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

[2024] SGHC 113

Originating Summons No 902 of 2021

In the matter of Nan Chiau Maritime (Pte) Ltd (in liquidation)

Between

Natixis, Singapore Branch

… *Plaintiff*

And

(1) Seshadri Rajagopalan
(2) Paresh Tribhovan Jotangia
(3) Nan Chiau Maritime (Pte) Ltd (in liquidation)

… *Defendants*

Originating Summons No 903 of 2021

In the matter of Nan Chiau Maritime (Pte) Ltd (in liquidation)

Between

Societe Generale, Singapore Branch

… *Plaintiff*

And

(1) Seshadri Rajagopalan

(2) Paresh Tribhovan Jotangia
(3) Nan Chiau Maritime (Pte) Ltd (in liquidation)

… *Defendants*

Originating Summons No 23 of 2022

In the matter of Nan Chiau Maritime (Pte) Ltd (in liquidation)

Between

The Hongkong and Shanghai Banking Corporation Limited

… *Plaintiff*

And

(1) Seshadri Rajagopalan
(2) Paresh Tribhovan Jotangia
(3) Nan Chiau Maritime (Pte) Ltd (in liquidation)

… *Defendants*

JUDGMENT

[Admiralty and Shipping — Admiralty jurisdiction and arrest — Action in rem — Statutory liens]
[Insolvency Law — Administration of insolvent estates — Judicial management — Disposal of assets — Sale of vessel effected by judicial sale in Gibraltar following arrest by the mortgagee — Whether the issuance of an in rem writ in Singapore causes a vessel to be subject to a security within the meaning of s 100(2)(*a*) of the Insolvency, Restructuring and Dissolution Act]

[Insolvency Law — Administration of insolvent estates — Judicial management — Whether the issuance of an in rem writ renders the in rem writ claimant a creditor of the owner of the vessel within the meaning of s 115 of the Insolvency, Restructuring and Dissolution Act]
[Insolvency Law — Administration of insolvent estates — Judicial management — *Ex parte James* principle — Whether the *Ex parte James* principle affords a free-standing right to recover the net proceeds of the sale of the vessel in Gibraltar — Whether the conduct of the judicial managers rose to a level of opprobrium that required intervention by the court]

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v
Seshadri Rajagopalan and others and other matters

[2024] SGHC 113

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S Mohan J
17 August, 10–11 October 2023

2 May 2024 Judgment reserved.

S Mohan J:

Introduction

1 In HC/OS 902/2021 ("OS 902"), HC/OS 903/2021 ("OS 903") and HC/OS 23/2022 ("OS 23") (collectively, the "OS Proceedings"), the plaintiffs are banks which commenced various admiralty actions *in rem* against the vessel "CHANG BAI SAN" (the "Vessel") in respect of claims for misdelivery and/or loss of cargo carried onboard the Vessel. Bills of lading were alleged to have been issued by Ocean Tankers (Pte) Ltd ("OTPL") as the demise charterer of the Vessel in respect of various cargoes shipped onboard the Vessel. The plaintiffs claim that the bills of lading (and/or the cargoes they represented) were pledged to the plaintiffs as security for various financing facilities granted by the plaintiffs to Hin Leong Trading (Pte) Ltd ("HLT").

2 The third defendant, Nan Chiau Maritime (Pte) Ltd ("Nan Chiau Maritime"), was the registered owner of the Vessel at all material times. The first and second defendants were appointed by the court as joint and several judicial managers of the third defendant. While the third defendant was under judicial management, the Vessel sailed to Gibraltar, where she was arrested by the mortgagee of the Vessel and eventually sold by the Gibraltar court.

3 In the OS Proceedings, the plaintiffs contend, among other things, that (a) by virtue of filing the *in rem* writs referred to at [1] above, the Vessel was a property of the third defendant "subject to a security" within the meaning of s 100(2)(*a*) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA"), such that the first and second defendants were not permitted to dispose of the Vessel without the authorisation of the court; and (b) by virtue of filing the *in rem* writs, the plaintiffs are "creditors" within the meaning of s 115 of the IRDA, and the first and second defendants acted in a manner that was unfairly prejudicial to the interests of the plaintiffs as creditors contrary to s 115 of the IRDA. As detailed below at [23], the plaintiffs seek various declarations, including that the first and second defendants, in (among others) procuring the arrest and judicial sale of the Vessel in Gibraltar, did so in breach of s 100(2) of the IRDA and/or in a manner that was unfairly prejudicial to the plaintiffs and other creditors of the third defendant under s 115 of the IRDA. The plaintiffs also seek other consequential orders with regard to the proceeds of sale of the Vessel and accounting for them.

4 From the brief summary above, it would be apparent that the applications before me stand (and perhaps collide) at the intersection between admiralty law and insolvency law, and raise issues that have hitherto not arisen before our courts. In the main, they concern the nature of an *in rem* writ and whether the issuance of an *in rem* writ causes a vessel to be "subject to a

security" under s 100(2)(*a*) of the IRDA, as well as whether the issuance of an *in rem* writ by a claimant renders that claimant a creditor of the owner of the vessel.

5 For the reasons elaborated upon in this judgment, I dismiss the plaintiffs' applications. Let me start by setting out the factual background to the OS Proceedings.

Facts

The parties

6 The plaintiffs in OS 902, OS 903 and OS 23 are Natixis, Singapore Branch ("Natixis"), Societe Generale, Singapore Branch ("Societe Generale"), and The Hongkong and Shanghai Banking Corporation Limited ("HSBC") respectively. They commenced admiralty actions *in rem* in Singapore against the Vessel (the "Admiralty Actions") in respect of claims for misdelivery and/or loss of cargo which, according to the plaintiffs, had been pledged to them by the following bills of lading as security for financing facilities granted by the plaintiffs to HLT:

Plaintiff	**Admiralty action**	**Bill of lading number**	**Date of filing of writ**	**Date of service of writ**
Natixis[1]	HC/ADM 148/2020 ("ADM 148")	OTK19-2864	22 June 2020	1 October 2020

[1] 1st Affidavit of Lee Jing Yi filed on 3 September 2021 ("1LJY") at paras 9–10, pp 75–83.

Societe Generale[2]	HC/ADM 153/2020 ("ADM 153")	OTK20-817	24 June 2020	1 October 2020
	HC/ADM 154/2020 ("ADM 154")	OTK20-709	24 June 2020	1 October 2020
HSBC[3]	HC/ADM 93/2020 ("ADM 93")	OTK20-591	24 April 2020	
		OTK20-811		

7 As I mentioned above at [2], the third defendant, Nan Chiau Maritime, was the registered owner of the Vessel at all material times.[4] Nan Chiau Maritime was a subsidiary of Xihe Holdings (Pte) Ltd ("Xihe Holdings") and, together with Xihe Holdings, was part of the Hin Leong group of companies founded by Lim Oon Kuin (the "HLT Group"), which included HLT and OTPL.[5] It is undisputed that, for the purposes of s 4(4) of the High Court (Admiralty Jurisdiction) Act 1961 (2020 Rev Ed) ("HCAJA"), OTPL is the party who would be liable *in personam* on the plaintiffs' claims in the Admiralty Actions, since OTPL was the demise charterer of the Vessel at the material time.[6] The Vessel was redelivered to the third defendant on 10 May 2021.[7] The

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2 Affidavit of Chwee Kin Keong Stanley filed on 3 September 2021 ("CKKS") at paras 9–10, pp 75–105.

3 Affidavit of Louis Han Liang Siew filed on 7 January 2022 ("LHLS") at paras 11–14, pp 84–95, 97–98.

4 1LJY at pp 17–18.

5 1LJY at para 6, pp 19–21, 71.

6 Written Submissions of Natixis and Societe Generale at para 10; 1LJY at para 26; 1st Affidavit of Paresh Tribhovan Jotangia filed on 14 December 2021 ("1PTJ") at paras 10–11.

7 5th Affidavit of Lee Jing Yi filed on 25 May 2023 ("5LJY") at p 445.

timing of the redelivery of the Vessel is material, as I explain later in this judgment.

8 The first and second defendants are Seshadri Rajagopalan and Paresh Tribhovan Jotangia, both of whom were appointed as joint and several interim judicial managers of the third defendant on 9 October 2020, and subsequently as joint and several judicial managers on 6 November 2020.[8] After the judicial management of the third defendant expired on 30 June 2022, the first and second defendants, together with one Ho May Kee, were appointed as the provisional liquidators of the third defendant on 4 July 2022.[9] The third defendant subsequently entered voluntary winding up following resolutions passed on 26 July 2022, and the first and second defendants, together with Ho May Kee, were appointed as the joint and several liquidators of the third defendant.

9 Standard Chartered Bank (Hong Kong) Limited was the mortgagee of the Vessel (the "Mortgagee").[10]

Background to the dispute

10 From the time the first and second defendants were appointed as interim judicial managers of the third defendant on 9 October 2020 until about 16 June 2021, the Vessel was generally lying off the southern coast of West Malaysia outside port limits, with occasional calls in Singapore.[11]

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8 1LJY at pp 73–74.

9 Affidavit of Lee Jing Yi filed on 2 August 2022 in HC/OA 417/2022 at para 8, pp 17–24.

10 1LJY at pp 17–18.

11 1LJY at para 14, pp 99–101.

11 It is undisputed that on 1 April 2021, there was a "without prejudice" meeting between the first and second defendants on the one hand, and the plaintiff banks as well as ICICI Bank Limited ("ICICI") on the other, with a view to seeing how the Vessel could be dealt with in a manner where all the parties' interests could be preserved.[12] While the plaintiffs' case is that the "without prejudice" discussions continued thereafter in an attempt to find a resolution, the defendants contend that the parties had not continued any negotiations beyond early May 2021.[13]

12 The evidence on this is not entirely clear but sometime between about 16 June 2021 and 8 July 2021, the Vessel departed for the Cape of Good Hope, apparently on a voyage to Cape Town, South Africa with an estimated arrival of 7 August 2021.[14] By this time, the demise charter of the Vessel to OTPL had come to an end and the Vessel had been redelivered to the third defendant on 10 May 2021 (see [7] above). This meant that, at least as a matter of Singapore law, after 10 May 2021, any claimant with a claim against OTPL that could otherwise be the subject of an admiralty action *in rem* against the Vessel, would not be able to validly invoke the court's admiralty jurisdiction by, among others, issuing an admiralty *in rem* writ against the Vessel after 10 May 2021 – the reason being that after the redelivery of the Vessel to the third defendant, the requirements of s 4(4) of the HCAJA would not be met with respect to any claims against OTPL.

13 On 30 July 2021, Natixis, through its solicitors Resource Law LLC, requested the first and second defendants to provide information on the purpose

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12 1LJY at para 15; 3rd Affidavit of Paresh Tribhovan Jotangia filed on 1 September 2022 ("3PTJ") at para 17.

13 1LJY at para 15; 3PTJ at paras 17–18.

14 1LJY at para 16, pp 99–104.

of the Vessel's voyage, whether Cape Town was the Vessel's final destination and, if Cape Town was not the Vessel's final destination, where her final destination was.[15] Societe Generale and HSBC did the same on 2 August 2021.[16] On 3 August 2021, the first defendant sent an email to the Mortgagee, stating that the defendants had received those queries from the lawyers for Natixis, HSBC, Societe Generale and ICICI. In that email, the first defendant stated that the defendants' lawyers would respond to set out the legal position that the owner is free to direct the Vessel's movement and there was no obligation to update the *in rem* writ claimants on the movement of the Vessel, and further, that the claimants could obtain the information directly from the Mortgagee.[17] On the same day, the first and second defendants, through their solicitors, responded to the plaintiffs (a) questioning the basis of the plaintiffs' requests for information, (b) alleging that the Mortgagee was entitled to take enforcement action against the Vessel and had "issued confidential instructions" in respect thereof to the third defendant, and (c) stating that the Mortgagee had requested the plaintiffs to redirect their queries to the Mortgagee.[18] However, when the Mortgagee was approached by the plaintiffs for information, the Mortgagee's solicitors indicated that it was under no obligation to reveal any or the requested information to the plaintiffs.[19] A few days later on 5 August 2021, an employee of the judicial managers' adviser AlixPartners Hong Kong Limited ("AlixPartners") sent text messages to the Mortgagee's staff, expressing that "the cat is out of the bag on [the Vessel]".[20]

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15 1LJY at para 18, pp 111–112.

16 CKKS at para 18, pp 139–140; LHLS at para 23, pp 126–127.

17 5LJY at p 823.

18 1LJY at para 19, pp 117–118; CKKS at para 19, pp 145–146; LHLS at para 25, pp 124–125.

19 1LJY at paras 21–24; Written Submissions of Natixis and Societe Generale at para 17.

20 5LJY at p 19.

14 It subsequently transpired that the Vessel was not headed to Cape Town *per se* but was on a voyage *via* the Cape of Good Hope to Gibraltar where she arrived on or about 28 August 2021.[21] As soon as the Vessel arrived in Gibraltar, she was arrested by the Mortgagee who had commenced admiralty proceedings against the Vessel in Gibraltar in anticipation of the Vessel's arrival.[22] It is apparent from the numerous exchanges between the judicial managers, their advisers and the Mortgagee that by 24 May 2021, out of various options put to them, including a sale of the Vessel pursuant to s 100 of the IRDA, which was acknowledged to be "an untested and new legal process",[23] the Mortgagee had agreed to procure the arrest of the Vessel in Gibraltar and have her sold to a private buyer by judicial auction.[24]

15 Prior to the commencement of the OS Proceedings, the plaintiffs had commissioned searches in the Gibraltar courts. The searches revealed that another vessel, formerly known as the "QI LIAN SAN" which was previously owned by Nan King Maritime (Pte) Ltd (another subsidiary of Xihe Holdings which was also under judicial management), had been ordered to be sold by the Gibraltar court in April 2021 in admiralty proceedings brought in Gibraltar by the mortgagee of that vessel, Oversea-Chinese Banking Corporation Ltd.[25]

16 Having regard to the fate of the "QI LIAN SAN" in Gibraltar, as well as the assertion in the first and second defendants' solicitors' email that the Mortgagee was entitled to take enforcement action against the Vessel and had

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21 1LJY at para 16, pp 102–104.

22 1LJY at para 16, pp 105–110.

23 5LJY at p 499.

24 5LJY at pp 494–540.

25 1LJY at para 28, pp 137–145.

issued "confidential instructions" to the third defendant in respect of the Vessel (see [13] above), Natixis and Societe Generale believed that pursuant to an arrangement between the first and second defendants and the Mortgagee, the Vessel had, by design, been sent to Gibraltar to be arrested there by the Mortgagee and judicially sold by the Gibraltar courts.[26] Further, under Gibraltar law, the plaintiffs could only bring an admiralty action *in rem* in Gibraltar against the Vessel if, at the time when the action was brought in Gibraltar, the Vessel was still under demise charter to OTPL[27] – the position under Gibraltar law is thus similar to that under our law (see [12] above). As the Vessel had been redelivered to the third defendant on 10 May 2021 (see [7] above), the plaintiffs were no longer entitled to bring any admiralty action *in rem* in Gibraltar against the Vessel and accordingly, were also unable to enjoy any rights an admiralty *in rem* claimant in Gibraltar would *vis-à-vis* the sale proceeds of the Vessel.

17 Therefore, Natixis and Societe Generale commenced OS 902 and OS 903 on 3 September 2021, seeking, among others, a declaration that by reason of the filing of the *in rem* writs, the Vessel is a property of the third defendant which is subject to a security under s 100(2)(*a*) of the IRDA, such that the first and second defendants as the judicial managers of the third defendant are not permitted or otherwise entitled to dispose of the Vessel without authorisation by an order of the court under s 100(2) of the IRDA.

18 On 20 September 2021, the Mortgagee obtained default judgment in the Gibraltar proceedings for the sum of US$17,718,750.27 and a further order for the Vessel to be sold by the Gibraltar Admiralty Marshal to Genial Marine S.A.

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26 1LJY at para 29; CKKS at para 29.

27 1LJY at para 31.

of Liberia ("Genial Marine") for US$41,500,000 (the "Purchase Price").[28] The evidence indicates that the sale of the Vessel by the Gibraltar Admiralty Marshal pursuant to the order of the Gibraltar court was by private treaty to Genial Marine (as opposed to *via* a public auction). Genial Marine had already made a firm offer to the Gibraltar Admiralty Marshal to purchase the Vessel at the Purchase Price on 31 August 2021.[29]

19 On 21 December 2021, the Gibraltar court made further orders, among others:[30]

(a) that the Mortgagee is entitled to recover a further sum of US$6,768,745.15 plus interest (the "Further Sums");

(b) that a sum of US$138,000 be retained by the Gibraltar court;

(c) that the order of priorities to the Vessel's proceeds of sale be determined as follows:

(i) firstly, the Gibraltar Admiralty Marshal's expenses of arrests;

(ii) secondly, the Mortgagee's costs as producer of the fund;

(iii) thirdly, the Mortgagee's judgment obtained on 20 September 2021 and the Further Sums;

(iv) fourthly, the Mortgagee's legal fees; and

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28 2nd Affidavit of Lee Jing Yi filed on 8 April 2022 ("2LJY") at para 5(a), pp 13–14.

29 2LJY at para 9, pp 17–30.

30 2LJY at para 5(b), pp 15–16.

(v) finally, any remaining balance to be paid by the Admiralty Marshal to the third defendant; and

(d) that the proceeds of sale of the Vessel be applied and paid out in accordance with the priorities listed in (c) above, save that the maximum sum payable to the Mortgagee shall not exceed US$24,497,495.15 exclusive of accruing daily judgment interest.

20 On 7 January 2022, HSBC commenced OS 23, seeking the same reliefs as in OS 902 and OS 903.

21 As a result of specific discovery that was ordered against the defendants in the OS Proceedings, among other documents, a Memorandum of Agreement dated 20 August 2021 entered into between the third defendant (as seller) and Genial Marine (as buyer) (the "MOA") was disclosed, together with various correspondence/communications between the judicial managers *inter se*, with their advisers AlixPartners and with the Mortgagee/its solicitors.[31] Focusing on the MOA, it was signed by the first and second defendants on behalf of the third defendant. Of particular relevance to the OS Proceedings are cll 9 and 21 of the MOA:[32]

> 9. Encumbrances
>
> The Vessel shall be delivered free from all charters, encumbrances, mortgages and maritime liens or any other claims whatsoever (which may be procured through a judicial sale) and is not subject to Port State or other administrative detentions. Should the Sellers fail to procure such judicial sale or otherwise be unable to deliver the Vessel on the above basis within three (3) months of the date of this Agreement, this MOA shall be deemed to be null and void and each party shall have

31 5LJY at para 12(d), pp 856–867.

32 5LJY at pp 863, 866.

no recourse against the other party for any claims arising from this MOA.

21. Judicial Sale

The Sellers ~~may~~ shall procure the sale of the Vessel to the Buyers through a judicial sale (the "Sale") at a court of competent jurisdiction (the "Court"), subject always to a grant of approval from the Court or the relevant officer of the Court (e.g. sheriff, marshal, bailiff or the equivalent) responsible for conducting judicial sale of vessels (the "Court Officer"). In such an event, the Sellers or its mortgagee bank, STANDARD CHARTERED BANK (HONG KONG) LIMITED (the "Mortgagee") shall make the necessary application(s) to the Court to effect the Sale as soon as practicable (the "Application").

The Sale, if granted, shall be conducted on the terms and conditions set by the Court or the Court Officer in conjunction with an order for sale made by the Court. The Buyers agree that they shall:-

(a) enter into and perform such agreements required by the Court and/or the Court Officer;

(b) provide any necessary documentation, including an offer letter to the Court and/or the Court Officer stating the Purchase Price herein as the offer price; and

(c) taking delivery of the Vessel on such date as is designated by the Court and/or the Court Officer or on the earliest date within such period as is designated by the Court and/or the Court Officer (as the case may be).

Should the Buyers enter into any terms and conditions governing the Sale with the Court and/or the Court Officer, the Buyers shall abide by the terms and conditions stipulated (the "Court Terms") notwithstanding if such Court Terms are inconsistent with the terms in this Agreement. The Court Terms shall override and supersede the terms and conditions stated in this Agreement, save for Clause 16 and Clause 20.

This Agreement shall terminate with effect from:

(a) the date on which the Application is granted and the Buyers have entered into all agreements required to by the Court and/or the Court Officer for the Sale to be legal and binding;

(b) the date on which the Application is denied;

(c) the date on which the Application is withdrawn by the Sellers or the Mortgagee; or

> (d) the date falling 8 weeks after the Application is made, if it has not been granted by that time,
>
> whichever is earlier, or such other date as mutually agreed in writing between the Buyers and Sellers. This Agreement shall be deemed to be null and void and neither Party shall have a claim against the other Party for any losses suffered.

22 On 5 July 2023, Natixis and Societe Generale sought the court's leave to amend OS 902 and OS 903, to account for the sale of the Vessel to Genial Marine, which the plaintiffs allege was on the terms of the MOA. On 12 July 2023, HSBC did the same in respect of OS 23.

23 Leave was given to the plaintiffs to amend the reliefs they sought, following which the plaintiffs seek the following reliefs in each of the (amended) OS Proceedings:

(a) A declaration that each of the plaintiffs has security in the Vessel for their respective claims in the Admiralty Actions arising from the filing of the writs in the Admiralty Actions (collectively, the "Admiralty Writs"), and that each of the plaintiffs is a creditor of the third defendant within the meaning of s 115 of the IRDA.

(b) A declaration that by reason of the filing of the Admiralty Writs, the Vessel is a property of the third defendant which is subject to a security under s 100(2)(*a*) of the IRDA, and that the first and second defendants as the judicial managers of the third defendant are not permitted or otherwise entitled to dispose of the Vessel without authorisation by an order of the court under s 100(2) of the IRDA.

(c) A declaration that the first and second defendants as the judicial managers of the third defendant have, in selling the Vessel to Genial Marine on the terms of the MOA, and/or in procuring, instructing,

assisting, facilitating and/or allowing the Vessel to sail from the region of the southern coast of West Malaysia to Gibraltar and/or the arrest and/or judicial sale of the Vessel in a jurisdiction other than Singapore without authorisation by an order of the court under s 100(2) of the IRDA, acted in breach of s 100(2) of the IRDA and/or in a manner that is or was unfairly prejudicial to the interests of the plaintiffs and other creditors of the third defendant under s 115 of the IRDA.

(d) An order that the first and second defendants as the judicial managers of the third defendant shall provide:

(i) an account of all expenses incurred by the defendants (or any one or more of them) in selling the Vessel to Genial Marine as aforesaid and/or in instructing, assisting, facilitating and/or allowing the Vessel to undertake the voyage to Gibraltar; and

(ii) the purposes of judicial management which the first and second defendants seek to promote by selling the Vessel to Genial Marine as aforesaid and/or by instructing, assisting, facilitating and/or allowing the Vessel to undertake the voyage to Gibraltar and/or the arrest and/or judicial sale of the Vessel in a jurisdiction other than Singapore, by reference to s 100(2) read with s 89 of the IRDA.

(e) An order that if the Vessel is or has been disposed of by the defendants (or any one or more of them) without authorisation by an order of the court under s 100(2) of the IRDA, the net proceeds of the disposal shall be held as a separate fund and/or applied by the defendants (or any one of them) subject to the plaintiffs' security rights and interest in the Vessel, or in accordance with ss 100(5)(*a*) and/or 100(6) of the

IRDA, to be determined by the court or in any other manner the court thinks fit for giving relief in respect of the matters complained of.

(f) An order that if the Vessel is or has been disposed of other than by the defendants (or any one or more of them) whether by judicial sale or private sale or otherwise, the net proceeds (if any) of the disposal paid or payable to the defendants (or any one or more of them) shall be held as a separate fund and/or applied by the defendants (or any one of them) subject to the plaintiffs' security rights and interest in the Vessel, or in accordance with ss 100(5)(*a*) and/or 100(6) of the IRDA, to be determined by the court or in any other manner the court thinks fit for giving relief in respect of the matters complained of.

The parties' cases

24 In sum, the plaintiffs' case is that:[33]

(a) They have security in the Vessel for their claims in the Admiralty Actions arising from the filing of the Admiralty Writs.

(b) The first and second defendants acted in breach of s 100(2) of the IRDA and/or in a manner that was unfairly prejudicial to the interests of the plaintiffs under s 115 of the IRDA by carrying out the following acts without authorisation by an order of the court under s 100(2) of the IRDA:

(i) selling the Vessel to Genial Marine on the terms of the MOA; and/or

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[33] Written Submissions of Natixis and Societe Generale at para 168; Written Submissions of HSBC at para 1.1.5.

(ii) procuring, instructing, assisting, facilitating and/or allowing:

(A) the Vessel to be sent on the voyage to Gibraltar; and/or

(B) the arrest and/or judicial sale of the Vessel in Gibraltar.

(c) The plaintiffs are therefore entitled to, among other reliefs, an order that the net proceeds of the sale of the Vessel should be held as a separate fund and/or applied by the defendants subject to the plaintiffs' security rights and interests in the Vessel, or in accordance with ss 100(5)(*a*) and 100(6) of the IRDA. In this regard, the plaintiffs argue that the court has the jurisdiction to grant such relief based on the principle in *Ex parte James; In re Condon* (1874) LR 9 Ch App 609 ("*Ex parte James*"), which is that the court will not permit its officers to act in a way which although lawful and in accordance with enforceable rights, does not accord with the standards which right-thinking people, or society, would think should govern the conduct of the court or its officers.[34] Alternatively, the court also has the jurisdiction to grant such relief under s 115 of the IRDA.[35]

25 The gist of the defendants' case is that:

(a) The plaintiffs are not creditors of the third defendant and thus have no standing to bring claims under s 115 of the IRDA.[36]

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34 Written Submissions of Natixis and Societe Generale at paras 305–328; Written Submissions of HSBC at paras 6.1–6.5.

35 Written Submissions of Natixis and Societe Generale at paras 305, 329–342.

36 Defendants' Written Submissions at paras 6–28.

(b) Any alleged breach of s 100(2) of the IRDA would not give the plaintiffs any private rights of action against the defendants as (i) s 100(2) of the IRDA is permissive and does not impose a statutory duty; and (ii) Parliament did not intend for aggrieved parties to have private rights of action against judicial managers under s 100(2) of the IRDA.[37]

(c) Section 100 of the IRDA is inapplicable in this case because:

(i) The Vessel was arrested by the Mortgagee and sold by way of a judicial sale in Gibraltar; thus, the defendants did not dispose of the Vessel.[38] In this regard, the MOA was merely or akin to a "letter of comfort" and was never intended to be effective to conduct and/or conclude any sale of the Vessel.[39]

(ii) If the plaintiffs' primary case is to be accepted, *ie*, that the sale of the Vessel was in fact conducted by the first and second defendants pursuant to the MOA, then all that means is that the Vessel was not sold as if it was not subject to the security. The issuance of the *in rem* writs caused statutory liens to accrue to the plaintiffs, and since such statutory liens cannot be defeated by a change of ownership, they would still remain enforceable against Genial Marine.[40]

(d) As for the plaintiffs' reliance on the principle laid down in *Ex parte James*, while it conceptually provides a free-standing ability to seek curial intervention, the threshold for the principle to apply is a high

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37 Defendants' Written Submissions at paras 29–54.

38 Defendants' Written Submissions at para 58.

39 Defendants' Written Submissions at paras 59–64.

40 Defendants' Written Submissions at paras 65–78.

one, which requires the judicial manager's and/or liquidator's conduct to be plainly wrong.[41]

Issues to be determined

26 Based on the key arguments raised by the parties, I consider that the following issues arise for my determination in the OS Proceedings:

(a) In relation to s 100 of the IRDA:

(i) Whether by reason of the filing of the Admiralty Writs, the Vessel was a property of the third defendant which was subject to a security under s 100(2)(*a*) of the IRDA?

(ii) Whether there was a disposal of the Vessel by the first and second defendants as if she was not subject to security?

(iii) Whether the court's sanction is required under s 100(2) of the IRDA, *ie*, does s 100(2) of the IRDA impose a statutory duty?

(iv) Whether failure by a judicial manager to obtain sanction under s 100(2) of the IRDA is actionable by the holder of the security?

(b) In relation to s 115 of the IRDA:

(i) Whether the plaintiffs were creditors of the third defendant or otherwise had standing to obtain relief under s 115 of the IRDA?

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41 Notes of Arguments, 10 October 2023, at p 14 ln 23–26; Notes of Arguments, 11 October 2023, at p 8 ln 19–p 9 ln 18.

(ii) If the court decides that the plaintiffs were creditors of the third defendant or otherwise had standing to obtain relief under s 115 of the IRDA, whether the plaintiffs should be granted relief under s 115 of the IRDA?

(c) Whether the principle in *Ex parte James* applies such as to warrant curial intervention?

27 Before delving into the issues, I should highlight that in their affidavits, written submissions and oral arguments, the plaintiffs devoted a considerable amount of time and effort to delving into the details of the factual evidence.[42] The court was brought through (in a fair amount of detail) the contents of affidavits filed by the judicial managers in other proceedings, and communications between the judicial managers, AlixPartners, and the Mortgagee. The plaintiffs sought to piece together their case on the overall picture that emerged from the evidence as to what transpired between, on the one hand, the judicial managers and their advisers *inter se* as well as with the Mortgagee (*ie*, what I would term as the "internal" or "inward facing" communications and deliberations) and, on the other, the judicial managers' interactions with the plaintiffs (*ie*, what I would term as the "external" or "outward facing" communications). Among others, the plaintiffs sought to demonstrate that (a) the Vessel was among several vessels in the Xihe Holdings/HLT group that were in fact sold by the judicial managers as part of a "structured sale programme" and (b) that in their internal deliberations, the judicial managers had considered and put forward to the Mortgagee a sale under s 100 of the IRDA as one of a number of possible options.

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42 See, for example, Written Submissions of Natixis and Societe Generale at paras 41–162.

28 However, ultimately, it is in my view unnecessary for the court to be saddled with the *minutiae* of the factual evidence or to come to any definitive conclusion on whether the Vessel was or was not part of the structured sale programme. This is because the key issues in this case do not really call for a detailed assessment of the evidence as such – they are more in the nature of questions of law. Thus, I have laid out the factual evidence only insofar as they may be necessary or relevant to addressing those questions. With this in mind, I turn now to the first issue.

Section 100(2) of the IRDA

Whether the Vessel was subject to a "security" within the meaning of s 100(2)(a) of the IRDA, by virtue of the plaintiffs issuing in rem writs against the Vessel?

29 To recapitulate, the plaintiffs contend and seek a declaration that by reason of the filing of the Admiralty Writs, the Vessel is a property of the third defendant which is subject to a security under s 100(2)(*a*) of the IRDA, and that the first and second defendants as the judicial managers of the third defendant are not permitted or otherwise entitled to dispose of the Vessel without authorisation by an order of the court under s 100(2) of the IRDA.

30 Section 100 of the IRDA provides:

> **Power to deal with charged property, etc.**
>
> **100.**—(1) The judicial manager of a company may dispose of or otherwise exercise the judicial manager's powers in relation to any property of the company, which is subject to a security to which this subsection applies, as if the property were not subject to the security.
>
> (2) Where, on application by the judicial manager of a company, the Court is satisfied that *the disposal* (with or without other assets or property)—

> (*a*) *of any property of the company subject to a security* to which this subsection applies; or
>
> …

would be likely to promote one or more of the purposes of judicial management under section 89(1), *the Court may by order authorise the judicial manager to dispose of the property*, as if the property were not subject to the security …

(3) Subsection (1) applies to any security that, as created, was a floating charge, and subsection (2) applies to *any other security*.

…

(5) It is a condition of an order made under subsection (2) that —

> (*a*) the net proceeds of the disposal must be applied towards discharging the sums secured by the security …; and
>
> (*b*) where the net proceeds of the disposal are less than the sums secured by the security …, the holder of the security … may prove on a winding up for any balance due to the holder ….

(6) Where a condition imposed under subsection (5) relates to 2 or more securities, that condition requires the net proceeds of the disposal to be applied towards discharging the sums secured by those securities in the order of their priorities.

(7) The judicial manager must give 7 days' notice, of an application by the judicial manager to the Court to dispose of property subject to a security under subsection (2), to the holder of the security …, and the holder … may oppose the disposal of the property.

(8) Where the Court makes an order under subsection (2), the judicial manager must lodge a copy of the order, within 14 days after the making of the order, with the Registrar of Companies.

(9) If the judicial manager, without reasonable excuse, fails to comply with subsection (7) or (8), the judicial manager shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $5,000 and also to a default penalty.

(10) Nothing in this section affects an application to the Court under section 115.

[emphasis added]

31 In my judgment, the Vessel is *not* property *subject* to "a security" within the meaning of s 100(2)(*a*) of the IRDA, simply by virtue of the plaintiffs issuing *in rem* writs against the Vessel. The corollary is that the first and second defendants as the judicial managers of the third defendant were not required to seek the court's authorisation to dispose of the Vessel in Gibraltar simply because the plaintiffs had issued *in rem* writs against the Vessel in Singapore. I have come to this conclusion for a number of reasons.

32 First, none of the cases or commentaries cited by the plaintiffs goes so far as to conclude that a claimant with an accrued statutory right of action *in rem* is (or is treated as), from the point of the *issuance* of the *in rem* writ, a party who holds or has *security* over the vessel.

33 In my view, a claimant who issues (or even serves) an *in rem* writ does not, merely by that act, hold security over the vessel. It is of course indubitably true that the issuance of an *in rem* writ causes a statutory right of action *in rem* (or a "statutory lien" as it is sometimes described) to accrue in favour of the claimant. The accrual of that statutory lien entitles the claimant to arrest and detain the ship (in Singapore) to obtain security for its *in rem* claim. That statutory lien is not defeated by any subsequent transfer of ownership of the ship (apart from one effected by a judicial sale) or subsequent dissolution of the shipowning entity: *Kuo Fen Ching and another v Dauphin Offshore Engineering & Trading Pte Ltd* [1999] 2 SLR(R) 793 ("*Kuo Fen Ching*") at [28], [32] and [33]. However, such a statutory lien holder only holds or obtains security in the true sense of the word when it arrests the vessel. As noted by the Court of Appeal in *Kuo Fen Ching* at [33], the action *in rem* is "a means of providing pre-judgment security", and at [28] that "[w]hat is clear is that ***once a vessel is arrested****, the ship, or the security provided in lieu of it,* ***represents pre-judgment security***" [emphasis added]. The security is thus the arrested ship,

or any alternative security (for example, a bank guarantee) provided in lieu of it.

34 In *The "Ocean Winner" and other matters* [2021] 4 SLR 526 ("*The "Ocean Winner"*"), Ang Cheng Hock J (as he then was) held that "[b]y filing the admiralty *in rem* writ, the plaintiff is also seeking to *create* its security interest in the ship, *ie*, a statutory lien" [emphasis in original] (at [60]). In my view, the reference by Ang J (as he then was) to "security interest" does not mean that an *in rem* writ claimant holds security over the vessel simply by virtue of filing an *in rem* writ; rather, and as I mentioned above, the statutory lien creates *the means to obtain security*, *ie*, by enabling the claimant to arrest the ship. The learned judge's statement and use of the phrase "security interest" must accordingly be read and understood in its proper context. At [61]–[62] of *The "Ocean Winner"*, Ang J was addressing the point that a claimant's right to procure a statutory lien, granted by s 4(4) of the HCAJA, is potentially at risk of being destroyed by the shipowners if the claimant does not file its admiralty *in rem* writ in time. This is because s 4(4) of the HCAJA requires that, at the time when the action is brought, the person who would be liable on the claim in an action *in personam* is either the beneficial owner of that ship as respects all the shares in it or the charterer of that ship under a charter by demise. Section 4(4) of the HCAJA provides:

> **Mode of exercise of admiralty jurisdiction**
>
> **4.**—
>
> …
>
> (4) In the case of any such claim as is mentioned in section 3(1)(*d*) to (*q*), where —
>
> (*a*) the claim arises in connection with a ship; and
>
> (*b*) the person who would be liable on the claim in an action in personam (referred to in this subsection as the relevant person) was, when the cause of action arose,

> the owner or charterer of, or in possession or in control of, the ship,
>
> an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the General Division of the High Court against —
>
> (*c*) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of that ship under a charter by demise; or
>
> (*d*) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

It follows that if a claimant is unable to validly file an admiralty *in rem* writ to even create its statutory lien, then in a case where a ship is under a demise charter, the shipowner can defeat the claimant's *in rem* claim by terminating the bareboat charters with the charterers' agreement and accepting physical redelivery of the vessel before the writ is filed, with the consequence that no action *in rem* may be brought. Accordingly, by filing the admiralty *in rem* writ, the claimant seeks to secure its interest in the ship, by first creating a statutory lien (*ie*, "security interest") that entitles the claimant to arrest and detain the ship as actual security for its *in rem* claim. In my view, that is the context in which the learned judge's use of the phrase "security interest" is to be understood.

35 The plaintiffs relied on the case of *In Re Aro Co Ltd* [1980] Ch 196 ("*Re Aro*") in support of their position that the plaintiffs had, upon issuance of the Admiralty Writs, security in the Vessel since they would have been a secured creditor. In particular, I was referred to the following passages in the judgment:[43]

> At pp 207H–208B

[43] Written Submissions of Natixis and Societe Generale at para 229; Written Submissions of HSBC at para 5.3.6; Notes of Arguments, 10 October 2023, at p 4 ln 26–29.

> The usual object of suing in rem is to obtain security. The plaintiff becomes entitled upon the institution of his suit to the arrest and detention of the subject matter in the custody of an officer of the court pending adjudication, and on adjudication in his favour to a sale and satisfaction of his judgment out of the net proceeds thereof, subject to other claims ranking in priority to or pari passu with his own. So stated, the rights of a plaintiff suing in rem have points of similarity with the rights of a legal or equitable mortgagee or chargee; such persons are also entitled in appropriate circumstances to have the subject matter of the charge preserved for their benefit, and if the account is in their favour to have it sold in order to satisfy the debt. The similarity is carried a stage further by the decision in *The Monica S.* [1968] P. 741, where it was held that the burden of the statutory right of action in rem in a case under section 3(4) of the Administration of Justice Act 1956 ran with the ship so as to enable the plaintiff to serve the writ on the ship notwithstanding a transfer of ownership since the writ was issued. It must follow from that decision that the plaintiff in rem is entitled to have the ship arrested despite change in ownership, and notwithstanding that the writ has not been served.
>
> At p 209B–D

> In our judgment there is no particular reason for equating the date of the creation of the status of a secured creditor with the date of when the Admiralty jurisdiction can be said to be "invoked" for the purposes of section 3 of the Administration of Justice Act 1956. It seems more logical to test the position of the plaintiffs by asking whether, immediately before the presentation of the winding up petition, they could properly assert as against all the world that the vessel Aro was security for their claim, not whether they could assert that they had invoked the jurisdiction of the Admiralty Court within the meaning of section 3 of the Act of 1956. If it is correct to say, as was not challenged in the court below and is not challenged in this court, that after the issue of the writ in rem the plaintiffs could serve the writ on the *Aro*, and arrest the *Aro*, in the hands of a transferee from the liquidator and all subsequent transferees, it seems to us difficult to argue that the *Aro* was not effectively encumbered with the plaintiffs' claim. In our judgment the plaintiffs ought to be considered as secured creditors for the purpose of deciding whether or not the discretion of the court should be exercised in their favour under section 231.

36 Those passages should also be read and understood in their proper context. The question before the court there was whether the applicant should be given leave, under the English equivalent of s 133 of the IRDA to continue with its action *in rem* in England, in circumstances where (a) the shipowning entity was under compulsory liquidation, (b) the vessel had already been arrested in England and sold judicially at the instance of another creditor, and (c) the applicant had not served its own *in rem* writ but had merely filed a caveat against release. The focus of the court was whether the applicant could, if it so wished, take steps to arrest the vessel even if the shipowner became insolvent subsequent to the issuance of the writ. It is in that context that the court then held that it was prepared to treat the applicant as a "secured creditor" for that purpose (*ie*, whether to grant leave for the action *in rem* to be continued). It would, in my view, be misreading *Re Aro* to conceive the case as authority for the proposition that by the mere issuance of the *in rem* writ, the claimant *is already* in possession of security or, in the language and context of s 100(2)(*a*) of the IRDA, that the vessel in question *is* "subject to *a security*" [emphasis added].

37 Therefore, in my judgment, it is not correct for the plaintiffs to contend that an admiralty *in rem* writ, in and of itself, *creates* security *in* the vessel or renders a vessel "subject to a security" – such an interpretation involves giving the words "subject to a security" and "subject to the security" in s 100(2) of the IRDA a strained reading. Rather, the admiralty *in rem* action is merely "a *means* of providing a prejudgment security for a plaintiff with a claim against the ship" [emphasis added] (*Kuo Fen Ching* at [33]). It is ultimately the arrested ship, or the security provided in lieu of it, that is the security for an *in rem* claim – the arrest of the ship is the means to that end.

38 Counsel for Natixis and Societe Generale, Mr Collin Seah, also relies on the following passage in DC Jackson, *Enforcement of Maritime Claims* (Routledge, 4th Ed, 2006) ("DC Jackson") (at paras 19.10–19.11) to buttress his clients' position:

> … the issue of an *in rem* claim form means that … the claimant becomes a secured creditor. … Whether all claims attracting an action *in rem* should be classified together as having identical characteristics is a question to be debated; but, with enforcement against third parties and the ***holder having the status of secured creditor, the basic right can hardly be described as simply 'one of several alternative modes of procedure'. It is proprietary.***
>
> This is not to say that the action *in rem* as such is not also a method of procedure. It is the means of asserting an interest – that interest being a maritime lien, a statutory lien, or a proprietary right itself. The error is to equate the statutory lien with the method of enforcement – an error, particularly liable to occur when the lien is created by the issue of the *in rem* claim form. ***In that context the same act creates the interest as initiates the enforcement process.***
>
> [emphasis added in bold italics]

39 In my view, it is clear that an admiralty *in rem* claimant has some form of proprietary interest in the vessel, by virtue of issuing the *in rem* writ. However, in my judgment, that interest is not equivalent to holding security over or in the vessel. Again, context is key and as the Court of Appeal itself observed in *Diablo Fortune Inc v Duncan, Cameron Lindsay and another* [2018] 2 SLR 129 at [45], "the phrase 'proprietary interest' has different meanings in different contexts, and it would be 'delusive exactness' to come up with a universal definition". In my judgment, the status of an *in rem* claimant being equated to a "secured creditor" (*per Re Aro*) or "proprietary" (*per* DC Jackson) is more correctly attributable to the fact, as I have explained above, that the moment the *in rem* writ is issued, the claim and right to obtain security (*ie*, by the admiralty procedural mechanism of arresting the vessel against which the *in rem* writ is issued) is not defeated by any subsequent change(s) in

ownership (barring one following a judicial sale) or even the winding up and/or dissolution of the shipowner. That interest or right accrued to an *in rem* claimant is "secured" or "proprietary" *in that sense*. I do not read the passage from DC Jackson at [38] above as suggesting otherwise or elevating the status of an *in rem* claimant to a party who in fact has security in or over the vessel concerned the moment the *in rem* writ is issued.

40 Further, it bears mentioning that the nature of the interest that an admiralty *in rem* claimant with an accrued statutory lien has in the vessel is unlike that of, for instance, a mortgagee and/or chargee where the security over the vessel is *created* by the mortgage or charge, and where any subsequent admiralty action *in rem* commenced by the mortgagee or chargee to enforce its mortgage/charge can be characterised as a true enforcement of the security that the mortgagee and/or chargee *already* has in or over the vessel. On the other hand, in the case of a statutory lienee (*ie*, one arising pursuant to s 3(1)(*d*)–(*q*) read with s 4(4) of the HCAJA*),* the *in rem* writ *merely encumbers* the vessel with the statutory lien, and thus it may be said that in that sense, an *in rem* claimant has a proprietary interest in the vessel – but again, the encumbrance or interest created simply means that the claim (and the right to obtain security by way of an arrest) is not defeated by any subsequent changes of ownership (barring one by a judicial sale) or the insolvency/dissolution of the shipowning entity.

41 Indeed, Prof William Tetley in William Tetley, *International Maritime and Admiralty Law* (Éditions Y. Blais, 2002) described the statutory right of action *in rem* as follows (at p 482) (referred to with approval in *The "Setia Budi"* (High Court of Malaya at Kuala Lumpur) (unreported) ("*The "Setia Budi"*") at [67]):

> A statutory right *in rem*, unlike traditional maritime lien, arises only from the time of arrest of the ship (or, in the United Kingdom, from the time of the issue of the writ of arrest) … ***Rather than being a substantive property right in the ship emanating from the general maritime law, the statutory right in rem is purely procedural remedy conferred by statu[t]e allowing for arrest of the vessel in an action in rem as security for a maritime [claim]***.
>
> [emphasis added in bold italics]

42 A similar comment is made in Roy Goode, *Goode on Commercial Law* (Ewan McKendrick ed) (LexisNexis, 5th Ed, 2016) ("Goode on Commercial Law") in describing "procedural securities" (at paras 22.73–22.74):

> 22.73
>
> A party whose claim is purely personal may nevertheless be able to invoke court procedures by which moneys or other assets of his opponent are taken into the custody of the law, either to abide the outcome of the action or for the purpose of enforcing a judgment or order in favour of the claimant. ***The effect of the attachment is to make the assets in question a security for the claimant*** to which he can have recourse for satisfaction of his judgment even if the other party has meanwhile become bankrupt or gone into liquidation.
>
> 22.74
>
> Among the acts giving rise to a procedural security are: the issue of an Admiralty writ *in rem*; the payment of money into court, whether in fulfilment of a condition of leave to defend or in satisfaction of the claimant's claim or in compliance with an order for security for costs; the payment into court of a fund, or surrender into legal custody of other property, the subject of the action pursuant to an interim order for detention, custody or preservation of the fund or property; the appointment of a receiver of property by the court at the behest of the claimant; and the attachment of an asset by way of execution.
>
> [emphasis added in bold italics]

While the first sentence of para 22.74 suggests that the *issuance* of an *in rem* writ gives rise to a "procedural security", the accompanying footnote thereto refers to the case of *Re Aro*, which, as I have explained above (at [35]–[37]), does *not* stand for the proposition that the plaintiffs in that case had, upon

issuance of the *in rem* writ, security in the vessel. To borrow the words of Goode on Commercial Law at para 22.73, it is the actual "attachment" (or arrest in admiralty parlance) that renders the vessel "a security".

43 In the same vein, I also agree with the following observations made by Ong Chee Kwan J in *The "Setia Budi"* (at [68]):

> … ***(1) the nature of the statutory right in rem is purely a procedural remedy and not a substantive remedy. They are rights granted by statute to arrest a vessel in an action in rem to obtain a security for the maritime claim that is in essence in personam in nature.*** It is a procedural device to force the owner of the vessel to appear and to submit to the jurisdiction of the Court … (3) they do not travel with the ship in the sense that if the ship is sold before [] the writ *in rem* is issued, the statutory right *in rem* is extinguished. Hence, they are secured claims only *after* the writ *in rem* is issued prior to the change of ownership (4) in the case of distribution of the proceeds of the vessel in a judicial sale, the statutory right *in rem* ranks after the ship mortgage and much lower than maritime liens.
>
> [emphasis in bold italics added]

44 Moreover, it is trite that a statutory lien resulting from the issuance of an *in rem* writ is only valid or effective *in Singapore*, *ie*, it can only be enforced by an arrest of the vessel in question in Singapore and not anywhere else – there is no extra-territorial admiralty *in rem* jurisdiction. Therefore, an admiralty *in rem* claimant does not possess any "proprietary" or "security" interest over the vessel concerned anywhere else in the world. In my view, it is therefore illogical to construe a statutory lien as constituting security over the vessel because *true security* follows the vessel wherever it sails – for instance, a mortgagee of the vessel holds security over the vessel which may be enforced anywhere in the world where the vessel in question may be found, and irrespective of whether the vessel is or is not subject to a demise charter. That is not the case for an *in rem* writ claimant who issues a writ here and has an accrued statutory lien. That statutory lien only has effect in Singapore and does not encumber the vessel

anywhere else in the world. If the plaintiffs' submissions are right, it would effectively mean that s 100(2)(*a*) of the IRDA requires the judicial manager of a shipowning company to seek the court's authorisation to dispose of the company's ship outside of Singapore if the ship is the subject of an admiralty *in rem* writ issued in Singapore, even though statutory liens created under s 4(4) of the HCAJA only have any effect on that ship within Singapore. In turn, that would mean that admiralty *in rem* writs issued in Singapore would, effectively, encumber the ship in question anywhere else in the world.

45 I am unable to accept that s 100(2)(*a*) should be interpreted as having such an effect. In my view, it does not and to hold otherwise would be illogical and run counter to established principles of admiralty law. In my judgment, there is no suggestion in s 100(2)(*a*) of the IRDA or any of the available, relevant interpretive evidence that Parliament intended or envisaged the provision having such an effect, either generally or specifically with reference to ships subject to statutory liens under the HCAJA. Nor have the plaintiffs cited any authority where s 100(2)(*a*) of the IRDA (or its equivalent in other jurisdictions) has been applied with such width.

46 Finally, the conclusion I have reached on this question is, in my view, also consistent with the intention of Parliament and the meaning of the words "subject to a security" or "subject to the security".

47 It is not disputed that the words "subject to a security" or "subject to the security" in s 100 of the IRDA are not defined and are open to competing interpretations. Accordingly, under s 9A(3) of the Interpretation Act 1965 (2020 Rev Ed), regard may be had to the Minister's speech during the second reading

of the bill.[44] The predecessor to s 100 of the IRDA was s 227H of the Companies Act (Cap 50, 1988 Rev Ed) ("Companies Act 1988"). During the second reading of the Companies (Amendment) Bill (Bill No. 9/1986) ("Companies (Amendment) Bill"), Dr Hu Tsu Tau, the (then) Minister for Finance said in relation to what was to become s 227H of the Companies Act 1988 (*Singapore Parliamentary Debates, Official Report* (5 May 1986) vol 48 at col 40 (Hu Tsu Tau, Minister for Finance)):

> … A key element in a company rescue is the provision of a breathing space during which plans can be put together to achieve the purposes just mentioned. The judicial management procedure, accordingly, provides for a statutory moratorium on all actions and proceedings against a company. Government is also aware, however, of the *danger of undermining prudent lending practice by prejudicing creditors' rights to enforce their security. Special provision is therefore made in section 227H to give recognition to the rights of secured lenders. With the approval of the Court, the judicial manager may dispose of the property subject to security, other than those under floating charge and the net proceeds of the disposal would be applied towards discharging the sums secured by that security.*
>
> [emphasis added]

48 I am keenly conscious that the court should not use the Minister's speech to trump the actual words used in s 100 of the IRDA (or s 227H of the Companies Act 1988) but the speech does, in my view, give an indication of the kind of security that Parliament had in mind and the class of persons the section was intended to target. While I am not suggesting that "secured lenders" is the only class that the provision is meant to cater to, it at least fortifies the conclusion I have reached that it was not intended to extend to admiralty *in rem* claimants in the position of the plaintiffs.

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[44] Written Submissions of Natixis and Societe Generale at paras 177–180.

49 In my view, to equate or elevate the interest or status that the plaintiffs had acquired upon the issuance of the Admiralty Writs to that of having or holding security in or over the Vessel would be stretching the language of the phrases "subject to a security", "holder of the security" and/or "subject to the security" in s 100 of the IRDA too far. I therefore disagree that simply by virtue of the Admiralty Writs being issued, the Vessel was a property "subject to a security" within the meaning of s 100(2)(*a*) of the IRDA.

50 My conclusions above are sufficient to dispose of the plaintiffs' claims that are premised on s 100(2) of the IRDA. In my judgment, the provision is simply not applicable to the plaintiffs for the reasons I have given above. However, for completeness, and since I heard arguments on them, I will state my views on the other issues that were raised in the OS Proceedings relating to s 100(2) of the IRDA.

Did the first and second defendants dispose of the Vessel?

51 Even if it is the case that the Vessel was "subject to a security" by reason of the Admiralty Writs, I am doubtful whether the first and second defendants as judicial managers could be said to have disposed of the Vessel for s 100(2) of the IRDA to be engaged. It is not in dispute that the Vessel was ultimately sold to Genial Marine via a judicial sale by the Gibraltar courts. Following an order of the Gibraltar courts, the Gibraltar Admiralty Marshall sold the Vessel to Genial Marine and transferred ownership to it – these were juridical acts following the steps taken by the Mortgagee to commence the *in rem* proceedings in Gibraltar and arrest the Vessel there (see [14] and [18]–[19] above).

52 The plaintiffs contend that nonetheless, the first and second defendants did dispose of the Vessel as if she was not subject to security (in breach of s 100(2)(*a*) of the IRDA) by selling her to Genial Marine on the terms of the

MOA. The effect of cll 9 and 21 of the MOA (see [21] above) was that the first and second defendants agreed to sell the Vessel to Genial Marine on terms that she would be delivered by way of a judicial sale in order to deliver her free of encumbrances. Therefore, the judicial sale of the Vessel in Gibraltar was, the plaintiffs contend, merely the means or mode of performing the terms of the MOA.[45] On the other hand, the defendants' position is that the MOA was, in substance, merely a letter of comfort to address the Mortgagee's concern that there would be no bids for the Vessel and/or that any bid received may be lowered after the Vessel had arrived in Gibraltar.[46] Further, the MOA, by virtue of cl 21, was not effective to conduct and/or conclude any sale of the Vessel as the MOA would have been terminated whichever way the Gibraltar court had decided on the Mortgagee's application for a sale of the Vessel.[47]

53 As a preliminary comment, the MOA was, in my view, not merely a letter of comfort as contended by the defendants. For that matter, nor was it a sham – it was a legally binding agreement and no one suggested otherwise; the fact that it may have been subject to the Gibraltar court allowing the sale of the Vessel to Genial Marine did not make it any less so. In my judgment, however, it cannot be said that the MOA was the operative agreement under which or by which the Vessel was *disposed*. While I accept that the MOA was certainly an instrumental part of the process of sale, at the end of the day, it cannot be ignored that there was a judicial sale from the Gibraltar court to Genial Marine. In my judgment, that was the operative act of disposal, which quite clearly was not executed or performed by the first and second defendants.

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45 Written Submissions of Natixis and Societe Generale at paras 236, 257–258; Written Submissions of HSBC at para 2.5.6.

46 Defendants' Written Submissions at para 59.

47 Defendants' Written Submissions at paras 60–63.

54 The plaintiffs' submission that the judicial sale was merely the means by which the MOA was performed is, in my view, an artificial one. The clear intention under the MOA, as expressed in cl 21, was for (a) the Vessel to be arrested in Gibraltar, (b) the sale to Genial Marine to be approved by the Gibraltar courts, and (c) the Vessel to be sold by the Gibraltar courts (through its Sheriff/Marshall) to Genial Marine.

55 Further, the plaintiffs place heavy emphasis on the Mortgagee's role – in particular, whether the Mortgagee actively initiated the sale or was a mere passenger taking instructions and direction from the first and second defendants.[48] In my view, whether the Mortgagee was an active or docile participant is not material. The fact remains that the Mortgagee had to arrest the Vessel (and agree to do it) in order for any part of the process leading to the judicial sale of the Vessel to go forward. Whether reluctantly or with trepidation, the Mortgagee did arrest the Vessel, irrespective of whether there were other motives or objectives. That act by the Mortgagee put in place the process by which the Vessel would be and was eventually judicially sold. If the Mortgagee had not arrested the Vessel, the judicial sale in Gibraltar would simply not have been possible.

56 Ultimately, the Vessel was sold by a foreign competent court. In fact, the whole plan behind sailing the Vessel to Gibraltar was for the Mortgagee to arrest the Vessel there and for the Gibraltar court to order the judicial sale by private treaty to Genial Marine at the price agreed in the MOA. In my judgment, the "property" (*ie*, the Vessel) was disposed of via a judicial sale by the Gibraltar court and not by the first and second defendants, as the plaintiffs contend. Thus,

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48 Written Submissions of Natixis and Societe Generale at paras 265–268; Written Submissions of HSBC at paras 4.4.2–4.4.3.

I am doubtful whether there was a disposal of property *by* the first and second defendants to speak of which was in breach of s 100(2)(*a*) of the IRDA.

Whether the court's sanction is required under s 100(2) of the IRDA?

57 On this question, I disagree with the defendants' submission that s 100(2) of the IRDA is a permissive provision and thus, the court's sanction is not required under s 100(2) of the IRDA.[49]

58 As I mentioned above at [47], the predecessor of s 100 of the IRDA is s 227H of the Companies Act 1988. In *Re Boonann Construction Pte Ltd* [2000] 2 SLR(R) 399, Judith Prakash J (as she then was) held that leave of the court is necessary in order for the judicial manager to dispose of any property which is subject to a security (at [9]–[10]):

> Among the powers granted to the judicial managers by the [Companies Act 1988] is the power to dispose of any property of the company which is subject to a security as if the property were not subject to the security. The relevant section is s 227H. In the case of property which is subject to a mortgage or a fixed charge (as is the case here), however, *the judicial manager can only dispose of the same with the leave of the court*. …
>
> It is notable that whilst the Act contemplates that there may be situations in which it would be in the interest of the company in judicial management that its property should be sold although the same is subject to a security, *the Act is at pains to protect the interests of the secured creditor*. It does this by providing for the net proceeds of sale to be paid to that creditor to discharge the company's obligation to it in priority to any other application of the funds. …
>
> [emphasis added]

59 I have referred at [47] above to the Minister's speech during the second reading of the Companies (Amendment) Bill where reference is made to giving

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[49] Defendants' Written Submissions at paras 29–54.

recognition to the rights of secured lenders. Notably, the predecessor of s 100(7) of the IRDA (see [30] above), namely s 227H(7)(*b*) of the Companies Act 1988, was not in the initial version of s 227H in the Companies (Amendment) Bill when it was moved during its second reading in Parliament. This amendment was proposed by the Select Committee on the Companies (Amendment) Bill with the following explanation (*Report of the Select Committee on the Companies (Amendment) Bill (Bill No 9/86)* (Parl 5 of 1987, 12 March 1987)):

> This amendment would ensure that *holders of security … would receive notice of the application of the judicial manager to dispose of property* which is subject to a security … and to *oppose their disposal*.
>
> [emphasis added]

60 In my view, it is clear from both the case law and legislative intent that s 100(2)(*a*) of the IRDA is meant to protect the interests of fixed security holders. I agree with the plaintiffs that this is given effect by:[50]

(a) providing that judicial managers can only dispose of property subject to fixed security with authorisation by an order of the court under s 100(2) of the IRDA; and

(b) ensuring that security holders have the opportunity to oppose the disposal of the property by:

(i) requiring judicial managers to give seven days' notice of the hearing of the application under s 100(2) of the IRDA, as provided for under s 100(7) of the IRDA; and

(ii) ensuring compliance with s 100(7) of the IRDA by providing in s 100(9) of the IRDA that it is an offence if without

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[50] Written Submissions of Natixis and Societe Generale at paras 182 and 281.

reasonable excuse, there is a failure by judicial managers to give the requisite seven days' notice under s 100(7) of the IRDA.

61 Accordingly, the court's prior sanction is required under s 100(2) of the IRDA.

Whether failure by a judicial manager to obtain sanction under s 100(2) of the IRDA is actionable by the holder of the security under that section?

62 On this issue, the failure by a judicial manager to obtain the court's sanction under s 100(2) of the IRDA is, in my view, *not* actionable by the holder of the security *under* s 100(2)(*a*) of the IRDA. Any right of action, if it does exist, would have to be pursued under or pursuant to s 115 of the IRDA. To be clear, I have concluded above at [29]–[50] that the plaintiffs do not even fall within the class of holders of security over the Vessel contemplated by s 100 of the IRDA. The discussion and analysis here do not detract from that conclusion.

63 The law is clear that a breach of statutory duty does not, in and of itself, give rise to a private right of action: *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another suit* [2009] 4 SLR(R) 788 at [211], citing *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 731:

> … in an ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. Such a cause of action can arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the *protection of a limited class* of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection

> the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory duty was intended to be enforceable by those means and not by private right of action …. However, the mere existence of some other statutory duty remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy.
>
> [emphasis in original]

64 In respect of s 100(2) of the IRDA, s 100(9) of the IRDA provides that if a judicial manager fails to comply with ss 100(7) or 100(8), the judicial manager shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $5,000 and also to a default penalty. For convenience, I reproduce the relevant provisions under s 100 of the IRDA:

> **Power to deal with charged property, etc.**
>
> **100.**—
>
> …
>
> (7) The judicial manager must give 7 days' notice, of an application by the judicial manager to the Court to dispose of property subject to a security under subsection (2), to the holder of the security or to the owner of the goods which are subject to any of the agreements mentioned in that subsection, and the holder or the owner (as the case may be) may oppose the disposal of the property.
>
> (8) Where the Court makes an order under subsection (2), the judicial manager must lodge a copy of the order, within 14 days after the making of the order, with the Registrar of Companies.
>
> (9) If the judicial manager, without reasonable excuse, fails to comply with subsection (7) or (8), the judicial manager shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $5,000 and also to a default penalty.
>
> (10) Nothing in this section affects an application to the Court under section 115.

65 Therefore, in relation to breaches of ss 100(7)–(8) of the IRDA, the statute clearly provides a means of enforcing the duty, which indicates that the statutory duty was intended to be enforceable by those means and not by private

right of action. Specifically in respect of the statutory obligation under s 100(2) of the IRDA, in my view, there is nothing to show that Parliament intended for the holders of security to have a private remedy.

66 Rather, it seems to me that s 115 of the IRDA (which I address in greater detail in the next section) is the provision that provides a statutory remedy, and which s 100(10) of the IRDA itself points to. Among others, s 115 of the IRDA protects the interests of creditors (which would *include* the holders of security over any property of the company) by expressly giving creditors the power to apply to the court for an order that the company's affairs, business and property are being or have been managed by the judicial manager in a manner that is or was unfairly prejudicial to the interests of its creditors or members generally (see [68] below).

67 Accordingly, I hold that any failure by a judicial manager to obtain the court's sanction under s 100(2) of the IRDA is not actionable at the instance of an aggrieved party under s 100(2) of the IRDA, but rather, under s 115 of the IRDA, which I now turn to.

Section 115 of the IRDA

Are the plaintiffs "creditors" of the third defendant under s 115 of the IRDA?

68 Section 115 of the IRDA provides:

> **Protection of interests of creditors and members**
>
> **115.**—(1) At any time when a company is in judicial management or interim judicial management, *a creditor or member of the company may apply to the Court for an order under this section on the ground —*
>
> > (*a*) that the company's affairs, business and property are being or have been managed by the judicial manager or

> interim judicial manager in a manner that is or was unfairly prejudicial to the interests of —
>
> (i) its creditors or members generally;
>
> (ii) some part of its creditors or members (including at least the applicant); or
>
> (iii) a single creditor that represents at least one quarter in value of the claims against the company;
>
> (*b*) that any actual or proposed act or omission of the judicial manager or interim judicial manager is or would be prejudicial in the manner mentioned in paragraph (*a*);
>
> …
>
> (2) On an application under subsection (1), the Court may —
>
> (*a*) make such order as the Court thinks fit for giving relief in respect of the matters complained of;
>
> (*b*) adjourn the hearing conditionally or unconditionally; or
>
> (*c*) make an interim order or any other order that the Court thinks fit.
>
> …
>
> [emphasis added]

69 The wording of s 115 of the IRDA is unequivocal in that it applies to, among others, creditors of the company "in judicial management". In my judgment, the plaintiffs are *not* "creditors" of the third defendant, Nan Chiau Maritime – in the context of the OS Proceedings, Nan Chiau Maritime is the relevant company "in judicial management" as far as s 115 of the IRDA is concerned. It bears reminding that the plaintiffs' claims are against *OTPL* (see [7] above). Therefore, the plaintiffs have no standing to seek the remedies provided for under s 115 of the IRDA against *Nan Chiau Maritime*.

70 I agree with Mr Thio Shen Yi SC, counsel for the defendants, that although the term "creditor" is not defined in the IRDA, it is understood to mean

a person who has a provable debt under s 218 of the IRDA.[51] In *DB International Trust (Singapore) Ltd v Medora Xerxes Jamshid and another* [2023] 5 SLR 773, Goh Yihan JC (as he then was) held, in the context of a winding up, that a "creditor" for the purposes of s 150 of the IRDA means a person who has a debt provable in the winding up of the company (at [57]). As s 218(2) of the IRDA does not apply different definitions to debts provable in a judicial management and a winding up, this reinforces the argument that the term "creditor" is intended to have the same meaning in the context of judicial management and winding up.

71 Evidently, the plaintiffs do not have any provable debts *vis-à-vis* the third defendant, Nan Chiau Maritime, within the meaning of s 218(2) of the IRDA, which provides:

> **Description of debts provable in judicial management or winding up**
>
> **218.**—
>
> (2) … the following are provable where a company is in judicial management or an insolvent company is being wound up:
>
> (*a*) any debt or liability to which the company —
>
> (i) is subject at the commencement of the judicial management or winding up, as the case may be; or
>
> (ii) may become subject after the commencement of the judicial management or winding up (as the case may be) by reason of any obligation incurred before the commencement of the judicial management or winding up, as the case may be;
>
> (*b*) any interest, on any debt or liability mentioned in paragraph (*a*), that is payable by the company in respect of any period before the commencement of the judicial management or winding up, as the case may be.

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51 Defendants' Written Submissions at para 8.

72 It is undisputed that the plaintiffs do not have any claims against Nan Chiau Maritime. Indeed, no proofs of debt were filed by the plaintiffs against Nan Chiau Maritime.[52] Rather, and as admitted by the plaintiffs, their underlying claims are the claims advanced in the Admiralty Writs. As I have explained above at [7], those claims are not against Nan Chiau Maritime but against OTPL who was the demise charterer of the Vessel, both at the time the plaintiffs' causes of action arose and when the Admiralty Writs were issued. OTPL is, as the plaintiffs themselves concede, the party who would be liable to them in an action *in personam*. Accordingly, it is unarguable that the plaintiffs cannot be considered creditors of Nan Chiau Maritime.

73 As the plaintiffs are not "creditors" within the meaning of s 115 of the IRDA, that section similarly does not avail the plaintiffs. Accordingly, the reliefs they seek pursuant to s 115 of the IRDA also do not avail them.

74 In any event, assuming I am wrong and that the plaintiffs do have standing to seek the remedies available under s 115 of the IRDA, I turn next to consider whether the actions and conduct of the first and second defendants as judicial managers (and officers of the court) rise to a level warranting the court's intervention.

Whether the actions of the first and second defendants rise to a level warranting the court's intervention under s 115 of the IRDA?

75 The question here is whether the first and second defendants had acted in a manner unfairly prejudicial to the plaintiffs. While the evidence shows that the judicial managers may not have been completely forthright in their communications with the plaintiffs (see [12]–[14] and [21] above), in my view,

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[52] Notes of Arguments, 10 October 2023, at p 19 ln 17–18.

that has to be viewed through the lens that, strictly speaking, the judicial managers did not owe any duty to the plaintiffs, as *in rem* writ claimants, in the first place. In one sense, the plaintiffs were in an adversarial position *vis-à-vis* Nan Chiau Maritime – while they were not creditors of Nan Chiau Maritime, the plaintiffs had accrued statutory liens against an asset of Nan Chiau Maritime. Bearing this in mind, I am loathe to conclude that the first and second defendants acted in a manner unfairly prejudicial to the plaintiffs.

76 As s 115 of the IRDA reflects, judicial managers owe a duty to the creditors and members of the company concerned. However, that must mean, concomitantly, that they do not owe any duty to *in rem* writ claimants who have no claim against the company concerned in the first place (but who may be a creditor of *another* related company). In the present case, it was up to the plaintiffs, as *in rem* writ claimants, to protect their own interests. Having issued the *in rem* writs in Singapore (and for some of the banks, in other jurisdictions as well), it was open to the plaintiffs to seek leave to prosecute their *in rem* actions and arrest the Vessel to obtain security for their *in rem* claims. This, the plaintiffs did not do.

77 While one might criticise the "cloak and dagger" approach of the judicial managers (I refer again, for example, to [12]–[14] and [21] above), in not being forthright to the plaintiffs (after the "cat was out of the bag") about the true destination of the Vessel when it was discovered by the plaintiffs to be ostensibly headed towards the Cape of Good Hope or the fact of the MOA having been entered into with Genial Marine, the judicial managers' conduct cannot, in my view, be said to unfairly prejudice the creditors and members of the company (*ie*, Nan Chiau Maritime). As I have alluded to above, *vis-à-vis* the *in rem* writ claimants, the judicial managers (standing in the shoes of Nan Chiau Maritime as the owner of the Vessel) could be said to be in an adversarial

position. If the first and second defendants had taken strategic steps with regard to the Vessel (*eg*, avoiding coming into Singapore or procuring the judicial sale of the Vessel in a foreign jurisdiction where the plaintiffs had not issued any *in rem* writs), that cannot be said to be a breach of the judicial managers' duties. This is particularly so since the plaintiffs were in substance a non-creditor "adverse party" in the sense that the plaintiffs possessed a statutory *in rem* right to arrest an asset of Nan Chiau Maritime (*viz*, the Vessel) for an underlying claim not against Nan Chiau Maritime but OTPL as the former demise charterer of the Vessel. In those circumstances, I see nothing legally objectionable in the judicial managers acting strategically to prevent the plaintiffs from taking steps to enforce their statutory liens against the Vessel. At the risk of repeating myself, it was for the plaintiffs (as an adverse party) to protect or secure their positions accordingly. In this regard, the available evidence indicates that the Vessel did call a number of times in Singapore after the Admiralty Writs were issued,[53] but it does not appear that the plaintiffs took any steps to secure their claims.

78 For the foregoing reasons, the first and second defendants did not, in my judgment, act in a manner unfairly prejudicial to the plaintiffs who were not creditors of Nan Chiau Maritime in the first place. In my view, it would also not be right or legally sound to impose a legal burden on judicial managers of a company to have regard to the interests of admiralty *in rem* statutory lien holders whose *in personam* claims are *not* against the company in judicial management.

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[53] 1LJY at pp 99–101.

Ex parte James

The applicable principles

79 The principle established by the decision of the English Court of Appeal in *Ex parte James* is that the court will not permit its officers to act in a way which, although lawful and in accordance with enforceable rights, does not accord with the standards which right-thinking people or, as it may be put, society would think should govern the conduct of the court or its officers: *Lehman Bros Australia Ltd v MacNamara and others* [2020] 3 WLR 147 ("*MacNamara*") at [35]. As a starting point, it is indisputable that a judicial manager or an interim judicial manager of a company is an officer of the court: s 89(4) of the IRDA. Accordingly, judicial managers may be subject to the *Ex parte James* principle.

80 Lee Seiu Kin JC (as he then was) observed in *Re PCChip Computer Manufacturer (S) Pte Ltd (in compulsory liquidation)* [2001] 2 SLR(R) 180 ("*Re PCChip*") that the court in *Ex parte James* appears to have relied not on any rule of law or equity in formulating the principle, but rather on the principle that a court would order its officers to act in an exemplary manner and do the right and proper thing (at [10]).

81 In my judgment, while the *Ex parte James* principle is a broad one and not applied rigidly, there must still be a principled application to the facts of the case. Otherwise, it has the potential to be a "free for all" principle that is resorted to as the panacea for anyone (whether or not a creditor) aggrieved by the actions of a judicial manager.

82 In this regard, although Lee JC (as he then was) held that the principle in *Ex parte James* is a statement of general policy that has not been reduced to

any rigid rule of law, nevertheless, the learned judge was of the view that the four conditions distilled by Walton J in *Re Clark (a bankrupt), ex p Trustee of the Property of the Bankrupt v Texaco* [1975] 1 All ER 453 provided the following guidance on the application of the principle (*Re PCChip* at [17] and [36]):

(a) There must be some form of enrichment of the assets of the estate by the claimant.

(b) The claimant must not be in a position to submit an ordinary proof of debt.

(c) In all the circumstances of the case, an honest person would consider that it would only be fair to return the money to the claimant.

(d) The principle applies only to the extent necessary to nullify the enrichment of the estate.

Application to the facts

83 In my judgment, the plaintiffs cannot rely on the *Ex parte James* principle in aid of a free-standing right to recover the net proceeds of the disposal of the Vessel in Gibraltar.

84 First, there has been no enrichment of the estate of the third defendant, Nan Chiau Maritime, at the expense of the plaintiffs. The plaintiffs simply commenced *in rem* actions against the Vessel by way of the Admiralty Writs – their underlying claims (which are in any event against *OTPL*) have not been adjudged. Further, and as I explained earlier (see [33]–[43] above), the plaintiffs' accrued statutory right of action *in rem* is a purely procedural remedy conferred by statute allowing the plaintiffs the right to arrest the Vessel in order

to obtain security for their claims. The plaintiffs did not exercise their rights to obtain security by arresting the Vessel in Singapore, and perhaps, they have to shoulder the blame for that. In my view, it cannot be said that there was enrichment of the estate of Nan Chiau Maritime *at the expense* of the plaintiffs.

85 Second, and more importantly, while some of the actions of the first and second defendants as judicial managers *vis-à-vis* the plaintiffs might, to an uninformed bystander, be characterised as lacking candour (see [77] above), their conduct does not, in my view, rise to a level of opprobrium that requires curial intervention under the *Ex parte James* principle. Pursuant to s 99(2)–(3) of the IRDA, the judicial managers were entitled to act as though they were the directors of Nan Chiau Maritime and were obliged to do such things as might have been necessary for the management of the affairs, business and property of Nan Chiau Maritime. The judicial managers were not, strictly speaking, obliged to sail the Vessel into any particular jurisdiction or to inform the plaintiffs what the plans for the Vessel were. Thus, the first and second defendants were well entitled to make strategic decisions about the Vessel without taking into account the interests of any *in rem* writ claimants who may have had an interest in arresting the Vessel themselves for claims against OTPL. Nan Chiau Maritime and OTPL were, after all, separate legal personalities.

86 Additionally, as I mentioned at [77] above, the judicial managers owe a duty to the creditors and members of the third defendant, Nan Chiau Maritime, whereas they do not owe a similar duty to the plaintiffs as non-creditor *in rem* writ claimants. In these circumstances, I cannot conclude on the evidence that the judicial managers acted contrary to the standards of right-thinking people or what society would think should govern the conduct of the court or its officers. In my view, it cannot be the case that just because the plaintiffs, as *in rem* writ claimants, feel aggrieved about the conduct of the judicial managers that curial

intervention is warranted. The *Ex parte James* principle does not stand for that proposition.

87 Further, the nature of the circumstances as well as the first and second defendants' conduct in the present case may be distinguished from that of the liquidators/judicial managers in the other cases that have applied the *Ex parte James* principle. For instance, in *Re PCChip*, money was mistakenly paid by a bank to the company in liquidation, such that the estate was clearly enriched. Therefore, the court directed the liquidators to return the money. In *MacNamara*, the focus was on the unfairness arising from the conduct of the administrators. An unsecured creditor entered into a claim determination deed pursuant to which its claim was agreed as £23.35m. However, due to a clerical error by the company's administrators, that figure was deficient by £1.67m. The administrators relied on a release clause in the deed to decline the request of the creditor to correct it. The Court of Appeal found that no right-thinking person would think it fair for the administrators to stand on their strict contractual rights and refuse to correct their mistake and was thus compelled to right the wrong of the administrators (at [103]).

88 Here, the first and second defendants may have acted strategically in order to facilitate or even encourage the arrest of the Vessel by the Mortgagee and the judicial sale in the Gibraltar courts; and may also have acted with the benefit of legal and other expert advice on, among others, Gibraltar maritime law. Be that as it may, their overall conduct as against the plaintiffs as non-creditor *in rem* claimants does not, in my view, rise to the level of misconduct and/or impropriety that attracts the application of the *Ex parte James* principle. Accordingly, I reject the plaintiffs' reliance on this principle.

Conclusion

89 For the reasons above, the plaintiffs' applications fail. As such, I dismiss OS 902, OS 903 and OS 23 with costs and shall hear the parties separately on costs.

90 Finally, it leaves me to thank Mr Seah, Mr Moses Lin (counsel for HSBC) and Mr Thio for their helpful submissions and assistance rendered to the court on the interesting questions that these applications raised for the court's consideration.

S Mohan
Judge of the High Court

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