuming that the English statutory scheme is analogous to ours, the residual powers for which the Lims contend are fairly wide. They encompass the ability to "restrain the company's solicitors from acting in circumstances where there would be a breach of confidentiality" and where "it would be just for the Court to exercise its supervisory jurisdiction". Such an ability would interfere with the exercise of the powers of the judicial managers (to appoint a solicitor and bring/defend any action). It would therefore amount to a "management power" for the purposes of para 64 of Schedule B1 of the UKIA. Indeed, the power to commence and defend proceedings in the name and on behalf of the company is a power that is expressly vested in the IJMs and JMs, as s 227G(2) of the Act (read with the Eleventh Schedule) makes abundantly clear. Such a power, it would stand to reason – even under the English statutory scheme – is not one exercisable by directors or shareholders of the company.

45 Thirdly, Hildyard J expressed the view that whilst a company is in administration, any exercise by the company or its directors of "management powers" would have to be consistent with the purposes of the administration (*Lehman Brothers* at [66]). This view was approved by the learned authors of *Goode on Principles of Corporate Insolvency Law* (Kristin van Zwieten ed) (Sweet & Maxwell, 5th Ed, 2018) at para 11-94, footnote 470. It is difficult to see how the purported residual power sought to be exercised by the directors in commencing the Injunction Applications would be consistent with the purposes of the judicial management, *ie*, to achieve the survival of the Companies (or the

whole or part of its undertaking) as a going concern or a scheme of arrangement, as provided for in the judicial management orders for both the Companies (see [24] above). As clarified by Snowden QC in *Closegate*, the concept of a "management power" as defined in paragraph 64 of Schedule B1 of the UKIA is "primarily intended to catch powers which, if exercised by the directors, could impede the exercise of similar powers by the administrators", but is not intended to catch a power exercisable by the directors to cause the company to challenge the "logically prior question of whether the administrators have any powers to exercise at all" (at [6]). The latter, it appears, is where the concept of residual powers becomes relevant, and also why such residual powers have been so narrowly construed by the courts.

46 As R&T rightly points out, *Lehman Brothers* involved quite a different factual context from the one here. The issue there was not whether certain powers sought to be exercised by directors without the consent of the administrators were "management powers", but rather whether directors could exercise powers which clearly were "management powers" *with the consent of the administrators*. No such issue arises in the present case. It is not disputed that no such consent was obtained by the Lims from the IJMs, the JMs, or the liquidators in commencing or pursuing the Injunction Applications. Their decision to act unilaterally is sufficient to distinguish *Lehman Brothers*.

The position in Malaysia

47 We also to consider the position in Malaysia which, for the reasons that follow, tracks closely the English position and bolsters support for a narrowly circumscribed scope of residual powers.

(1) *Sri Hartamas*

48 We begin with the Malaysian Supreme Court decision of *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1991] 3 MLJ 325 ("*Sri Hartamas*"). There, a winding-up order had been made against the appellant company. An application was made by motion for an order of stay of the winding-up order pending disposal of the appeal, such motion being supported by an affidavit filed by the solicitors of the company. The court cited *Re Union* with approval, stating that "notwithstanding the appointment of the provisional liquidator and the general assumption by him of the company's powers, the board still retained certain residuary powers which included authority to instruct solicitors and counsel to oppose the petition and, if a winding-up order is made, to appeal against the order".

49 Hashim Yeop A Sani CJ thus concluded that after a winding-up order is made, "generally speaking no one but the liquidator can act on behalf of the company. But it is quite clear that the company has a right to be heard to say that the winding-up order is wrong and to appeal against the order". The only question was who ought to move the appeal on behalf of the company. This should have been the directors, acting on behalf of the juridical corporate body, but since the motion was supported only by an affidavit filed by the solicitors, the motion was not properly before the court and was, accordingly, dismissed.

(2) *Taman Sungai*

50 The Malaysian Court of Appeal decision of *Taman Sungai Dua Development Sdn Bhd (previously known as Supershine (M) Sdn Bhd) v Goh Boon Kim* [1997] 2 MLJ 526 ("*Taman Sungai*") is to similar effect. There, provisional liquidators had been appointed over a company by an order of court.

The order was appealed against. The directors of the company filed a petition, seeking that the powers and duties of the provisional liquidator be stayed until determination of the appeal. This petition was opposed by the provisional liquidators on the basis that the directors ceased to have any capacity to instruct solicitors to make the application once the provisional liquidators had been appointed.

51 Mahadev Shankar JCA, delivering the judgment of the court, cited with approval the decisions in *Sri Hartamas* and *Re Union*, as well as a passage from *Australian Company Law* (W.E. Paterson and H.H Ednie ed) (Butterworths, 2nd Ed, 1971) at para 372/11:

> All the powers of the directors shall cease
>
> A reference to the powers of directors was made in *Re Standhill Consolidated Ltd* [1967] VR 749 at pp 753–754. An issue as to the extent of any residuary powers in directors after the appointment of a liquidator arose in *Re Union Accident Insurance Co Ltd* [1972] 1 All ER 1105; [1972] 1 WLR 640 where at pp 1113 and 642 respectively, Plowman J said: 'It is of course well-settled that on a winding up, the board of directors of a company becomes functus officio and its powers are assumed by the liquidator, and my attention was drawn to *Re Mawcon Ltd* [1969] 1 All ER 188 at p 192; [1969] 1 WLR 78 at p 82, where Pennycuick J stated in effect that the appointment of a provisional liquidator had the same result. No doubt that is so, but it is common ground that notwithstanding the appointment of a provisional liquidator, the board has some residuary powers, for example, *it can unquestionably instruct solicitors and counsel to oppose the current petition and, if a winding-up order is made, to appeal against that order.*
>
> Notwithstanding appointment of a provisional liquidator, the directors retained power to have the company represented in the winding-up proceedings: *Re Laverton Nickel NL* (1979) 3 ACLR 945.
>
> [emphasis added]

52 The court considered it pivotal that the case before it was one in which "the company itself is appealing against the order appointing the provisional liquidators" and where the "winding-up order had not yet been made". In the face of such authorities, Shankar JCA "considered the preliminary objection devoid of merit" and allowed the application for a stay.

(3) *Bursa Malaysia Securities*

53 In *Tan Sri Dato' Hj Lamin bin Hj Mohd Yunus v Bursa Malaysia Securities Bhd* [2012] 7 MLJ 85 ("*Bursa Malaysia Securities*"), concerning an application for judicial review in respect of the decision of the respondent's appeals committee, the Kuala Lumpur High Court noted that *Re Union* had been correctly applied in order to find that the appointment of a provisional liquidator over the company did not absolve the company's directors of their statutory duties in relation to its listing requirements (there, to submit certain financial statements within a specified time). Based on the test in *Re Union* – that the extent of residuary powers may be determined by looking at the other side of the coin, "namely to enquire whether the power which the board is said to have lost is one which can be said to have been assumed by the liquidator" – and following previous representations by the directors and the provisional liquidator that the directors would continue to comply with their obligations under the listing rules, the appeals committee had held that the directors were responsible (at [27]). Aziah Ali J held there was no basis for quashing the decision of the appeals committee in light of evidence showing that the directors' undertaking to ensure compliance remained intact notwithstanding the appointment of the provisional liquidator, and such an undertaking could not be assigned to the latter (at [34]–[35]).

54 In our view, *Bursa Malaysia Securities* does not present any basis on which the scope of the principle in *Re Union* can be widened. Simply, the case was decided in the specific context of undertakings that were given by the directors of the company to comply with listing obligations and may thus be confined to its particular set of facts.

Our views

55 According to the Judge, the *Re Union* line of cases merely stands for the proposition that following the making of an order appointing an interim judicial manager, judicial manager, provisional liquidator or liquidator, the directors only retain such "residuary powers" which the insolvency office-bearer did not or could not assume under the applicable legislation or order of court (Striking Out Judgment at [31]). The Malaysian decisions in *Sri Hartamas* and *Taman Sungai* stand for the same principle (Striking Out Judgment at [40]). We agree.

56 In substance, an application challenging the making of a judicial management order would challenge the *very juridical basis* on which such management powers of the directors have been removed*, ie,* upon the appointment of an interim judicial manager, judicial manager, provisional liquidator and/or liquidator. As such, it would appear attractive to hold that it would remain open for directors to challenge the very basis upon which their powers have been divested and that accordingly, it would "not be correct to say that such a power is vested in these insolvency officeholders" in the very first place (Striking Out Judgment at [36]). However, it seems to us, that bearing in mind that a judicial management order can only be made at the instance of the company itself acting in accordance with the resolutions of the board or the shareholders or upon the application of a creditor, it would be incongruous to allow the directors power to challenge their own actions or those of the

shareholders. Accordingly, whatever the theoretical attraction of such a holding may be, such residual powers as the directors may have to challenge a judicial management order should, in our view, only be available when the original application had been made by a creditor.

57 The view expressed above is consistent with the statutory prescription as to which parties are empowered to *veto* or *challenge* a judicial management application: (a) first, pursuant to s 227B(5)(*b*) of the Act, the court must dismiss an application for a judicial management order if the making of the order is opposed by a person who has appointed, will appoint or is entitled to appoint a receiver and manager of the whole or substantially the whole of a company's property; and (b) second, pursuant to s 227B(3)(*c*), where a nomination of a judicial manager is made by the company, a majority in number and value of creditors may be heard in opposition to the nomination (see *Re Genesis Technologies International (S) Pte Ltd* [1994] 2 SLR(R) 298 at [8]).

58 The Lims argue that *Re Union* does not limit the residual powers merely to actions challenging the validity of the appointment of an insolvency officer holder such as a judicial manager or liquidator. Rather, they submit that *Re Union* applies to "*all* proceedings which are such that it would not be appropriate for the liquidator to give instructions on behalf of the company". Obviously, they say, it would not be appropriate for the IJMs or the JMs, or indeed the liquidators of the Companies, to commence proceedings in their names to restrain R&T from acting.

59 We are not persuaded by this argument and reject it. The Lims' interpretation of *Re Union* as standing for such a broad proposition of law is untethered to authority; it is nothing more than a thinly veiled assertion that

directors possess residual powers to *effectively* second-guess the decisions of judicial managers in the management of the company. This appears to be an argument from necessity: in that if directors do not have that power, no one can make a different decision and the judicial managers or liquidators would not do so since they made the decision in the first place. But necessity is not the touchstone. *Re Union* provides no such authority. Moreover, as R&T rightly points out, this would effectively outflank and upend the purpose of the legislative scheme for judicial management and liquidation, which is to vest authority over the company's affairs in the judicial managers and liquidators *to the exclusion* of the directors. To describe the boundaries of a residual power in such an amorphous way would unduly *impinge* upon the powers, and *interfere* with the ability, of the appointed insolvency professionals to carry out their duties. This cannot be the correct position in law.

60 Next, the Lims submit that a distinction ought to be drawn between *the power to retain solicitors* and the *power to restrain solicitors*. The Injunction Applications, they contend, implicate only the latter power, such that by seeking to injunct R&T from acting for the Companies, they are not impermissibly usurping the liquidators' power to retain solicitors for the companies. With respect, this distinction is one of semantics but not based on any legal principle. Implicit in it is their acceptance that insolvency office holders have the power to retain solicitors. But the corollary of this must be that they also have the power to discharge solicitors. If they choose not to exercise that power by continuing to have a set of solicitors represent the company, that is a choice which is wholly within their prerogative. It is not open to the directors to usurp the power of retaining or discharging solicitors on behalf of the company by applying to court in the name and on behalf of the company to forcibly bring about a state of affairs that the IJMs, JMs and liquidators did not sanction and

were not minded to bring about voluntarily. In any event, it is clear that Plowman J's comments in *Re Union* related to "the power to instruct solicitors and counsel on the hearing of the winding-up petition". This is plainly not the case here. While the Injunction Applications purport to be an exercise of the power to restrain R&T, they are certainly not related to the making of the Companies' judicial management orders or the liquidation orders, which were not challenged, or subsequently appealed against. We can do no better than echo the Judge's observation that the Injunction Applications were not applications aimed at challenging either the appointment of the IJMs, JMs or liquidators or the judicial management and liquidation orders made as against the Companies (Striking Out Judgment at [37]):

> In the present case, however, the Lims were not seeking to challenge the IJM Orders or the JM Orders in the Injunction actions. They were exercising powers that had been divested from them and vested in the interim judicial managers and the judicial managers, namely, the power to commence proceedings in the name and on behalf of OTPL and HLT and to retain solicitors to advise them. Indeed, it is difficult to see how the Lims could have challenged the IJM Orders and the JM Orders. After all, the IJM Orders and JM Orders were ordered in terms of the prayers in applications filed by the Lims themselves on behalf of OTPL and HLT, and they brought no appeals subsequently against the orders. *Union Accident*, *Stephen* and *Closegate* therefore did not assist the Lims' argument that they had the power to cause [the Companies] to bring the Injunction actions. In fact, the cases supported the position taken by R&T.

61 Finally, the Lims claim that if the directors retain such a residual power, it will in fact ensure that the court retains oversight over the conduct of judicial managers or liquidators, as well as their solicitors, as officers of the court. They do not explain how this is so, and this assertion does not do much to address the authorities considered above. More fundamentally, the status of solicitors as officers of the court *already* means that the court has oversight over their conduct.

Summary

62 We summarise. As the cases establish, upon a court order placing a company under judicial management or in liquidation, with insolvency representatives being appointed concomitantly over the company, the company's directors retain residual powers in the limited situation where the company seeks to appeal against or otherwise challenge the very order appointing the judicial managers or liquidators, and must therefore act through its directors. This residual power is necessarily of a narrow scope, to be invoked only in very specific situations.

63 The present case does not come within the strictures of this exception. In contradistinction to, say, a challenge against the appointment of insolvency office holders, the Injunction Applications do not challenge the juridical basis of the IJMs', JMs' and liquidators' powers.

64 Therefore, we agree with the Judge's conclusion that the Lims did not retain any residual power as directors to procure the commencement of the Injunction Applications in the Companies' names. They had no authority to do so. And they did not have sanction to do so. The Injunction Applications were correctly struck out.

Costs

65 That suffices to deal with the substantive merits of the appeals. Having succeeded, R&T is entitled to the costs of the appeals. An attendant question that arises is the appropriate costs order to be made in the circumstances. R&T submits, in view of the peculiar state of affairs leading to the present appeals, that costs ought to be borne by the Lims *personally*, as non-parties to the present

appeals. Unsurprisingly, the Lims resist this, contending that they did not act in bad faith in bringing the Injunction Applications on behalf of the Companies.

66 It is clear that the court is vested with the discretionary power to make an order of costs against a non-party to proceedings. This follows from the broad wording of O 59 r 2(2) of the Rules:

> **Application (O. 59, r. 2)**
>
> …
>
> (2) Subject to the express provisions of any written law and of these Rules, the costs of and incidental to proceedings in the Supreme Court or the State Courts, including the administration of estates and trusts, shall be in the *discretion* of the Court, and the Court shall have *full power to determine by whom and to what extent the costs are to be paid.*
>
> [emphasis added]

67 The relevant legal principles as to when a non-party should be made liable for costs are set out in *DB Trustees (Hong Kong) Ltd v Consult Asia Pte Ltd and another appeal* [2010] 3 SLR 524 ("*DB Trustees*"). In essence, in determining whether costs ought to be ordered against a non-party to the proceedings, it must be *just* in all the circumstances of the case, to make the order. Two factors that may operate in favour of ordering a non-party to bear the costs of the proceedings are: (a) first, the *close connection* between the non-party and the proceedings; and (b) second, the fact that the non-party must have *caused the incurring of costs* (see *DB Trustees* at [29], [30] and [35]). While bad faith and impropriety on the part of the non-party are important considerations, they are not necessary requirements (*SIC College of Business and Technology Pte Ltd v Yeo Poh Siah and others* [2016] 2 SLR 118 at [93]). Finally, there is no indispensable rule of practice that a non-party must be given prior warning before an adverse order for costs is made; what is essential is that

the non-party must be accorded due process and that his or her views are adequately considered before such an order is made (*DB Trustees* at [47]).

68 In the circumstances here, we agree that it would be just for the Lims to bear the costs of the appeals personally. We observe that the Judge considered it appropriate to order costs below to be borne personally by the Lims, rather than from the Companies' coffers. We see no reason for the costs of the appeals to be any differently treated.

69 The Injunction Applications ought not to have been brought in the names of the Companies in the first place. The Companies were, for all intents and purposes, entirely nominal plaintiffs. The true drivers of the litigation were the Lims. In commencing the Injunction Applications, they assumed the risk that they might not in fact possess such a residual power. It can thus hardly be gainsaid that the Lims have a close connection to the Injunction Applications and the present appeals. There is, likewise, a direct nexus between their commencement of the Injunction Applications in the Companies' names and the incurring of costs by R&T, which has had to resist these applications. We are satisfied that both factors in *DB Trustees* are satisfied so as to warrant an imposition of costs to be borne personally by the Lims. Their submission that they were not acting in bad faith is not to the point because it is clear from *DB Trustees* that bad faith is not in fact a pre-requisite for ordering a non-party to bear costs. Ultimately, if costs were visited instead on the Companies, the creditors of the Companies, would in effect bear the burden of the directors' conduct; laying the burden on them would be unfair.

70 Having regard to the parties' respective costs submissions, we award R&T costs of the appeals fixed at $40,000, inclusive of disbursements, to be paid by Mr CM Lim and Ms HC Lim personally.

Conclusion

71 Accordingly, we dismiss the appeals and make the costs orders as set out above. The usual consequential orders are to apply.

Sundaresh Menon
Chief Justice

Andrew Phang Boon Leong
Justice of the Court of Appeal

Judith Prakash
Justice of the Court of Appeal

Belinda Ang Saw Ean
Judge of the Appellate Division

Chao Hick Tin
Senior Judge

Christopher Anand s/o Daniel, Harjean Kaur and Yeo Yi Ling Eileen and Keith Valentine Lee Jia Jin (Advocatus Law LLP) for the appellant in CA 202/2020;
Ong Ziying Clement, Suresh s/o Damodara, Chua Jun Yi Leonard, Ning Jie and Lim Dao Yuan Keith

(Damodara Ong LLC) for the appellant in CA 203/2020;
Toby Thomas Landau QC (instructed), Liew Wey-Ren Colin (Colin Liew LLC) for the respondent in CA 202 and 203/2020.
