IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2024] SGCA 2

Court of Appeal / Civil Appeal No 23 of 2022

Between

(1) Ascentra Holdings, Inc (in official liquidation)
(2) Chua Suk Lin Ivy
(3) Graham Robinson

… *Appellants*

And

SPGK Pte Ltd

… *Respondent*

In the matter of Originating Summons No 16 of 2022

Between

(1) Ascentra Holdings, Inc (In Official Liquidation)
(2) Graham Robinson
(3) Chua Suk Lin Ivy

… *Applicants*

And

SPGK Pte Ltd

… *Non-party*

JUDGMENT

[Insolvency Law — Cross-border insolvency — Recognition of foreign insolvency proceedings — Recognition of foreign solvent liquidation proceedings]

Ascentra Holdings, Inc (in official liquidation) and others
v
SPGK Pte Ltd

[2024] SGCA 2

Court of Appeal — Civil Appeal No 23 of 2022
Sundaresh Menon CJ, Steven Chong JCA and Belinda Ang Saw Ean JCA
3 August and 15 November 2023

25 January 2024 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 In HC/OS 16/2022 ("OS 16"), the appellants sought, among other things, an order recognising the liquidation of the first appellant, Ascentra Holdings, Inc (in official liquidation) ("Ascentra") in the Cayman Islands ("Ascentra's Cayman Liquidation"). Specifically, the appellants sought the recognition of Ascentra's Cayman Liquidation in Singapore and, by our courts, as a "foreign main proceeding" within the meaning of Art 2(*f*) of the Third Schedule to the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) (the "IRDA"). The Third Schedule to the IRDA, which we refer to for convenience as the "SG Model Law", sets out Singapore's adapted enactment of the Model Law on Cross-Border Insolvency that was developed by the United Nations Commission on International Trade Law.

2 CA/CA 23/2022 ("CA 23") was the appellants' appeal against the decision of a High Court judge (the "Judge") in OS 16 dismissing the appellants' application (see *Re Ascentra Holdings, Inc (in official liquidation) and others (SPGK Pte Ltd, non-party)* [2023] SGHC 82). In our judgment dated 18 October 2023, we allowed CA 23 and held that Ascentra's Cayman Liquidation ought to be recognised as a foreign main proceeding in Singapore under Art 17 of the SG Model Law. We also invited further submissions on whether the recognition of Ascentra's Cayman Liquidation should be made subject to any conditions (*Ascentra Holdings, Inc (in official liquidation) and others v SPGK Pte Ltd* [2023] 2 SLR 421 ("*Recognition Decision*") at [115]). This is our decision on whether the recognition of Ascentra's Cayman Liquidation should be made subject to the conditions which the respondent submits ought to be imposed.

Background

3 The background facts are set out in full in the *Recognition Decision* at [3]–[11]. For present purposes, it suffices to recount the following:

(a) The respondent is a company incorporated in Singapore and a wholly-owned subsidiary of Shang Peng Gao Ke, Inc ("SPGK Cayman"), a company incorporated in the Cayman Islands. The appellants maintain that Ascentra has potential claims against the respondent, SPGK Cayman, and another company incorporated in Singapore, Scuderia Bianco Pte Ltd ("Scuderia Bianco"). SPGK Cayman is said to owe certain sums of money to Ascentra, some of which is held by the respondent and Scuderia Bianco (*Recognition Decision* at [5]).

(b) On 17 September 2021, the Grand Court of the Cayman Islands (the "Cayman Grand Court") ordered, among other things, that:

(i) Ascentra's Cayman Liquidation be continued under the supervision of the Cayman Grand Court pursuant to s 124 of the Companies Act (2021 Revision) (Cayman Islands); and (ii) the second and third appellants, Ms Chua Suk Lin Ivy and Mr Graham Robinson ("Mr Robinson") respectively, be appointed as the joint official liquidators of Ascentra (the "Liquidators") (*Recognition Decision* at [8]).

(c) On 23 September 2021, the Liquidators filed a certificate in the Cayman Grand Court as to Ascentra's solvency. On 14 October 2021, Mr Robinson similarly stated in a letter addressed to Ascentra's shareholders that Ascentra was solvent (*Recognition Decision* at [10]).

4 In addition to seeking the recognition of Ascentra's Cayman Liquidation as a foreign main proceeding, the appellants applied in OS 16 for the Liquidators to be granted "like powers in relation to [Ascentra's] property and assets (and any proceeds thereof) as are available to a liquidator under Singapore insolvency law" (the "Relief Prayer"). The Relief Prayer further stated:

> … For the avoidance of doubt, and without prejudice to the generality of the foregoing, the [Liquidators] be authorised to bring or defend any action or other legal proceeding in the name and on behalf of [Ascentra], subject to any such action or proceeding being sanctioned by the [Cayman Grand Court]; …

The parties' submissions

The respondent's submissions

5 The respondent submits that the automatic stay and suspension in respect of the commencement of actions against Ascentra's property that arises upon recognition under Art 20(1) of the SG Model Law (the "Automatic Moratorium") should be terminated pursuant to Art 20(6) of the SG Model Law.

The respondent argues that Ascentra is a solvent entity undergoing a liquidation akin to a solvent voluntary liquidation under Singapore law, and granting a moratorium to Ascentra would unfairly stymie the legitimate claims of its creditors.

6 The respondent further submits that the discretionary reliefs sought by the appellants under Art 21 of the SG Model Law (see [14] below) ought not to be granted unconditionally. The respondent contends that the Relief Prayer has been sought to empower the Liquidators to obtain further information in Singapore in respect of possible claims against the respondent and its related parties, including the power to commence applications under s 244 of the IRDA. Thus, the respondent argues that the court should ensure that: (a) the Relief Prayer is necessary to protect Ascentra's property and the interests of its creditors; and (b) the interests of interested persons including persons from whom information or evidence may be sought are adequately protected.

7 To that end, the respondent submits that the court should require that the Liquidators seek the permission of the court before taking any action pursuant to the Relief Prayer in relation to the examination of witnesses, taking of evidence or the delivery of information concerning Ascentra's assets, affairs, rights, obligations or liabilities ("Investigation Actions"). According to the respondent, this is necessary for the following reasons:

> (a) Through the Relief Prayer, the Liquidators are seeking the court's rubber stamp on all future Investigation Actions. However, it is unclear at this juncture, and inappropriate to determine, whether such actions are necessary to protect either Ascentra's property or its creditors' interests.

(b) The Liquidators have previously used similar powers to take Investigation Actions in other jurisdictions in an oppressive and wasteful manner.

(c) The Liquidators have already utilised their powers to conduct extensive examinations of the Respondent's director (Mr Ryunosuke Yoshida) and other third parties in respect of Ascentra's possible claims against the respondent. The Liquidators would already have sufficient facts and documents to determine and ascertain the merits of any claims against the respondent and its related parties.

(d) The Singapore court should not grant any relief which would be prohibited in the jurisdiction where the foreign main proceedings have been commenced. Since the commencement of CA 23, the Liquidators have caused Ascentra to commence a claim against the respondent in the Cayman Islands for recovery of certain disputed sums. Although the Liquidators have wide investigative powers under Cayman law, these powers may only be invoked by the Liquidators for the purpose of exercising their statutory functions and not to obtain a special advantage in ordinary litigation. To mitigate the risk of inconsistent determinations as to the scope of the Liquidators' powers under Singapore law and Cayman law, and to ensure that evidence on foreign law can be led before the court at the correct juncture, the Liquidators should be required to obtain permission before commencing Investigation Actions.

(e) As it is unclear how the Liquidators will use their powers to take Investigation Actions, it may be impossible to prescribe conditions necessary to ensure that the Liquidators' actions are appropriately circumscribed at this juncture.

(f) The parties had previously agreed to circumscribe the Relief Prayer in the manner described above, as per the draft Order of Court enclosed in the Applicant's Further Written Submissions in OS 16.

8 In addition, the respondent submits that the court should tailor protections similar to those prescribed by the United States Bankruptcy Court (the "US Bankruptcy Court") which has recognised Ascentra's Cayman Liquidation under Chapter 15 of the Bankruptcy Code 11 USC (US) (1978) (the "US Bankruptcy Code"). The respondent contends that this would maintain consistency with the recognition accorded under Chapter 15 of the US Bankruptcy Code, and that although the recognition of Ascentra's Cayman Liquidation has been challenged in the United States (the "US"), the Chapter 15 Recognition and the reliefs granted have not yet been set aside.

The appellants' submissions

9 The appellants submit that the respondent's interest in the appellants' recognition application is *qua* a potential target from whom information or evidence may be sought through the Relief Prayer, and the respondent will not be made to bear any expenses incurred in Ascentra's liquidation. The respondent's views should therefore be accorded little or no weight, as opposed to those of Ascentra's members who have a real economic interest in Ascentra's solvent liquidation.

10 The appellants further submit that the Automatic Moratorium should be maintained as Ascentra's Cayman Liquidation was brought under the supervision of the Cayman court, and winding up orders made by courts involve an automatic stay on all legal proceedings against the company. Further, there is currently a stay of proceedings against Ascentra in both the Cayman Islands

and the US. In any event, the Liquidators are not aware of any claims that have been and/or will be brought against Ascentra, and any prospective claimant may apply to the court for the Automatic Moratorium to be lifted as and when there are any claims. The appellants also argue that there is no prejudice to the respondent in maintaining the Automatic Moratorium in Singapore. The respondent has submitted to the Cayman court's jurisdiction in respect of proceedings recently commenced by the Liquidators against the respondent in the Cayman Islands to recover money allegedly owing to Ascentra. Thus, any counterclaim the respondent might have against Ascentra must be raised in the Cayman proceeding. In any event, the respondent has not asserted any claim against Ascentra since the commencement of its liquidation.

11 The appellants further argue that no additional requirement should be imposed for the Liquidators to seek the permission of the Singapore Court to commence Investigation Actions for the following reasons:

(a) Any action or proceeding brought by the Liquidators in Singapore must first be sanctioned by the Cayman Court. Requiring the Liquidators to obtain permission from the Singapore court would add another layer of costs and increase the risk of inconsistent decisions by the Singapore and Cayman courts.

(b) It is duplicative and cost-inefficient to require the Liquidators to seek permission before taking any Investigation Actions as the same exercise would be undertaken at the hearing of the actual application for discovery and/or delivery of further evidence.

(c) The respondent's allegation that the Liquidators had previously taken investigation actions in other jurisdictions in an oppressive and wasteful manner is without basis and unsupported by evidence. In any

event, the proper forum to raise any such objections would be before the US Bankruptcy Court.

(d) The respondent's claim that the appellants have sufficient facts and documents to ascertain the merits of any claims against the respondent and its related parties is speculative.

12 Finally, the appellants submit that the respondent has not explained why it would be necessary to tailor protections similar to those prescribed by the US Bankruptcy Court, since the Liquidators would naturally have to comply with the applicable rules in Singapore.

Issues to be determined

13 We first set out the provisions of the SG Model Law relevant to the present application. Articles 20(1) and 20(2) of the SG Model Law prescribe the imposition of an automatic moratorium upon the recognition of a foreign proceeding as a foreign main proceeding in the following terms:

> **Article 20. Effects of recognition of a foreign main proceeding**
>
> 1. Upon recognition of a foreign proceeding that is a foreign main proceeding, subject to paragraph 2 of this Article —
>
> (*a*) commencement or continuation of individual actions or individual proceedings concerning the debtor's property, rights, obligations or liabilities is stayed;
>
> (*b*) execution against the debtor's property is stayed; and
>
> (*c*) the right to transfer, encumber or otherwise dispose of any property of the debtor is suspended.
>
> 2. The stay and suspension mentioned in paragraph 1 of this Article are —

> (*a*) the same in scope and effect as if the debtor had been made the subject of a winding up order under this Act; and
>
> (*b*) subject to the same powers of the Court and the same prohibitions, limitations, exceptions and conditions as would apply under the law of Singapore in such a case,
>
> and the provisions of paragraph 1 of this Article are to be interpreted accordingly.

14 Article 21(1) of the SG Model Law sets out the relief that may be granted upon the recognition of a foreign proceeding as follows:

> **Article 21. Relief that may be granted upon recognition of a foreign proceeding**
>
> 1. Upon recognition of a foreign proceeding, whether a foreign main proceeding or a foreign non-main proceeding, where necessary to protect the property of the debtor or the interests of the creditors, the Court may, at the request of the foreign representative, grant any appropriate relief, including —
>
> (*a*) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's property, rights, obligations or liabilities, to the extent they have not been stayed under Article 20(1)(a);
>
> (*b*) staying execution against the debtor's property to the extent it has not been stayed under Article 20(1)(b);
>
> (*c*) suspending the right to transfer, encumber or otherwise dispose of any property of the debtor to the extent this right has not been suspended under Article 20(1)(c);
>
> (*d*) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's property, affairs, rights, obligations or liabilities;
>
> (*e*) entrusting the administration or realisation of all or part of the debtor's property located in Singapore to the foreign representative or another person designated by the Court;
>
> (*f*) extending relief granted under Article 19(1); and

> (*g*) granting any additional relief that may be available to a Singapore insolvency officeholder, including any relief provided under section 96(4) of this Act.

15 The following issues arise for our determination:

(a) whether the court should terminate the Automatic Moratorium;

(b) whether the Liquidators should be required to seek the permission of the Singapore court before taking any Investigation Actions; and

(c) whether the court should tailor and impose protections similar to those prescribed by the US Bankruptcy Court.

The Automatic Moratorium

16 We begin first with the issue of whether the Automatic Moratorium ought to be terminated or modified.

17 We first do not accept the appellants' argument that the Automatic Moratorium should be maintained *because* Ascentra's Cayman Liquidation should be regarded as a court-ordered winding up, which entails an automatic stay on all legal proceedings against the company under Singapore law. In the first place, Ascentra's Cayman Liquidation was commenced as a voluntary liquidation which, under Singapore law, does not attract the operation of the automatic moratorium that is engaged upon the court making a winding up order pursuant to s 133 of the IRDA. Ascentra's Cayman Liquidation was only brought under the supervision of the Cayman Grand Court due to the failure of Ascentra's directors to file a declaration of solvency (*Recognition Decision* at [7]–[8]). However, the Liquidators have since filed a certificate in the Cayman

Grand Court as to Ascentra's solvency and have confirmed the same to Ascentra's shareholders (see [3] above).

18 Even if we accept that appellants' argument that Ascentra's Cayman Liquidation should be regarded as a court-ordered winding up, in our judgment, it would nonetheless be correct in principle to terminate any moratorium that is engaged as a result.

19 As the court observed in *The "Ocean Winner" and other matters* [2021] 4 SLR 526 at [57], the purpose of the moratorium in s 133 of the IRDA is to prevent all proceedings against the company that could result in any unsecured creditor "stealing a march" on their fellow unsecured creditors. In this regard, we also find the guidance provided in *Wang Aifeng v Sunmax Global Capital Fund 1 Pte Ltd and another* [2023] 3 SLR 1604 ("*Wang Aifeng*") helpful in considering whether to lift the Automatic Moratorium. The court in *Wang Aifeng*, referring to *Korea Asset Management Corp v Daewoo Singapore Pte Ltd* [2004] 1 SLR(R) 671 at [47]–[57], summarised at [31] the factors that the court should take into account in determining whether permission should be granted for a claimant to commence proceedings against a company in respect of which a winding up order has been made, despite the moratorium under s 133 of the IRDA, as follows:

(a) the timing when the application for permission was made (including the stage to which proceedings have progressed, as well as any delay in bringing the application for permission and whether pre-trial procedures were likely to be required or beneficial);

(b) whether the claimant is attempting to obtain a benefit not otherwise available to it through the conventional winding up procedure, such as by filing a proof of its debts;

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

(d) a matrix of factors including the views of the majority creditors, the need for an independent inquiry and the choice of liquidator.

20 That does not mean, however, that moratoriums should only be maintained in respect of insolvent companies. As we noted in the *Recognition Judgment* at [64]–[65], the concern that creditors might rush to satisfy their claims against a debtor company, while arising predominantly in the context of insolvent companies, may arise in a solvent, voluntary liquidation should it subsequently transpire that the company is insolvent. Moreover, a moratorium might be necessary to ensure the co-ordinated and orderly dissolution or successful rehabilitation of a company.

21 In the present case, the appellants have not argued or shown that there is a risk of Ascentra's creditors attempting to steal a march over one another. Nor have the appellants provided any other reason why a moratorium would be necessary in the context of Ascentra's Cayman Liquidation. In addition, none of the factors set out above at [19] have been engaged such as to justify the preventing the commencement of legal proceedings against Ascentra in Singapore. In the premises, we agree with the respondent that the Automatic Moratorium should be terminated.

Permission to take Investigation Actions

22 We turn next to deal with the respondent's submission that the court should impose a requirement that the Liquidators seek the permission of the Singapore court before taking any Investigation Actions.

23 We see no necessity for the imposition of such a condition. The respondent contends that the Relief Prayer, if granted, would allow the Liquidators to commence Investigation Actions without the permission of the court. However, as the appellants point out, pursuant to the Relief Prayer, the commencement of any action or proceeding by the Liquidators is subject to such proceeding being sanctioned by the Cayman Grand Court.

24 Moreover, should the Liquidators commence an Investigation Action (such as for the discovery of documents), the Liquidators would have to satisfy the court hearing the application that the legal requirements for that application are satisfied. For instance, the respondent raises the example of s 244 of the IRDA which permits the Liquidators to apply to the court to summon certain persons to provide information on the company's dealings. However, in determining whether an order under s 244 of the IRDA should be made, the Singapore court would: (a) consider whether there is some reasonable basis for the Liquidators' belief that the person that is the subject of the application can assist the Liquidators in obtaining relevant information and/or documents, and that the information and/or documents are reasonably required; and (b) balance any conflicting interests involved in deciding whether to grant the order (see *PricewaterhouseCoopers LLP and others v Celestial Nutrifoods Ltd (in compulsory liquidation)* [2015] 3 SLR 665 at [43]–[44]).

25 In this regard, the respondent has put nothing before us to explain why it cannot be left to the court hearing the application to determine whether the commencement of any particular Investigation Action would be necessary to protect Ascentra's property or the interests of its creditors. In *Picard (foreign representative of Bernard L Madoff Investment Securities LLC) v FIM Advisers LLP* [2010] EWHC 1299 ("*Picard*"), the trustee for the liquidation of a company applied for an order for the production of certain documents concerning the affairs of the company under Art 21 of Schedule 1 to the Cross-Border Insolvency Regulations 2006 (SI 2006 No 1030) (UK). It was at the hearing of the application for production itself (as opposed to the application for permission to take out the application for production) that the English court considered: (a) the principles governing its discretion as to whether to order the production of the documents sought; and (b) the scope of the documents to be produced. In particular, the English court considered, among other things, that in exercising its discretion, the court must have regard to all relevant circumstances and must ensure that the interests of the party against whom the order is sought are adequately protected (see *Picard* at [1] and [23]).

26 In our judgment, in line with *Picard*, the court determining any prospective Investigation Action taken out by the Liquidators is perfectly capable of ensuring that only applications which are necessary to protect Ascentra's or its creditors' interests are allowed. That court would also be well-placed to determine whether the specific Investigation Action commenced by the Liquidators would contravene or be inconsistent with the determinations of the Cayman court. We therefore agree with the appellants that imposing an additional requirement for the Liquidators to obtain the permission of the court before bringing any Investigation Action would be duplicative and inefficient.

27 For completeness, the respondent's allegation that the appellants had used similar powers to take Investigation Actions in other jurisdictions is irrelevant to the present application, which concerns whether conditions should be imposed for the commencement of Investigation Actions in Singapore. We also consider that the respondent's contention that the appellants have sufficient facts and documents to determine and ascertain the merits of any claims against the respondent and its related parties to be speculative and unsubstantiated.

28 For these reasons, we decline to impose any requirement for the Liquidators to obtain the permission of the court before commencing any Investigation Action.

Protections prescribed by the US Bankruptcy Court

29 Finally, we deal with the respondent's submission that the court should tailor and impose protections similar to those prescribed by the US Bankruptcy Court which has recognised Ascentra's Cayman Liquidation under Chapter 15 of the US Bankruptcy Code.

30 In relation to the nature of the "similar protections" sought by the respondent, the respondent makes reference to paras 117–119 of its Respondent's Case in CA 23, which states:

> (a) The issuance of subpoenas must be in accordance with applicable rules and the information sought must concern the assets, affairs, rights obligations or liabilities of Ascentra and (to the extent relevant) Ascentra's affiliates.

(b) The issuance to third parties should also be without prejudice to the recipients' or any other party in interests' rights to object in accordance with the applicable procedural rules.

31 The respondent has not explained why it cannot seek the imposition of such protective measures before the court hearing the Liquidators' application for the issuance of a subpoena (if there should be one). In line with our observations above at [26], the court hearing the Liquidators' application for the issuance of a subpoena would be perfectly capable of determining whether the imposition of the protective measures sought by the respondent would be necessary to protect the interests of Ascentra and its creditors. We therefore decline to impose these protective measures sought by the respondent.

Conclusion

32 For these reasons, we decline to impose the conditions sought by the respondent in respect of the recognition of Ascentra's Cayman Liquidation as a foreign main proceeding in Singapore, save for the termination of the Automatic Moratorium.

33 As to costs, the appellants take the position that no separate costs order should be made apart from that made in CA 23 as the current application is a "natural follow-up to the recognition of Ascentra's liquidation and is not

grounds for a separate costs order". We agree and make no further order as to costs. The usual consequential orders are to apply.

Sundaresh Menon
Chief Justice

Steven Chong
Justice of the Court of Appeal

Belinda Ang Saw Ean
Justice of the Court of Appeal

Lee Eng Beng SC and Yeo En Fei Walter (Rajah & Tann Singapore LLP) (instructed), Han Guangyuan Keith, Angela Phoon Yan Ling and Santhiya d/o Kulasakeran (Oon & Bazul LLP) for the appellants; Balakrishnan Ashok Kumar, Loh Song-En Samuel, Stanley Tan Sing Yee and Charlene Goh Kai Ning (BlackOak LLC) for the respondent.