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

[2023] SGHC 131

Companies Winding Up No 135 of 2021 (Summonses Nos 4319 of 2022 and 260 of 2023)

In the matter of the Insolvency, Restructuring and Dissolution Act (Act 40 of 2018)

And

In the matter of Dextra Partners Pte Ltd (in liquidation)

Between

Lavrentiadis, Lavrentios

… *Plaintiff*

And

Dextra Partners Pte Ltd (in liquidation)

… *Defendant*

Bankruptcy No 767 of 2021 (Summons No 4296 of 2022)

In the matter of the Insolvency, Restructuring and Dissolution Act (Act 40 of 2018)

And

In the matter of Bernhard Wilhelm Rudolf Weber

Bernhard Wilhelm Rudolf
Weber

… *Applicant*

GROUNDS OF DECISION

[Insolvency Law — Winding Up]
[Insolvency Law — Bankruptcy]

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Lavrentiadis, Lavrentios
v
Dextra Partners Pte Ltd (in liquidation) and another matter

[2023] SGHC 131

General Division of the High Court — Companies Winding Up No 135 of 2021 (Summonses Nos 4319 of 2022 and 260 of 2023) and Bankruptcy No 767 of 2021 (Summons No 4296 of 2022)
Chua Lee Ming J
20 February 2023

8 May 2023

Chua Lee Ming J:

Introduction

1 Dextra Partners Pte Ltd (in liquidation) (the "Company") was a licensed foreign law practice in Singapore which had been ordered to be wound up. Its sole shareholder and director, Mr Bernhard Wilhelm Rudolf Weber (the "Bankrupt"), had been adjudged a bankrupt.

2 The liquidators (the "Liquidators") of the Company and the trustee in bankruptcy of the Bankrupt (the "Trustee") made separate applications for, among other things, orders authorising each of them to enter into a funding agreement (the "Funding Agreement") with each other, the Company, and a judgment creditor of the Company and the Bankrupt, Mr Lavrentios Lavrentiadis (the "Funder"). Under the Funding Agreement, the Funder would

provide funding to the Company and the bankruptcy estate (the "Bankruptcy Estate") to conduct joint investigations into the affairs of the Company and the Bankrupt.

3 For the reasons below, I granted the orders sought.

Background facts

4 In HC/S 106/2018, the High Court found that the Company and the Bankrupt were jointly and severally liable to pay the Funder €17.2m plus interest and costs. The Bankrupt and the Funder filed cross appeals. The Court of Appeal dismissed the Bankrupt's appeal and allowed the Funder's appeal in part. The Court of Appeal ordered the Bankrupt to pay the Funder additional sums of €467,370.76 and US$4,022.50 plus costs. The Company and the Bankrupt paid €3.6m in partial satisfaction of the judgment debt.

5 In HC/B 767/2021, the Bankrupt applied for a bankruptcy order against himself. The bankruptcy order was made on 22 April 2021. The Funder then applied for an order appointing a private trustee in bankruptcy and consequently, the Trustee was appointed.

6 In HC/CWU 135/2021, the Funder applied to wind up the Company. The winding up order was made on 27 August 2021.

7 The Liquidators and the Trustee considered that it would be more efficient to conduct joint investigations into the affairs of the Company and the Bankrupt to determine if the Company and/or the Bankruptcy Estate had any potential claims against any parties, which could then be pursued and realised for the benefit of all stakeholders of the Company and the Bankruptcy Estate.

8 The Funder was the most significant creditor of the Company and the Bankruptcy Estate, based on the proofs of debt received. The Funder was owed S$24,915,157.86 by the Company (*ie*, 77.33% of the total amount of proofs of debt received), and S$1,423,956.85 by the Bankruptcy Estate (*ie*, 98.78% of the total amount of proofs of debt received).

9 The Funder agreed to fund the proposed joint investigations and, where appropriate, the pursuit of relevant claims. The parties reached agreement on the terms set out in the Funding Agreement. It was a condition precedent of the Funding Agreement that the Liquidators and the Trustee obtained an order from the court approving the Funding Agreement.

10 In consideration of the funding provided, the Company and the Bankruptcy Estate assigned and agreed to assign to the Funder any sums recovered under the Company's and the Bankruptcy Estate's claims respectively, to the extent and in accordance with the payment waterfall structure in cl 6.4 of the Funding Agreement. In brief, under cl 6.4, the sums recovered were to be applied as follows:

(a) first, to pay the Company and the Bankruptcy Estate for their costs and expenses incurred in investigating and pursuing their respective claims;

(b) second, to pay the Funder up to the total amount funded by the Funder;

(c) third, to pay the Funder up to a maximum of two times the total amount funded by the Funder; and

(d) fourth, any surplus would be returned to the Company and the Bankruptcy Estate in proportion to the amounts recovered under their respective claims.

The application by the Liquidators

11 The Liquidators sought an order authorising the Company and the Liquidators to enter into the Funding Agreement. As the Funder was a member of the committee of inspection ("COI") of the Company, the Liquidators also sought the following:

(a) permission of the Court pursuant to reg 37 of the Insolvency, Restructuring and Dissolution (Court-Ordered Winding Up) Regulations 2020 ("IRD (CWU) Regulations") for the Funder to purchase the Company's assets in terms of the Funding Agreement; and

(b) sanction of the Court pursuant to reg 39(1) of the IRD (CWU) Regulations for the Funder to derive a profit in terms of the Funding Agreement.

Whether the Funding Agreement should be authorised

12 The Funding Agreement was an agreement to assign the fruits of recovery (to the extent set out in cl 6.4) from claims by the Company and/or the Liquidators. These claims comprised the following:

(a) Pre-insolvency causes of action, *ie*, causes of action that accrued prior to the insolvency and were vested in the Company.

(b) Statutory claims, *ie*, causes of action that arose post-insolvency and were vested in the Liquidators, *ie*, claims relating to transactions at

> an undervalue, unfair preferences, extortionate credit transactions, fraudulent trading, wrongful trading and delinquent officers (see ss 224, 225, 228, 238, 239 and 240 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA")).

The claims by the Company and/or the Liquidators were necessarily not yet identified as they depended on the outcome of the joint investigations.

13 Section 144(2)(*b*) of the IRDA permits a liquidator to "sell the … movable property and things in action of the company". This provision has been interpreted to permit the sale of the fruits of a cause of action: *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597 ("*Vanguard*") at [24]. *Vanguard* dealt with s 272(2)(*c*) of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act"), which was the predecessor of s 144(2)(*b*) of the IRDA. The term "property" was not defined in the Companies Act; in *Vanguard* (at [23]), I gave it the same meaning given to it in the Bankruptcy Act (Cap 20, 2009 Rev Ed) ("Bankruptcy Act"). In s 2(1) of the IRDA, the term "property" has a similar definition as that in the Bankruptcy Act and the definition applies as well to s 144(2)(*b*) of the IRDA. This reinforces the decision in *Vanguard*.

14 Thus, s 144(2)(*b*) permitted the Liquidators to assign or agree to assign the fruits of the Company's pre-insolvency causes of action.

15 As for the statutory claims, s 144(1)(*g*) of the IRDA expressly permits a liquidator to assign the proceeds of such claims; the provision does not extend to assigning the claims themselves. The exercise of this power is subject to authorisation by the Court and compliance with certain requirements set out in the Insolvency, Restructuring and Dissolution (Assignment of Proceeds of an Action) Regulations 2020 ("IRD (APA) Regulations").

16 Section 144(1)(*g*) of the IRDA therefore removes any doubts as to whether the *fruits* of statutory claims can be assigned. These doubts arose as a result of the distinction drawn in *Re Oasis Merchandising Service Ltd* [1998] Ch 170 between pre-insolvency claims and post-insolvency claims, where the rights of action for the latter vest solely in the liquidators and cannot be assigned to a third party: see *Re Fan Kow Hin* [2019] 3 SLR 861 ("*Fan Kow Hin*") at [12]–[17] and *Solvadis Commodity Chemicals GmbH v Affert Resources Pte Ltd* [2018] 5 SLR 1337 ("*Solvadis*") at [33].

17 A sale pursuant to s 144(2)(*b*) of the IRDA does not require authorisation by the court. However, it is common for funding agreements to impose a condition precedent requiring the court's prior authorisation to be obtained. In such cases, a liquidator may seek authorisation by the Court pursuant to s 145(3) of the IRDA, which permits a liquidator to apply to the Court for directions in relation to any particular matter arising under the winding up.

18 A sale pursuant to s 144(1)(*g*) of the IRDA, on the other hand, requires authorisation by the Court or the COI.

19 In my view, where authorisation is sought for a sale under s 144(2)(*b*) of the IRDA, the factors to be considered by the court would be similar to those in an application for authorisation under s 144(1)(*g*) of the IRDA. Such factors include the following:

(a) whether the liquidator is acting in good faith; this is an overarching consideration: see *Solvadis* at [34];

(b) whether the sale or assignment is in the interests of the Company and its creditors;

(c) whether the funding agreement conflicts with any public policy; and

(d) whether the terms of the funding agreement conflict with any written law, in particular the IRDA and the regulations made thereunder.

Bona fides of the Liquidators

20 In the present case, there was no reason to impugn the *bona fides* of the Liquidators. The Company's assets were insufficient to meet the claims of the Company's creditors. The investigations were necessary and the Company needed funds to carry out the investigations and where appropriate, to pursue claims. The Funding Agreement was the only realistic means for the joint investigations to be carried out. The Funder was the only person willing to provide such funds.

Interests of the Company and its creditors

21 The Funding Agreement was clearly in the interests of the Company and its creditors. The objective of the Funding Agreement was to fund the joint investigations and where appropriate, to pursue claims to recover moneys for the Company. A funding agreement may not be in the interests of the company and its creditors if the decision whether to pursue, settle or discontinue claims is left solely to the funder. In the present case, however, the decision to bring, defend and/or settle any action was to be made by the Liquidators and subjected to the COI's approval, and the decision to discontinue any action was to be made by the Liquidators after consulting the COI.

22 Two aspects of the Funding Agreement need further elaboration. First, under the Funding Agreement, if the amounts recovered by the

Company/Liquidators were sufficient, the Funder stood to make a profit of up to two times the amount funded. The mere fact that the Funder stood to make a profit was clearly no reason not to authorise the Funding Agreement; it is commercially unrealistic to expect litigation funders to take the risks of funding an insolvent company's litigation and not expect to be compensated for it: *Vanguard* at [30]; *Solvadis* at [29].

23 The question was whether the amount of compensation was objectionable. It might be objectionable if the compensation far exceeded market practice. In this case, the evidence was that typically, in funding arrangements for companies in liquidation or bankruptcy estates, the funders stand to gain between 0.5 and 3.5 times the total amount funded. The multiplier would be around the lower end of the scale in cases involving the funding of the pursuit of specific claims. In cases involving the funding of investigations and subsequent pursuit of potential causes of action, the multiplier would be at the higher end of the scale since the risk undertaken by the funder is obviously higher. The investigations may not even result in any viable claims and the timeframe for any potential recovery would be longer.

24 In the present case, the Funder's potential profits under the Funding Agreement of up to two times the amount funded was nowhere near the top end of the scale. In my view, this was reasonable and the Funding Agreement was still in the interests of the Company and its creditors. The Funder bore the risk that the joint investigations and any claims made thereafter might be a futile exercise, and he could lose the entire amount funded by him.

25 Second, there was a possibility of cross-subsidisation. There may be no recovery from the claims by the Bankruptcy Estate/Trustee or the recovery may be less than the recovery from the claims by the Company/Liquidators.

However, under cl 6.4 of the Funding Agreement, the recovery from all of the claims would be pooled and used to pay the costs and expenses incurred by the Company and the Bankruptcy Estate in connection with the joint investigations and claims, and the Funder. In such a scenario, it could be said that the Company would be cross-subsidising the expenses incurred by the Bankruptcy Estate.

26 However, in my judgment, looked at holistically, the Funding Agreement was still in the interests of the Company and its creditors. In this case, the Company had been found to be the Bankrupt's alter ego due to the manner in which the Bankrupt conducted his personal affairs and the affairs of the Company. A joint investigation made practical sense and was an efficient use of the funds.

Public policy

27 The doctrine of maintenance and champerty has no application to the exercise of the statutory powers of sale of the causes of action or the fruits of such actions under the IRDA: *Vanguard* at [12] and [29]; *Solvadis* at [28]. Nevertheless, in my view, the public policy concerns underlying the doctrine of maintenance and champerty remain a relevant consideration when the court is asked to authorise a funding agreement.

28 What are these public policy concerns? The doctrine of maintenance and champerty is a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants; the question is whether there is any realistic possibility that the administration of justice may suffer: *Vanguard* at [38] quoting from *Giles v Thompson* [1994] 1 AC 142 at 164.

29 The relevant public policy considerations include whether the facts suggest that the funding agreement might tempt the funder "for his personal

gain to inflame the damages, to suppress evidence, to suborn witnesses or otherwise to undermine the ends of justice": *Vanguard* at [39] quoting from *Regina (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2003] QB 381 at [36].

30 The public policy concerns about the administration of justice are addressed where the control of the legal proceedings lies primarily with the liquidator. See, *eg*, *Fan Kow Hin* at [22], where the court expressed the view that the proposed funding agreement was not champertous so long as the assignee had no control over the conduct of proceedings. It is not necessary for the liquidator to have complete control of every single aspect of the legal proceedings. What is important is that any involvement that the funder may have in the legal proceedings should not run afoul of the public policy considerations. In *Vanguard*, I concluded (at [46]) that the purity of justice was protected because the liquidators had full control of the legal proceedings and the assignees' agreement was required only on the choice of solicitors and on any settlement or discontinuance of any claim. I was of the view that the limited involvement of the funder was reasonable and did not adversely affect the purity of justice.

31 In the present case, the Funding Agreement provided that the Liquidators would have full control of the Company's claims, including whether or not to continue, pursue or settle the claims save that:

> (a) the approval of the COI was required (i) for a change of lawyers, (ii) on any settlement of any of the Company's claims, and (iii) to bring, defend and/or settle any action in the name and on behalf of the Company; and

(b) the COI would be consulted before any discontinuation of any action or other legal proceedings in the name and on behalf of the Company.

32 In my view, there was no reason from the public policy perspective not to authorise the Funding Agreement.

33 I noted that the causes of action were not yet identified. However, in my view, this was not sufficient reason to deny authorisation of the Funding Agreement. The circumstances of the case were such that the specific causes of action (if any) could only be identified after the joint investigations. But funding was required for the joint investigations and funding was not possible without the agreement to assign the fruits of litigation. In addition, I took comfort in the fact that (a) the Liquidators, and not the Funder, had full control of which claims to pursue, continue or settle, and (b) the Liquidators would be acting as officers of the Court.

34 I therefore concluded that nothing in the Funding Agreement was objectionable from the public policy perspective.

Whether there was any conflict with written law

35 An assignment of the proceeds of a relevant action under s 144(1)(*g*) of the IRDA has to comply with the IRD (APA) Regulations: r 3 of the IRD (APA) Regulations.

36 In the present case, the Liquidators sought an order to the effect that the assignment of the Company's claims within the meaning of s 144(1)(*g*) of the IRDA was subject to the IRD (APA) Regulations being complied with. Thus, no issue arose with respect to the IRD (APA) Regulations.

37 In addition, as stated earlier, the Funder was a member of the COI. Accordingly, the Funder needed permission of the Court under reg 37 of the IRD (CWU) Regulations to purchase the Company's assets, and sanction of the Court under reg 39(1) of the IRD (CWU) Regulations to derive a profit pursuant to the Funding Agreement.

38 Regulations 37 and 39(1) state as follows:

> **Dealings with assets**
>
> **37.** The liquidator or a member of the committee of inspection of a company must not, while acting as the liquidator or a member of the committee, directly or indirectly purchase any of the company's assets, except with the permission of the Court.
>
> **Committee of inspection not to make profit**
>
> **39.**—(1) Except with the sanction of the Court, a member of the committee of inspection of a company is not, directly or indirectly, entitled to —
>
> (*a*) derive any profit from any transaction arising out of the winding up of the company; or
>
> …

39 The reason for requiring the court's permission or sanction under regs 37 and 39(1) respectively is clear. Members of the committee of inspection occupy a fiduciary position in relation to the creditors and contributories, which prevents them from deriving a profit from their office or from allowing their private interest to conflict with their duty as committee members: *Woon's Corporations Law* (LexisNexis, 2022 Desk Edition) at [3651].

40 Permission may be given under reg 37 if the terms of the transaction, including the amount of the purchase price, are fair to the general body of creditors so as not to cause detriment to the position of creditors: *Re DH International Pty Ltd (in liq) (No 2)* [2017] NSWSC 871 ("*DH International*")

at [37]. *DH International* was concerned with s 551(1)(*c*) of the Australian Corporations Act 2001, which was similar to reg 37 of the IRD (CWU) Regulations. Although *DH International* referred only to the creditors, in my view, the court must also consider the interest of the company. The no-conflict rule seeks to prevent the fiduciary from being swayed by considerations of personal interest: Hans Tjio, Pearlie Koh and Lee Pey Woan, *Corporate Law*, (Academy Publishing, 2015) ("*Corporate Law*") at para 09.051. The fact that the terms of the transaction are fair addresses the concern over the conflict of interest.

41 In the present case, the question whether the terms of the Funding Agreement were fair to the Company and its creditors clearly overlapped with the question whether the Funding Agreement was in the interests of the Company and its creditors. I was of the view that the Funding Agreement was fair for the same reasons that I found the Funding Agreement to be in the interests of the Company and its creditors (see [21]–[26] above).

42 As for reg 39(1) of the IRD (CWU) Regulations, the no-profit rule aims to preclude the fiduciary from misusing his position for his personal advantage: *Corporate Law* at para 09.051. In my view, the test as to when sanction should be given under reg 39(1) is similar to that applicable to reg 37, *ie*, whether the terms of the transaction are fair to the Company and its creditors. Where this is so, the member of the committee of inspection would not be misusing his position for his personal advantage.

43 Regulation 39(1) is perhaps more likely to be invoked in cases involving members of the committee of inspection deriving a profit in the form of payment for services. On the particular facts in this case, the Funding Agreement engaged both regs 37 and 39(1) of the IRD (CWU) Regulations at once. The Funder was

to be assigned part of the Company's recovery sum in consideration of the funds provided. The Funder would therefore be purchasing, through the funds provided, the Company's assets in the form of the Company's potential recoveries up to three times the amount funded. At the same time, the Funder stood to derive a profit from the Funding Agreement, up to two times the amount funded.

44 I had concluded (see [41] above) that the terms of the Funding Agreement were fair and not detrimental to the Company or its creditors.

45 I therefore granted permission under reg 37 for the Funder to purchase the Company's property, and sanction under reg 39(1) for the Funder to be entitled to derive a profit, pursuant to the Funding Agreement.

Section 144(1)(c) of the IRDA

46 The Liquidators' application relied on an alternative ground, *ie*, that the Funding Agreement was an arrangement within the meaning of s 144(1)(*c*) of the IRDA. Section 144(1)(*c*) states as follows:

> **Powers of liquidator**
>
> **144.**—(1) The liquidator may, after authorisation by either the Court or the committee of inspection —
>
> **…**
>
> (*c*) make any compromise or arrangement with creditors or persons claiming to be creditors, or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages, against the company, or by which the company may be rendered liable;
>
> …

47 In my view, s 144(1)(*c*) was not applicable to the present case as it applies to a compromise or arrangement relating to creditors' claims against the company. The Funding Agreement did not fall within the scope of s 144(1)(*c*).

The application by the Trustee

48 Under the Funding Agreement, the Bankruptcy Estate sold the fruits of recovery (to the extent set out in cl 6.4) from claims by the Bankruptcy Estate and/or the Trustee. As in the case of the Company, these claims comprised the following:

(a) Pre-insolvency causes of action, *ie*, causes of action that accrued prior to the insolvency and are vested in the Bankruptcy Estate.

(b) Statutory claims, *ie*, causes of action that arise after insolvency and are vested in the Trustee, *ie*, claims relating to transactions at an undervalue, unfair preferences and extortionate credit transactions (see ss 361, 362 and 366 of the IRDA).

49 A trustee in bankruptcy has the power to sell a bankrupt's property: s 377(1)(*a*) read with s 39(1) of the IRDA. This power includes the power to sell the fruits of pre-insolvency causes of action: *Vanguard* at [23]–[24] and *Fan Kow Hin* at [5]. The power also includes the power to sell or assign the fruits of statutory claims: *Fan Kow Hin* at [6] and [11]. The decision in *Fan Kow Hin* relied on s 102(4) of the Bankruptcy Act, which is now to be found in s 365(5) of the IRDA.

50 The power of the trustee in bankruptcy to sell or assign the fruits of pre-insolvency and statutory claims does not require the permission or sanction of the court. Nevertheless, as stated earlier, it was a condition precedent of the

Funding Agreement that it should be approved by the court. In this regard, the Trustee may apply to the Court for directions in relation to any particular matter arising under the bankruptcy: s 43(2) of the IRDA.

51 The considerations in deciding whether to approve the Funding Agreement were similar to those discussed above in relation to the application by the Liquidators. For reasons similar to those discussed above in relation to the application by the Liquidators:

(a) there was no reason to impugn the *bona fides* of the Trustee;

(b) the Funding Agreement was clearly in the interests of the Bankruptcy Estate and its creditors;

(c) there was no reason from the public policy perspective not to authorise the Funding Agreement; the Trustee had full control of the Bankruptcy Estate's claims similar to the Liquidators' control of the Company's claims; and

(d) the terms of the Funding Agreement did not conflict with any written law.

52 Accordingly, I authorised the Trustee to enter into the Funding Agreement.

Section 378(g) and (h) of the IRDA

53 The Trustee's application also relied on an alternative ground, *ie*, that the Funding Agreement was an arrangement under ss 378(*g*) and (*h*) of the IRDA read with s 39 of the IRDA. Section 378(*g*) and (*h*) state as follows:

General powers of Official Assignee

> **378.** The Official Assignee may exercise any of the following powers:
>
> > (*g*) make such compromise or other arrangement as is thought expedient with creditors or persons claiming to be creditors in respect of any debts provable under the bankruptcy;
> >
> > (*h*) make such compromise or other arrangement as is thought expedient with respect to any claim arising out of or incidental to the property of the bankrupt, made or capable of being made on the Official Assignee by any person or by the Official Assignee on any person;
> >
> > …

A trustee in bankruptcy may exercise the above powers: s 39(1)(*b*) of the IRDA.

54 In my view, ss 378(*g*) and (*h*) of the IRDA were not applicable to the Funding Agreement. These provisions deal with compromises or arrangements relating to claims against the bankruptcy estate (s 378(*g*)) and claims against or by the Official Assignee (s 378(*h*)). The Funding Agreement did not fall within the scope of either provision.

Conclusion

55 For the reasons above, I authorised the Liquidators and the Trustee to enter into the Funding Agreement with each other and with the Company and the Funder.

Chua Lee Ming
Judge of the High Court

Han Guangyuan, Keith and Ammani Mathivanan (Oon & Bazul LLP) for the Liquidators of Dextra Partners Pte Ltd (in liquidation) and the Trustee in Bankruptcy of the Bankrupt;
Lim Xian Yong, Alvin and Andrea Ang Si Min (WongPartnership LLP) for the Funder (watching brief);
Mr Giandeo Pittea, Representative (Director of Wintrust Switzerland and Wintrust Asia) for Milky Way Limited (watching brief);
Mr Erik Chong Ai Lee, Representative (Resident manager) for Wintrust Asia Pacific (watching brief).
