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

[2022] SGHC 271

Suit No 1175 of 2019 (Summons No 2752 of 2022)

Between

Wang Aifeng

… *Plaintiff*

And

(1) Sunmax Global Capital Fund 1 Pte Ltd
(2) Li Hua

… *Defendants*

GROUNDS OF DECISION

[Insolvency Law — Bankruptcy — Bankruptcy effects]
[Insolvency Law — Bankruptcy — Permission to continue proceedings]

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v
Sunmax Global Capital Fund 1 Pte Ltd and another

[2022] SGHC 271

General Division of the High Court — Suit No 1175 of 2019 (Summons No 2752 of 2022)
Goh Yihan JC
5 October 2022

1 November 2022

Goh Yihan JC:

1 The plaintiff-applicant, Mr Wang Aifeng, sought permission from the court in the present application to continue proceedings in High Court Suit No 1175 of 2019 ("Suit 1175") against the second defendant, Mr Li Hua ("Mr Li"), pursuant to s 327(1)(*c*) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA"). The first defendant is Sunmax Global Capital Fund 1 Pte Ltd. Despite having been served with the relevant documents and hearing details, both defendants were absent at the hearing before me.

2 At the end of the hearing before me, and having carefully considered the applicant's submissions, I granted the applicant permission to continue proceedings in Suit 1175 against the second defendant. Because there has not been a reported local decision on how a court is to exercise its discretion to grant

permission under s 327(1)(*c*) of the IRDA, I now set out the full reasons for my decision in these grounds.

Background facts

3 By way of background, the first defendant is a company incorporated in Singapore. It is an investment holding company. It was an approved fund under the Global Investor Program administered by Contact Singapore.[1] Thus, investors could invest in the first defendant by subscribing to the first defendant's preference shares. The second defendant was a director and an authorised representative of the first defendant.[2]

4 The plaintiff's action in Suit 1175 against the defendants had come about in the following manner. The plaintiff had invested $1,500,000 in the first defendant on or about 15 March 2011.[3] The plaintiff's case is that he had invested in the first defendant in reliance of and being induced by the second defendant's representations.

5 In particular, the plaintiff alleged that the second defendant had provided the plaintiff with the terms and conditions for the subscription of preference shares in the first defendant which were set out in a Private Placement Memorandum dated 1 February 2009 (the "Memorandum"). The second defendant had done so at a marketing event held in Beijing, the People's Republic of China in 2009. In addition, the plaintiff also alleged that the second defendant had orally informed him that the terms set out in the Memorandum

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1 Affidavit of Wang Aifeng exhibited in the affidavit of Poon Chun Wai dated 25 July 2022 ("Mr Wang's Affidavit") at para 4.

2 Mr Wang's Affidavit at para 5.

3 Mr Wang's Affidavit at para 6.

would govern his investment and that the investment would be principal-guaranteed (exclusive of management fee). The second defendant's representations were allegedly consistent with the terms of the Memorandum, which, among others, provided that the plaintiff is entitled to receive the sum of $1,237,500 together with any investment returns and accrued interest by 15 March 2016.[4]

6 However, the plaintiff did not receive the promised investment returns. The defendants later denied that the investments in the first defendant were principal-guaranteed. The plaintiff therefore brought an action in Suit 1175 against the defendants in misrepresentation and/or unlawful means conspiracy. The plaintiff alleged that his loss amounted to $1,500,000, which is the amount of his investment.

7 Importantly for the present application, Suit 1175 was commenced against the first defendant on 13 November 2019. Mr Li was then added as the second defendant on 11 May 2020. After a series of interlocutory applications filed by the parties, both the plaintiff and the defendants were ready for trial by February 2022. In fact, on 7 April 2022, the Assistant Registrar directed the parties to exchange their affidavits of evidence-in-chief by 7 June 2022, and for trial to be fixed for six days in August 2022.[5]

8 However, on 6 May 2022, the second defendant filed a debtor's bankruptcy application in High Court Bankruptcy No 1122 of 2022 ("B 1122"). The second defendant was declared bankrupt on 28 June 2022.[6] In light of the

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4 Mr Wang's Affidavit at para 6.

5 Minute Sheet (Pre-Trial Conference) in HC/S 1175/2019 dated 7 April 2022.

6 Mr Wang's Affidavit at para 9.

second defendant's bankruptcy, the Registry vacated directions for trial. On 2 August 2022, Mr Farooq Mann of Mann & Associates PAC was appointed as the private trustee in bankruptcy of the second defendant.[7] Finally, on 19 May 2022, a judgment creditor of the defendants filed an application in CWU 116 of 2022 ("CWU 116") to wind up the first defendant.[8] I had heard that application on 5 August 2022 and ordered the first defendant to be wound up (see the High Court decision of *Song Jianbo v Sunmax Global Capital Fund 1 Pte Ltd* [2022] SGHC 229 at [24]).

The applicable law

Overview

9 With the above background in mind, I turned to the applicable law. In this regard, s 327(1)(*c*)(ii) of the IRDA ("s 327(1)(*c*)(ii)") provides that the court's permission is needed for legal proceedings to proceed against a bankrupt. Section 327(1)(*c*) of the IRDA provides as follows:

> **Effect of bankruptcy order**
>
> **327.**—(1) On the making of a bankruptcy order —
>
> …
>
> (*c*) unless otherwise provided by Parts 3 and 13 to 22 —
>
> (i) no creditor to whom the bankrupt is indebted in respect of any debt provable in bankruptcy has any remedy against the person or property of the bankrupt in respect of that debt; and
>
> (ii) no action or proceedings may be proceeded with or commenced against the bankrupt in respect of that debt,

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7 Mr Wang's Affidavit at para 14.

8 Mr Wang's Affidavit at para 15.

> except by the permission of the Court and in accordance with such terms as the Court may impose.

10 Section 327(1)(*c*)(ii) is largely identical with s 76(1)(*c*)(ii) of the now repealed Bankruptcy Act (Cap 20, 2009 Rev Ed). However, despite both provisions having been part of Singapore law for a considerable period of time, there has not been a local decision explaining in detail how a court is to exercise its discretion to grant permission for legal proceedings to proceed against a bankrupt. As such, I had to consider the policy behind the need for permission in outlining some relevant factors to guide my exercise of discretion to grant permission under s 327(1)(*c*)(ii).

The policy behind the need for permission for legal proceedings to proceed against a bankrupt

11 I turned first to the policy behind the need to apply for permission for legal proceedings to proceed against a bankrupt. In this regard, the Court of Appeal recently had occasion to comment on the purpose of s 327(1)(*c*) of the IRDA as follows (see *Ong Jane Rebecca v Lim Lie Hoa and other appeals and other matters* [2021] 2 SLR 584 at [68]):

> … The rationale behind the provision is to prevent a scramble of creditors going after the bankrupt and potentially violating the *pari passu* principle of distribution, which is a key pillar of our insolvency regime. That is why the provision confers on the court the discretion to grant leave, where appropriate, for such proceedings to continue, and to *impose conditions* to manage such litigation. …
>
> [emphasis in original]

12 Moreover, the Court of Appeal in *Overseas Union Bank v Lew Keh Lam* [1998] 3 SLR(R) 219 also observed (at [35]), albeit in relation to the predecessor section of s 327(1)(*c*)(ii) of the IRDA, that is, s 76(1)(*c*)(ii) of the Bankruptcy Act (Cap 20, 1996 Rev Ed), that the purpose of the requirement to

seek permission "was to prevent the liquidator's or administrator's task being made more difficult by a scramble among creditors to raise actions, obtain decrees or attach assets". A few years later, the Court of Appeal in *Caltong (Australia) Pty Ltd (formerly known as Tong Tien See Holding (Australia) Pty Ltd) and another v Tong Tien See Construction Pte Ltd (in liquidation) and another appeal* [2002] 2 SLR(R) 94 similarly stated as follows (at [51]):

> This court had in *Overseas Union Bank v Lew Keh Lam* [1998] 3 SLR(R) 219 stated that the purpose of s 76(1)(*c*)(ii) was to prevent the [liquidators'] or administrator's task from being made more difficult due to a scramble among creditors in taking action or obtaining decrees against the debtor or his assets. The requirement to obtain leave is to ensure that the court could guard against any inequity on account of such a scramble. …

13 Finally, the District Court in *JA v JB* [2005] SGDC 104 ("*JA v JB*"), albeit in the family law context, also had occasion to observe (at [13]) that s 76(1)(*c*)(ii) of the Bankruptcy Act (Cap 20, 1996 Rev Ed) "serves the purposes of the bankruptcy regime by preventing a multiplicity of actions erupting or bubbling [as a result of actions] which have been or would be filed by creditors in the (mistaken) belief that doing so will give them greater priority amongst all the unsecured creditors when the bankrupt's assets are distributed by the Official Assignee". The learned District Judge went further to observe (at [13]) that:

> Such a multiplicity of actions would waste the resources of the bankrupt's estate, distract the Official Assignee from his real task of gathering in and managing the bankrupt's assets, and, ultimately, delay the distribution of the bankrupt's assets to the creditors. …

14 However, apart from these general statements on the policy behind s 327(1)(*c*)(ii) and its predecessor provision, there does not appear to have been any other local decision explaining the relevant factors a court should consider when deciding whether to grant permission for legal proceedings to proceed

against a bankrupt (see, for example, the High Court decision of *Liu Yanzhe and another v Tan Eu Jin and others* [2019] SGHC 67 at [22]). That said, it is clearly important to bear these general statements in mind when considering the relevant factors to guide the exercise of discretion to grant permission under s 327(1)(*c*)(ii).

15 More importantly, in my respectful view, the lack of a local decision explaining the relevant factors cannot mean that the discretion under s 327(1)(*c*)(ii) should be exercised absolutely with no rational basis. I agreed with V K Rajah JC (as the learned judge then was), who had said in the seminal High Court decision of *Korea Asset Management Corp v Daewoo Singapore Pte Ltd (in liquidation)* [2004] 1 SLR(R) 671 ("*Korea Asset Management*") that the discretion (in relation to the grant of permission to continue or commence proceedings against companies being wound up) "has to be exercised rationally in the context of the insolvency scheme" (at [45]). However, as the learned judge noted, it is important in my view to recognise that none of any such identified factors should be viewed as being decisive alone, nor should the factors be construed as fetters on the discretion conferred by the statutory provision (see *Korea Asset Management* at [46]).

The relevant foreign authorities

16 Given that the principles in Singapore are not well discussed, I also found it helpful to refer to the foreign jurisprudence stemming from the United Kingdom ("UK") and Australia.

17 I begin with the UK position. The analogue to s 327(1)(*c*)(ii) can be found under s 285(3)(b) of the Insolvency Act 1986 (c 45) (UK) (the

"UK Insolvency Act"). Section 285(3)(b) provides as follows in the relevant part:

> **285 Restriction on proceedings and remedies.**
>
> (3) After the making of a bankruptcy order no person who is a creditor of the bankrupt in respect of a debt provable in the bankruptcy shall—
>
> (a) have any remedy against the property or person of the bankrupt in respect of that debt, or
>
> (b) before the discharge of the bankrupt, commence any action or other legal proceedings against the bankrupt except with the leave of the court and on such terms as the court may impose.
>
> …

In a similar fashion, leave of court is required before an action or other legal proceedings can be commenced against the bankrupt in the UK.

18 The seminal case in England which elucidates the factors relevant to the grant of leave is *Bristol & West Building Society v Trustee of the property of Back and another (bankrupts)* [1998] 1 BCLC 485 ("*Bristol & West Building*") (see David Milman and Peter Bailey, *Sealy & Milman: Annotated Guide to the Insolvency Legislation* vol 1 (Sweet & Maxwell, 25th Ed, 2022) at S.285(3), (4)).

19 In *Bristol & West Building*, proceedings were commenced against two undischarged bankrupts for negligence and/or breach of contract and breach of trust. Leave was then sought to commence proceedings. In determining whether leave should be granted under s 285(3) of the UK Insolvency Act, the English High Court laid down the following principles to guide its exercise of discretion, albeit these factors were described as "not necessarily all embracing" (at 489):

(a) The court need not investigate the merits of the proposed claim, provided it is satisfied that it is not clearly unsustainable. An application for leave may be given if good cause is shown on the merits. By that, the court had in mind "a serious question to be tried" similar to that required for interlocutory relief rather than a *prima facie* case.

(b) There must be no prejudice to the creditors or to the orderly administration of the bankruptcy if the action is to proceed.

(c) The claim must be of a type which should proceed by action rather than through the proofing procedure in bankruptcy (see *Re Bank of Credit and Commerce International SA (No 4)* [1994] 1 BCLC 419).

(d) Leave is more likely to be granted where there is an insurance company standing behind the respondent to pay any judgment debt the plaintiff might obtain. If successful, such an action is unlikely to prejudice the creditors of the respondent. The section is not designed to protect an insurer.

(e) A condition is often imposed that the plaintiff will not enforce any judgment against the respondent without the leave of the court. This ensures that the bankruptcy court retains ultimate control.

(f) Mere delay by itself in applying for leave will not prevent leave from being granted. Leave is not to be withheld simply and solely as a punishment.

(g) Leave may be granted after the expiry of the relevant period of limitation to continue an action commenced within the limitation period without the leave of the court.

20 Leave was granted by the English High Court in *Bristol & West Building*. Among other reasons, the court justified its decision to grant leave as such (at 490):

> (a) With regard to the claim for negligence and/or breach of contract, while the affidavit in support did not provide evidence of causation, this did not make the proposed claim unsustainable "unless the affidavit is to be treated as a pleading which it is not" and it remained to be decided at trial.
>
> (b) With regard to the claim for breach of trust, there were issues which could not be resolved at the leave stage prior to discovery and/or interrogatories (relating to proof of deliberate conduct to mislead or withhold information), and such issues would require further investigation and cannot be ruled out *in limine* as unsustainable.
>
> (c) The questions of negligence and breach of trust were matters which could only be resolved by court proceedings and were quite inappropriate to be decided by way of proof of debt in the bankruptcy proceedings.
>
> (d) The proposed proceedings would be run by the Solicitors Indemnity Fund (which provides professional indemnity cover) on behalf of the respondents and will not prejudice the creditors in the bankruptcy proceedings, provided any judgment obtained against the respondents is not to be enforced without leave of the bankruptcy court (a condition to which the applicants were willing to submit).
>
> (e) There was some delay in commencing the proceedings against the respondents (the transaction occurred some seven years or so ago),

> which would inevitably have impaired the memories of the respondents and any other witnesses. However, the court did not consider that it should preclude the applicants from bringing the proceedings (commenced within the limitation period) as the proposed claim did not turn on precise words used but on the general conduct of the respondents with regard to the particular transaction which was the subject of documentary evidence.

21 The non-exhaustive list of factors espoused in *Bristol & West Building* has since been endorsed in later English decisions without modification (see, for example, *Re Richard Clive Hallows Gallagher v Hallows Associates (a firm no longer trading)* [2020] Lexis Citation 267 at [26]; *Avonwick Holdings Ltd v Castle Investment Fund Ltd* [2015] EWHC 3832 (Ch) at [17]; and *Re Breytenbach* [2011] Lexis Citation 109 ("*Re Breytenbach*") at [26]).

22 In *Re Breytenbach*, whilst the English Bankruptcy High Court was minded that there was no need to refer to "any other principles" to assist in determining whether leave should be granted (other than those in *Bristol & West Building*), it also noted that where leave is "not opposed by the bankrupts, their trustee or their insurers", then that is also "plainly something to be taken into account" (at [27]).

23 Having set out the UK position in some detail, I turned next to examine the Australian position. In Australia, s 58(3)(b) of the Australian Bankruptcy Act 1966 (Cth) (the "Australian Bankruptcy Act") provides that leave of court is required to commence any legal proceeding or take any fresh step in such a proceeding against a bankrupt:

> **Section 58**
>
> **Vesting of property upon bankruptcy – general rule**
>
> …
>
> (3) Except as provided by this Act, after a debtor has become a bankrupt, it is not competent for a creditor:
>
> > (a) to enforce any remedy against the person or the property of the bankrupt in respect of a provable debt; or
> >
> > (b) except with the leave of the Court and on such terms as the Court thinks fit, to commence any legal proceeding in respect of a provable debt or take any fresh step in such a proceeding.

24 The Supreme Court of South Australia said in *Gertig v Davies* (2003) 85 SASR 226 (at [15]) that s 58(3) of the Australian Bankruptcy Act protects a bankrupt and the property of the bankrupt against the enforcement of remedies and enables the court to control proceedings in respect of a provable debt in the light of the objectives of the Act. The policy purpose behind this provision is therefore similarly to relieve the trustee and the estate of the costs and time in defending legal proceedings, and where the creditor applies for leave to commence or continue with proceedings, the court is tasked to apply a screening process to balance the interests of the creditors and of the estate (see Michael Murray and Jason Harris, *Keay's Insolvency: Personal and Corporate Law and Practice* (Thomson Reuters, 10th Ed, 2018) at p 171). In this way, the bankrupt is freed from any claims that might be made in respect of the period prior to bankruptcy and the trustee in bankruptcy can treat a claim against the estate like the claim of all other creditors, so that the assets of the estate are, in due course, divided pro rata among the creditors (see the Federal Court of Australia decision in *7Steel Building Solutions Pty Ltd v Wright* [2011] FCA 328 ("*7Steel Building Solutions*") at [10], citing *Re Rose; Ex parte Devaban Pty Ltd* (Unreported, Federal Court of Australia, Hill J, 7 October 1994) ("*Re Rose*")).

25 There are a handful of cases in Australia which set out the relevant principles in a rather decentralised manner on how the court should exercise its discretion to grant leave, and the principles may be summarised as such:

(a) First, relevant to the exercise of the discretion conferred is whether the proposed claims are complex (both factually and legally) and whether it may be preferable for those issues to be resolved at a hearing rather than by way of a proof of debt (see *7Steel Building Solutions* at [12] and [20] citing the Federal Court of Australia decision in *Allanson v Midland Credit Ltd* (1977) 30 FLR 108 at 114 ("*Allanson v Midland Credit*"); see also, the Federal Court of Australia decision in *Stojanovski v Stojanovski* [2018] FCA 580 at [9]). For example, this would be so where the facts are complex as the claim was also made against other defendants, apart from the bankrupt, who could be jointly and severally liable, and where some defences would form the basis of a cross-claim.

(b) Second, leave is more appropriately granted where the proceedings proposed against the bankrupt would require the involvement of "other parties" and for the proper conduct of which it may be necessary for the bankrupt to become a party (see *7Steel Building Solutions* at [10]–[11], citing the Federal Court of Australia decisions in *Re Rose*; *Re Sharp; Ex parte Tietyens Investments Pty Ltd* [1998] FCA 1367; *Sturdy Components Pty Ltd v Trustee of the Bankrupt Estate of Sturt* [2000] FCA 884 at [3]; and *Done v Financial Wisdom Ltd* [2008] FCA 1706 at [34]–[35]).

(c) Third, the court will consider whether the applicant was seeking to gain some advantage over the other creditors by commencing

proceedings at a certain time, and whether the trustee in bankruptcy opposes to leave being granted (see *7Steel Building Solutions* at [21]).

(d) Fourth, it is relevant to assess if leave is granted, whether the bankrupt's estate will suffer financially in any way (see the Federal Court of Australia decision in *Macquarie Bank Limited v Bardetta* [2005] FCA 507 at [19], citing *Allanson v Midland Credit* at 114).

(e) Fifth, the presence of any delay in the applicant seeking leave is relevant, though the court will also consider what the prejudice caused to any party by reason of the delay is. If any disadvantage to the bankrupt's estate arises, leave should not be granted (see the Federal Court of Australia decision in *Armstrong Scalisi Holdings Pty Ltd v Gioiello* [2018] FCA 1729 at [25], citing *Kattirtzis v Zaravinos* [2001] FCA 1158 at [8]).

26 For completeness, whilst situated in a different context of seeking leave to bring proceedings in the corporate insolvency context, I also found the New South Wales Court of Appeal decision of *Cassegrain v Gerard Cassegrain & Co Pty Ltd (in liq)* [2012] NSWCA 435 ("*Cassegrain*") to be of assistance. Therein, it was stated that the relevant factors to be considered also include (at [33]):

> … the amount and seriousness of the claims; the degree and complexity of the legal and factual issues involved; the stage to which the proceedings, if commenced, have progressed; the risk that the same issues would be relitigated if the claims were to be the subject of a proof of debt; whether the claim has arguable merit; whether proceedings are already in motion at the time of liquidation; whether the proceedings will result in prejudice to creditors; whether the claim is in the nature of a test case for the interest of a large class of potential claimants; whether the grant of leave will unleash an "avalanche of litigation"; whether the cost of the hearing will be disproportionate to the company's resources; delay and whether pre-trial procedures such as

> discovery and interrogatories are likely to be required or beneficial …

27 Having briefly surveyed the foreign authorities, it is now an appropriate juncture to consider the relevant factors to be applied in Singapore when determining whether permission should be granted to commence or continue proceedings against individuals who have been declared bankrupt.

The relevant factors to guide exercise of discretion to grant permission under s 327(1)(c)(ii)

28 In considering the relevant factors, apart from the foreign cases, I found it helpful to refer to cases that have laid down factors in a similar context of granting permission to continue or commence proceedings against companies that are being wound up. The relevant statutory provisions are to be found in the following sections of the IRDA: s 133(1) (in relation to compulsory winding up) and s 170(2) (in relation to a creditor's voluntary winding up). These provisions provide as follows:

> **Effect of winding up order**
>
> **133.**—(1) When a winding up order has been made or a provisional liquidator has been appointed, no action or proceeding may be proceeded with or commenced against the company except —
>
> (*a*) by the permission of the Court; and
>
> (*b*) in accordance with such terms as the Court may impose.
>
> **Property and proceedings**
>
> **170.**—(2) After the commencement of the winding up, no action or proceeding may be proceeded with or commenced against the company except by the permission of the Court and subject to such terms as the Court may impose.

29 In my view, the policy that underlies s 327(1)(*c*)(ii), which involves an insolvent individual, is the same as the policy which applies to the situation involving the grant of permission to continue or commence proceedings against an insolvent company. Indeed, as the learned District Judge put it in *JA v JB* (at [13]), "the same principles ought to apply to both categories of insolvent beings, as the task of the liquidator or the trustee in bankruptcy is the same – to gather in the assets of the insolvent person and then distribute them fairly … amongst the creditors in as efficient, expeditious and cost-effective a manner as possible after payment of secured and preferential debts".

30 Similarly, Rajah JC in *Korea Asset Management* referred to the mandatory requirement for permission to proceed with or commence proceedings in the insolvency and judicial management regimes (at [32]–[37]). He noted (at [35]) that "the bankruptcy regime also creates similar fetters restraining any steps from being taken in any action or proceedings once bankruptcy has commenced" which was an integral feature of the insolvency scheme, thereby recognising that the policy across both situations of insolvency and bankruptcy is the same. Specifically, Rajah JC had said this as to the purpose for these provisions requiring permission before the continuation or commencement of proceedings against companies that are being wound up (at [36]):

> The rationale for these provisions is axiomatic: it is to prevent the company from being further burdened by expenses incurred in defending unnecessary litigation. The main focus of a company and its liquidators once winding up has commenced should be to prevent the fragmentation of its assets and to ensure that the interests of its creditors are protected to the fullest extent. In other words, returns to legitimate creditors should be maximised; the process of collecting assets and returning them to legitimate creditors should be attended to with all practicable speed. …

This statement of principle was recently endorsed by the Court of Appeal in *An Guang Shipping Pte Ltd (judicial managers appointed) and others v Ocean Tankers (Pte) Ltd (in liquidation)* [2022] 1 SLR 1232 at [10], noting that it was "well explained".

31 Accordingly, I adopted as my starting point the factors Rajah JC identified in *Korea Asset Management* in relation to the continuation or commencement of proceedings against companies that are being wound up, which I regarded as being equally applicable to the situation under s 327(1)(*c*)(ii). In this regard, the learned judge had identified the following factors:

(a) the timing as to when the application for permission was made (at [47]);

(b) the nature of the claim, specifically, whether the claimant is attempting to obtain a benefit not otherwise available to it through the conventional winding up procedure, *ie*, by filing proof of debts (at [48]–[49]);

(c) the existing remedies, specifically, whether the claim can be dealt with within the insolvency regime (at [50]); and

(d) matrix factors including: (i) the views of the majority creditors, (ii) the need for an independent inquiry, and (iii) the choice of liquidator (at [51]–[57]).

32 In my view, and having considered the factors identified by Rajah JC in *Korea Asset Management*, the foreign jurisprudence, and also by the plaintiff in the present application, I found the following to be relevant factors that a court

should consider in the exercise of its discretion whether to grant permission for the continuation or commencement of proceedings against a bankrupt under s 327(1)(*c*)(ii):

(a) the timing of the application for permission.

(b) the nature of the claim.

(c) the existing remedies.

(d) the merits of the claim.

(e) the existence of prejudice to the creditors or to the orderly administration of the bankruptcy.

(f) other miscellaneous factors such as the potential of an avalanche of litigation being unleashed by the grant of permission, the proportionality of the cost of the proceeding to the bankrupt's resources, and the views of the majority creditors.

I now elaborate on each of these factors briefly.

Timing of the application

33 As Rajah JC held in *Korea Asset Management* (at [47]), and as the High Court noted in *W Y Steel Construction Pte Ltd v Tycoon Construction Pte Ltd (in liquidation)* [2016] SGHC 80 ("*W Y Steel Construction*") (at [14(a)]), the timing as to when the application for permission was made could be a relevant consideration. An early application may persuade the court to allow the trustee in bankruptcy an opportunity to consider the matter in appropriate cases. The stage to which proceedings have progressed, as well as any delay in bringing the application for permission and whether pre-trial procedures are likely to be

required or beneficial, are relevant factors (see above at [26]). Indeed, the closer to the date of bankruptcy the application is made, the more likely it is for a court to infer that the application was made to snatch at the bankrupt's assets. Also, an application made when, for instance, the trustee in bankruptcy has completed much of his work, is not likely to be successful. However, it must be kept in mind that an early application does not, by itself, assure the grant of permission. The entire factual matrix must be considered by the court.

34 Contrariwise, mere delay by itself would not necessarily prevent leave from being granted as leave is not to be withheld as a punishment (see above at [19(f)]). The court will consider what is the prejudice caused to any party by reason of the delay (see above at [25(e)]). The prejudice occasioned may depend on whether the memories of the parties and other witnesses have been impaired, and whether it is necessary to rely on those memories (see above at [20(e)]).

The nature of the claim

35 The nature of the claim is also important. The claim must be of a type which should proceed by action rather than through the proofing procedure in bankruptcy (see above at [19(c)] and [20(c)]). The court will consider the degree of complexity of the legal and factual issues involved, and whether it may be preferable for those issues to be resolved at a hearing rather than by way of a proof of debt (see above at [25(a)]). Leave is also more appropriately granted where the proceedings proposed are proceedings to which other parties are involved, and for the proper conduct of which, it may be necessary for the bankrupt to become a party (see above at [25(b)]).

36 I would also add that the claims of secured creditors stand apart from unsecured creditors as made clear by s 327(3) of the IRDA. This provision

provides that s 327 of the IRDA "does not affect the right of any secured creditor to realise or otherwise deal with the secured creditor's security in the same manner as the secured creditor would have been entitled to realise or deal with it if this section had not been enacted" (subject to fulfilling the requirements in s 327(4) of the IRDA). This is similar to the insolvency regime, where secured creditors who are merely attempting to claim property which *prima facie* belonged to them should be "readily given" permission to proceed with or commence proceedings (see *Korea Asset Management* at [49]), because their security is regarded as standing apart from the pool of assets available for *pari passu* distribution amongst unsecured creditors (see the Court of Appeal decision in *SCK Serijadi Sdn Bhd v Artison Interior Pte Ltd* [2019] 1 SLR 680 at [11]).

The existing remedies

37 In a related vein, if the nature of the claim is such that it *can* be dealt with adequately within the bankruptcy regime, then a court will not likely grant permission for proceedings to continue or commence against the bankrupt. The court will also examine whether the company's assets will be dissipated by attending to the claim and the reasons for wanting to proceed outside the insolvency scheme (see *W Y Steel Construction* at [14(c)]).

38 The rationale for this is simple. The entire purpose of the bankruptcy regime is to ensure an efficient method for creditors to be paid. If that regime can satisfactorily address a claim, then it would not serve any good purpose to grant permission to continue or commence proceedings by other means.

The merits of the claim

39 As Rajah JC put it in *Korea Asset Management* (at [48]), a court will be "loathe to lend its imprimatur to sterile litigation" and permission ought not to be given where "there is no likelihood of the claim being satisfied in any way". While a court should not engage substantively with the merits of the proposed action at the grant of permission stage, it should not turn a blind eye to this as well. Again, the reason for this is in line with the purpose behind s 327(1)(*c*)(ii). If the proposed action is doomed to fail from the start, then it would not serve any good purpose to grant permission to commence what would likely be an exercise in futility. It would be better to preserve the resources of the bankrupt for distribution, rather than expending a part of those on defending sterile litigation.

40 The appropriate standard at which to assess the merits of the proposed action is "a serious question to be tried" similar to that required for interlocutory, relief rather than a *prima facie* case (see above at [19(a)], and the examples in [20(a)] and [20(b)]). As noted in the English decision of *Bristol & West Building*, the court need not undertake a substantive investigation into the merits of the proposed claim, "provided that if on the face of the matter there was no arguable claim then clearly leave should be refused" on the grounds that it would be a waste of time and expense (at 489). In other words, the court must be satisfied that the proposed claim is not clearly unsustainable.

The existence of prejudice and commercial morality

41 If the nature of the claim is such that if prosecuted successfully, it would prejudice the claims of the other legitimate creditors in contravention of the statutorily prescribed *pari passu* treatment for all unsecured creditors, the court

should not grant permission to proceed with or commence proceedings (see *Korea Asset Management* at [48]). Further, it is for the applicant to demonstrate that there will be little or no prejudice occasioned to the creditors, the bankrupt's estate or to the orderly administration of the bankruptcy if the action is to proceed (see above at [19(b)] and [25(d)]).

42 As Rajah JC held in *Korea Asset Management* at [48], albeit not in an identical context, the court will examine every application to ensure that a party is not seeking to avail itself of a benefit that would not otherwise be available through the conventional winding up procedure (or in this case, the bankruptcy regime). This should be applicable to the situation under s 327(1)(*c*)(ii) as well. For clarity, this "benefit that would not otherwise be available" refers to unfair commercial advantages such as jumping the ranking of the priority of creditors, but does not refer to having the dispute appropriately resolved by court proceedings when necessary (as opposed to the bankruptcy process). The court will thus consider whether the applicant was seeking to gain some advantage or steal a march over the other creditors, and in this connection, whether the trustee in bankruptcy opposes the grant of leave will be a relevant consideration (see above at [22] and [25(c)]).

43 Ultimately, the court is attempting to balance the collective interests of the general body of creditors against the relative hardship and injustice which may be experienced by the applicant. Thus, while convenience and the saving of costs are factors that would be taken into consideration, equally or if not more so, *fair play and commercial morality* are also important considerations (see *Korea Asset Management* at [42]; *W Y Steel Construction* at [15]).

Other miscellaneous factors

44 Finally, there are the miscellaneous factors such as the potential of an avalanche of litigation being unleashed by the grant of permission, the proportionality of the cost of the proceeding to the bankrupt's resources, and the views of the majority creditors, *etc* (see above at [26] and [31(d)]). At the end of the day, the court must exercise its discretion in a practical manner.

Application to the present application

45 With the applicable law in mind, I turned to the present application. I granted permission for the plaintiff to continue Suit 1175 against the second defendant. I did so for the following reasons.

46 First, considering the timing of the proposed action, Suit 1175 was commenced on 13 November 2019, which was more than two years before the second defendant took out the bankruptcy application (B 1122) on 6 May 2022, and the suit was already proceeding towards trial. The stage to which proceedings have progressed was advanced. As such, Suit 1175 was not filed in a scramble to reach the second defendant's assets and obtain an unfair advantage.

47 Second, considering the nature of the claim, Suit 1175 would not offend the *pari passu* principle of distribution in bankruptcy or prevent the trustee in bankruptcy from effectively adhering to this principle because the second defendant has stated in the Statement of Affairs filed for his bankruptcy application that he had no preferential or secured creditors. I also noted that the trustee in bankruptcy has yet to object to the present application, having taken no position on the matter.

48 Third, still considering the nature of the claim, the second defendant is a necessary party to Suit 1175 because the key factual issue in dispute is whether the second defendant had made the alleged representations to the applicant and whether he did so on behalf of the first defendant, given that the underlying action is founded in misrepresentation.

49 Fourth, considering the existence of remedies within the bankruptcy regime, the issues in dispute between the parties are more properly determined by a court of law instead of the trustee in bankruptcy. This is because while the plaintiff could very well file a proof of debt, the outcome of Suit 1175 would turn on key factual issues such as the veracity of the plaintiff's account of the various representations allegedly made by the second defendant. As such, these are issues that would be better dealt with by a court of law, with the benefit of cross-examination.

50 Fifth, as to the merits of the claim, I was satisfied that Suit 1175 raised serious questions to be tried. I did not think that it could be described in any way as being doomed to fail from the start.

51 Finally, I did not think that any of the miscellaneous factors militated against the grant of permission in this case.

52 Thus, for all these reasons, I granted permission to the plaintiff to continue Suit 1175 against the second defendant.

Conclusion

53 In the premises, I granted order in terms for prayers 1 and 2 in respect of High Court Summons No 2752 of 2022 (in Suit 1175).

Goh Yihan
Judicial Commissioner

Aw Wen Ni and Poon Chun Wai (WongPartnership LLP) for the plaintiff;
The first defendant and second defendant absent.