IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2024] SGCA 43

Court of Appeal / Civil Appeal No 2 of 2024

Between

(1) British Steamship Protection And Indemnity Association Limited
(2) British Steamship Management Ltd

… *Appellants*

And

(1) Charles Thresh
(2) Michael Morrison

… *Respondents*

GROUNDS OF DECISION

[Insolvency Law — Cross-border insolvency — Recognition of foreign insolvency proceedings — Activities of a regulated company, if illegitimate, are excluded from consideration in assessing a company's centre of main interests]

TABLE OF CONTENTS

British Steamship Protection and Indemnity Association Ltd and another
v
Thresh, Charles and another

[2024] SGCA 43

Court of Appeal — Civil Appeal No 2 of 2024
Sundaresh Menon CJ, Belinda Ang JCA, Kannan Ramesh JAD
1 July 2024

24 October 2024

Kannan Ramesh JAD (delivering the grounds of decision of the court):

Introduction

1 The subject company applied for and obtained a licence from the Bermuda Monetary Authority (the "BMA") to carry on insurance business "in and from within Bermuda" within the meaning of the Bermuda Insurance Act 1978 (the "Bermuda IA"). It duly incorporated in Bermuda for this purpose. The licence was subject to terms, upon which registration was conditional. The terms centralised the underwriting of insurance business in Bermuda and imposed measures to enable the BMA to exercise regulatory oversight over the company and its insurance activities. The company commenced insurance business in compliance with the terms of its licence. Much later, it failed to comply with the terms of its licence but continued to underwrite insurance from operations outside of Bermuda purportedly under its licence. The central question in the

present appeal was whether the company's insurance activities outside of Bermuda undertaken in breach of the terms of its licence was a relevant factor in determining its centre of main interests ("COMI") under the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law") as adopted in Singapore (the "SG Model Law").

2 We answered the question in the negative and, on 1 July 2024, dismissed the present appeal, affirming the decision of the judge below (the "Judge") recognising the liquidation proceedings of the company in Bermuda as a foreign main proceeding. These are the full grounds of our decision.

Facts

3 CA/CA 2/2024 was an appeal against the decision of the Judge recognising the liquidation proceedings in (Companies (Winding Up) 2022 No 281) commenced in the Supreme Court of Bermuda (Commercial Court) (the "Proceeding") and the winding-up order dated 28 October 2022 made therein (the "Winding-Up Order"), as a foreign main proceeding under Art 17(2)(*a*) of the SG Model Law, and ordering consequential relief (see *Re Thresh, Charles and another (British Steamship Protection and Indemnity Association Ltd and another, non-parties)* [2023] SGHC 337 (the "Judgment")).

4 The company at the centre of this matter, British Steamship Protection and Indemnity Association (Bermuda) Limited (the "Company"), was incorporated in Bermuda on 18 June 2010 and registered under the Bermuda IA as a Class 2 Insurer effective on 15 July 2010. As a Class 2 Insurer, the Company was authorised to carry on insurance business, subject to the terms of its licence and the provisions of the Bermuda IA. Under its Class 2 licence, the Company was limited to underwriting insurance business for only its shareholders all of

which also had to be 100% ceded to reinsurers, unless prior written approval of the BMA had been obtained. Thus, in order to comply with the terms of the licence, each policyholder was required to purchase a share in the Company's parent, which they had to hold for the term of their policy.

5 While the Company complied with the terms of its licence initially, it subsequently did not. As a result, on 12 September 2022, the BMA brought the Proceeding to wind-up the Company under the Bermuda Companies Act 1981 (the "Bermuda CA") and the Bermuda IA. The grounds relied upon were principally breaches of the Bermuda IA, namely that: (1) the Company failed to appoint an approved auditor since 2019 as required by s 16 of the Bermuda IA; (2) the Company failed to file statutory financial returns from 2019 to 2021 as required by s 18A of the Bermuda IA; (3) the Company failed to maintain adequate accounting and record keeping systems and meet reporting requirements as required by s 46 of Bermuda's Insurance Code of Conduct 2015 read with the Schedule to the Bermuda IA; (4) the Company failed to appoint and maintain a principal representative (the "PR") as required by s 8 of the Bermuda IA; and (5) the Company failed to maintain a registered office as required by s 62 of the Bermuda CA. The Winding-Up Order was made and the respondents were appointed joint provisional liquidators (the "JPLs"). Notably, the Company was not wound up on the basis it was insolvent.

6 On 13 July 2023, the JPLs sought recognition of the Proceeding and the Winding-Up Order in HC/OA 697/2023 (the "Application") as a foreign proceeding under of Art 17(2)(*a*) of the SG Model Law. A letter from the Supreme Court of Bermuda requesting assistance for the JPLs was tendered in support of the Application.

7 The 1st appellant, British Steamship Protection And Indemnity Association Limited ("BSP"), a company registered in the Marshall Islands, was the sole shareholder of the Company. The 2nd appellant, British Steamship Management Ltd ("BSM"), a company registered in the Marshall Islands, was the manager of the Company and one of its creditors. BSP was the principal shareholder of BSM. The 1st and 2nd appellants shall hereinafter be collectively referred to as the "appellants". The appellants were effectively controlled by Mr Li Yu, who was also an executive director of the Company prior to its winding-up. Mr Li Yu is a Singaporean resident in Singapore.

8 According to the JPLs, Mr Li Yu had failed to cooperate by providing them with information and assistance despite numerous requests. As such, the JPLs were "not be able to proceed with an orderly run-off of the existing policies and dissolution of the Company", which would "be prejudicial to the Company's policyholders". The reliefs sought were therefore necessary and as Mr Li Yu was in Singapore, the Application was appropriately pursued here. The appellants opposed the Application on several grounds.

The Decision below

9 The Judge allowed the Application and recognised the Proceeding and Winding-Up Order as a "foreign main proceeding" under Art 17(2)(*a*) of the SG Model Law (Judgment at [62], [79]).

10 As it was common ground that the Company was not wound up on the ground that it was insolvent, the Judge considered whether it was a foreign proceeding within Art 2(*h*) of the SG Model Law. Applying the five requirements for a proceeding to qualify as a "foreign proceeding" set out by this court in *Ascentra Holdings, Inc (in official liquidation) and others v SPGK*

Pte Ltd [2023] 2 SLR 421 ("*Ascentra Holdings*") at [29], he found that the Proceeding was brought under a law relating to insolvency or adjustment of debt. This was on the basis that various subsections of s 35 of the Bermuda IA provided *inter alia* for a petition for winding-up to be brought on the ground of insolvency (Judgment at [20]–[23]). Further, he held that the Proceeding was collective in nature. He observed that the JPLs had the same powers as liquidators, and the liquidation of the Company was similar to a compulsory liquidation in terms of distribution of the Company's assets amongst its creditors on a *pari passu* basis, followed by its contributories (Judgment at [25]–[32]).

11 The Judge found that the public policy exception in Art 6 of the SG Model Law did not apply. He rejected the appellants' argument that there was a breach of natural justice and the right to a fair hearing (Judgment at [45]–[46]). The Judge also did not accept the appellants' argument that the JPLs had made dishonest arguments and had incurred exorbitant costs (Judgment at [47]–[49]).

12 The Judge found that the Company's COMI was in Bermuda. Despite the Company's lack of presence in Bermuda when the Application was brought (Judgment at [50]–[54]), the Judge found it material that the appellants had not asserted that the Company's COMI was in another jurisdiction based on objectively ascertainable and permanent factors. There was also no objective evidence pointing to another jurisdiction (Judgment at [56]–[60]). In the Judge's view, the most important factor was that the Company's insurance business was licensed by Bermuda and regulated by the BMA. Thus, the centre of Company's commercial activity and therefore its COMI was in Bermuda (Judgment at [61]–[62]).

13 Finally, the Judge rejected the appellants' argument that the JPLs lacked standing to bring the Application because they had not been appointed as liquidators by the creditors and contributories of the Company. He noted that there was no suggestion that the JPLs' powers under the Winding-Up Order were impaired or affected as a result. Accordingly, the JPLs were "foreign representatives" within Art 2(*i*) of the SG Model Law (Judgment at [77]–[78]).

The parties' cases

Appellants' case

14 The appellants challenged only certain aspects of the Judgment. In the main, their arguments were a repeat of those canvassed before the Judge. We set them out in brief below and expand upon them as necessary when each issue is considered. The appellants made three main points, that:

(a) The Proceeding was not a foreign proceeding within Art 2(*h*) of the SG Model Law because (i) it was not brought under a law relating to insolvency or adjustment of debt, and (ii) it was not collective in nature.

(b) The Proceeding should not be recognised as either a foreign main or a non-main proceeding under Art 17(2) of the SG Model Law, as the Company neither had its COMI nor an establishment in Bermuda at the relevant time.

(c) Recognising the Proceeding as either a foreign main or non-main proceeding was against the public policy of Singapore because there had been a lack of due process and a failure on the part of the JPLs to protect relevant interests.

Respondents' case

15 The JPLs argued that the Judge had not erred in making his decision, largely agreeing with his reasoning. They made the following points:

(a) On the basis of *Ascentra Holdings* (see [10] above), the Proceeding was a foreign proceeding within Art 2(*h*) of the SG Model Law as it was brought under a law relating to insolvency or adjustment of debt and was collective in nature.

(b) The Proceeding should be recognised as a foreign main proceeding pursuant to Art 17(2)(*a*) of the SG Model Law because the Company's COMI was in Bermuda.

(c) Recognising the Proceeding was not against the public policy of Singapore.

Issues to be determined

16 The following issues therefore arose for determination:

(a) Whether the Proceeding was a foreign proceeding within Art 2(*h*) of the SG Model Law. The following sub-issues were pertinent:

(i) Whether the Proceeding was conducted under a law relating to insolvency or adjustment of debt; and

(ii) Whether the Proceeding was collective in nature.

(b) Whether the Proceeding was a foreign main proceeding under Art 17(2)(*a*) of the SG Model Law.

(c) Whether recognition of the Proceeding was contrary to the public policy of Singapore.

Whether the Proceeding was a foreign proceeding within the meaning of Art 2(*h*) of the SG Model Law

17 Art 17(1)(*a*) of the SG Model Law provides that a proceeding "must be recognised if it is a foreign proceeding within the meaning of" Art 2(*h*). Art 2(*h*) defines a foreign proceeding as follows:

> "foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation.

18 In accordance with Art 15(2)(*b*) of the SG Model Law, the Supreme Court of Bermuda issued a certificate dated 12 January 2023 affirming that the Proceeding was a foreign proceeding. The certificate provided as follows:

> …The [Winding-Up Order] would be considered a foreign proceeding within the meaning of Article 2(h) of the UNCITRAL Model Law on Cross-Border Insolvency…

Pursuant to Art 16(1) of the SG Model Law, the receiving court was thus entitled to presume that the Proceeding and the Winding-Up Order was a foreign proceeding. As this was only a presumption and the appellants challenged it on the basis outlined above, the Judge correctly considered whether the Proceeding was a foreign proceeding under Art 2(*h*). We agreed with the Judge's conclusion that it was.

19 *Ascentra Holdings* had settled the question of when a proceeding would be considered a foreign proceeding within Art 2(*h*). Five cumulative requirements had to be satisfied (*Ascentra Holdings* at [29]):

> (a) First, that proceeding must be collective in nature.
>
> (b) Second, that proceeding must be a judicial or administrative proceeding in a foreign State.
>
> (c) Third, that proceeding must be conducted under a law relating to insolvency or adjustment of debt.
>
> (d) Fourth, the property and affairs of the debtor company must be subject to control or supervision by a foreign court in that proceeding.
>
> (e) Fifth, that proceeding must be for the purpose of reorganisation or liquidation.

In the present appeal, the parties disagreed on whether the first and third requirements were satisfied. We were of the view that both were made out.

The Proceeding was conducted under a law relating to insolvency or adjustment of debt

20 *Ascentra Holdings* held that the Broad Approach applied to the interpretation of the phrase "under a law relating to insolvency or adjustment of debt" in Art 2(*h*) of the SG Model. The Broad Approach was explained in *Ascentra Holdings* at [99] as follows:

> To reiterate, under the Broad Approach, the requirement that a proceeding be conducted "under a law relating to insolvency or adjustment of debt" within the meaning of Art 2(*h*) will be satisfied as long as the law or the relevant part of the law under which the relevant proceeding is conducted includes provisions dealing with the insolvency of a company or the adjustment of its debts. It will generally be irrelevant that the company concerned in the relevant proceeding is not insolvent or in severe financial distress.

21 Applying the Broad Approach, it was clear that the Proceeding was conducted "under a law relating to insolvency or adjustment of debt". The Proceeding was brought on the basis of various sub-sections of s 35 of the Bermuda IA (Judgment at [22]), namely:

> (i) Section 35(1)(b) – the Company has failed to satisfy an obligation to which it is or was subject by virtue of the Insurance Act; and/or
>
> (ii) Section 35(1)(c) – the Company has failed to satisfy the obligation as to the preparation of accounts and failure to file statutory financial statements; and/or
>
> (iii) Section 35(3) – it is just and equitable that the Company be wound up as it is expedient in the public interest given the Company's failure to act prudently, to rectify non-compliances in a timely fashion, to communicate forthrightly and openly with the Authority regarding non-compliances and the reasons therefore and to identify non-compliances as and when they arise.

22 Materially, as noted by the Judge, s 35(1)(*a*) of the Bermuda IA expressly provides for a petition for winding-up to be brought on the ground of insolvency:

> **Winding up on petition of Authority**
>
> 35 (1) The Authority may present a petition for the winding up, in accordance with the Companies Act 1981, of an insurer, being a company which may be wound up under that Act, on the ground –
>
> (a) that the insurer is unable to pay its debts within the meaning of sections 161 and 162 of the Companies Act 1981; or
>
> …

23 Moreover, s 35(3) of the Bermuda IA provides for the winding-up of an insurer (that as a company, may be wound up under the Bermuda CA), if it is just and equitable to do so:

> (3) If, in the case of an insurer, being a company which may be wound up under the Companies Act 1981, it appears to the Authority that it is expedient in the public interest that the insurer should be wound up, it may, unless the insurer is already being wound up by the Court, present a petition for it to be so wound up if the Court thinks it just and equitable for it to be so wound up.

One such ground for a just and equitable winding-up includes *inter alia* the ground where "the company is unable to pay its debts" (see s 161(*e*) of the Bermuda CA):

> **Circumstances in which company may be wound up by the Court**
>
> 161 In addition to any other provisions in this or any other Act prescribing for the winding up of a company a company may be wound up by the Court if –
>
> …
>
> (e) the company is unable to pay its debts;
>
> …

24 It was thus clear that the relevant part of the law (*ie*, s 35 of the Bermuda IA) under which the Proceeding was brought "includes provisions dealing with the insolvency of a company". The Judge therefore correctly concluded that the Proceeding was conducted "under a law relating to insolvency and adjustment of debt".

25 For completeness, we did not accept the appellants' submission that the winding-up of a solvent entity would be contrary to the intention of the Model Law. This issue was also settled by *Ascentra Holdings* (at [58]–[59] and [64]).

The Proceeding was collective in nature

26 *Ascentra Holdings* (at [104]) summarised the principles upon which a proceeding would be considered as collective in nature:

> (a) For a proceeding to be collective, it must concern all creditors of the debtor generally, in contrast to, for instance, one that is instigated at the request, and for the benefit, of a single secured creditor (*Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law* (Look Chan Ho gen ed) (Globe Law and Business Publishing, 4th Ed, 2017) at p 178).

> (b) In evaluating whether a proceeding is collective, a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors (2013 Guide, Part 2 at para 70).

27 We agreed with the Judge that the Proceeding was collective in nature. As he had observed (Judgment at [28]–[32]), the Winding-Up Order provided that the JPLs would "have all of the powers set out in s 175 of the [Bermuda CA]". This included the power: (a) to bring or defend any action in the name and on behalf of the Company; (b) to carry on the business so far as it was necessary for the beneficial winding-up thereof; (c) to compromise liabilities on such terms as might be agreed; (d) to raise on the security of the assets of the Company any money that was required; and (e) to do all such other things as might be necessary for winding-up the affairs of the Company and distributing its assets.

28 The Winding-Up Order also provided the JPLs with the power to: (a) ascertain and take all steps necessary to obtain the assets of the Company; (b) conduct such investigations as necessary to secure the assets and determine liabilities of the Company, or to enable the liquidation to proceed in a speedy and efficient manner; (c) carry on the business of the Company as necessary for the beneficial winding-up of the Company; and (d) do such act under the Bermuda CA that was required to be done by a liquidator.

29 The powers conferred on the JPLs by the Winding-Up Order empowered them to act in the same manner as liquidators on matters concerning creditors and to deal with substantially all of the assets and liabilities of the Company. The Judge described this as an appointment on a "full powers basis" (Judgment

at [29(c)]). The attributes described above pointed squarely to the Proceeding being a collective process (see [26] above).

30 The appellants argued that for a proceeding to concern all creditors generally, each creditor must receive notice of the proceeding and be able to protect their rights (citing *In re Global Cord Blood Corporation* 2022 WL 17478530 (Bankr. S.D.N.Y. Dec. 5, 2022) ("*Global Cord*")). This argument was misconceived. In our view, participation of all creditors is not a requirement for a proceeding to be regarded as collective in nature, and *Global Cord* does not support such a proposition. *Global Cord* was not about whether the creditors and the assets of the company had to be dealt with compositely in a collective process. It concerned proceedings which were "commenced by concerned shareholders" to recover "funds that allegedly have been dissipated or improperly transferred due to alleged fraud and other fiduciary breaches by management and/or board members". As *Global Cord* observed, there was nothing in the proceedings "that [was] specifically oriented towards creditors". Accordingly, the court found that the proceeding was not a "collective" action. In fact, contrary to the appellants' argument, *Global Cord* considered various authorities that stood for the proposition that a foreign proceeding could be collective in nature even if some creditors were not able to participate (*Global Cord* at p 17-18).

31 We were therefore of the view that the Proceeding was a foreign proceeding within Art 2(*h*) of the SG Model Law.

Whether the Proceeding should be recognised as a foreign main proceeding under Art 17(2)(*a*) of the SG Model Law

General principles related to COMI

32 We turn to the central issue in the present appeal – whether the Proceeding ought to be recognised as a foreign main proceeding under Art 17(2)(*a*) of the SG Model law. The issue turned on whether the COMI of the Company was in Bermuda.

33 The concept of COMI is central to the recognition of foreign proceedings as foreign main proceedings under the SG Model Law. Art 17(2)(*a*) of the SG Model Law provides that a foreign proceeding must be recognised as a foreign main proceeding if it takes place in the State where the debtor has its COMI. Recognition as a foreign main proceeding has consequences on the reliefs that follow. Relief under Art 20 is automatic following recognition. Conversely, a foreign non-main proceeding is limited to discretionary relief under Art 21. Additionally, in a situation where there are concurrent foreign proceedings, the reliefs that are granted or to be granted as regards the non-main proceeding must be consistent or have to be modified to be consistent with the reliefs granted in the foreign main proceedings, pursuant to Art 30(1) and (2) of the SG Model Law.

34 The UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (2013) (the "*2013 Guide*") explains COMI in the following terms (at [144]):

> The concept of a debtor's centre of main interests is fundamental to the operation of the Model Law. The Model Law accords proceedings commenced in that location greater deference and, more immediate, automatic relief. The essential attributes of the debtor's centre of main interests correspond to those attributes that will enable those who deal with the debtor

> (especially creditors) to ascertain the place where an insolvency proceeding concerning the debtor is likely to commence. As has been noted, the Model Law establishes a presumption that the debtor's place of registration is the place that corresponds to those attributes. However, in reality, the debtor's centre of main interests may not coincide with the place of its registration and the Model Law provides for the rebuttal of the presumption where the centre of main interests is in a different location to the place of registration. In those circumstances, the centre of main interests will be identified by other factors which indicate to those who deal with the debtor (especially creditors) where the centre of main interests is. It is thus important to consider the factors that may independently indicate that a give State is the debtor's centre of main interests.

35 The *2013 Guide* states that COMI generally involves the assessment of factors which indicate to those who deal with the debtor, especially creditors, where insolvency proceedings concerning the debtor would be commenced.

36 The starting point is the presumption in Art 16(3) which provides as follows:

> In the absence of proof to the contrary, the debtor's registered office is presumed to be the debtor's centre of main interests.

As observed in *Re Zetta Jet Pte Ltd and others (Asia Aviation Holdings Pte Ltd, intervener)* [2019] 4 SLR 1343 ("*Zetta Jet 2*") at [30]–[33], Art 16(3) does not raise a presumption in the sense that it shifted the burden to a party to rebut the presumption on a balance of probabilities. Instead, the presumption is a helpful starting point which may be displaced by other factors. In other words, where other factors pointed to the COMI being in a place other than the registered office, the presumption would be displaced. The *2013 Guide* identifies the following factors as being relevant (at [145]–[147]):

> In most cases, the following principal factors, considered as a whole, will tend to indicate whether the location in which the foreign proceeding has commenced is the debtor's centre of main interests. ***The factors are the location: (a) where the central administration of the debtor takes place, and (b)***

> ***which is readily ascertainable by creditors. The date at which these factors should be analysed in order to determine the location of the debtor's centre of main interests is addressed [below]***.
>
> When these principal factors do not yield a ready answer regarding the debtor's centre of main interests, a number of additional factors concerning the debtor's business may be considered. The court may need to give greater or less weight to a given factor, depending on the circumstances of the particular case. ***In all cases, however, the endeavour is an holistic one, designed to determine that the location of the foreign proceeding in fact corresponds to the actual location of the debtor's centre of main interests as readily ascertainable by creditors***.
>
> The order in which the additional factors are set out below is not intended to indicate the priority or weight to be accorded to them, nor is it intended to be an exhaustive list of relevant factors; other factors might be considered by the court as applicable in a given case. ***The additional factors may include the following: the location of the debtor's books and records; the location where financing was organized or authorized, or from where the cash management system was run; the location in which the debtor's principal assets or operations are found; the location of the debtor's primary bank; the location of employees; the location in which commercial policy was determined; the site of the controlling law or the law governing the main contracts of the company; the location from which purchasing and sales policy, staff, accounts payable and computer systems were managed; the location from which contracts (for supply) were organized; the location from which reorganization of the debtor was being conducted; the jurisdiction whose law would apply to most disputes; the location in which the debtor was subject to supervision or regulation; and the location whose law governed the preparation and audit of accounts and in which they were prepared and audited***.
>
> [Emphasis added]

Case law has also provided some guidance on what other factors may be relevant to the COMI analysis (see for example *Re Zetta Jet 2* at [85]–[107]).

37 Two observations are important. First, the weight to be given to each factor depends on the circumstances of each case. In particular, consideration

must be given to the likelihood of a creditor placing weight on a specific factor (*Zetta Jet 2* at [78]). Second, COMI is a holistic analysis. The correct approach is to ascertain where the COMI is, based on factors readily and objectively ascertainable by third parties, especially creditors (*Re Rooftop Group International Pte Ltd and another (Triumphant Gold Ltd and another, non-parties)* [2020] 4 SLR 680 ("*Re Rooftop*") at [12] citing *Zetta Jet 2* at [80]). This assessment is carried out as at the date of the recognition application (*Re Rooftop* at [12], citing *Zetta Jet 2* at [61]).

The parties' cases on the Company's COMI

38 The appellants submitted that various factors pointed to the Company's COMI not being in Bermuda. It was emphasised that the Company had business interests in various countries. Our attention was drawn to Mr Li Yu's affidavit filed in the Application which stated that: (a) the Company had data stored in China; (b) the Company had back offices in China and Ukraine; (c) the Company's creditors were not in Bermuda; (d) the Company's customers were vessel owners located across the world, with the majority in China; and (e) the Company's employees were located in offices in China, Ukraine and Russia. Further, the Company's insurance operations were run by or through EF Marine Pte Ltd ("EF Marine") in Singapore, which, according to Mr Li Yu, received premiums on behalf of the Company's re-insurer, Swiss Re International SE Singapore Branch ("Swiss Re"), which was also based in Singapore.

39 Before the Judge and in its written submissions in the present appeal, the appellants did not indicate where the Company's COMI in fact was. However, in oral submissions, counsel for the appellants Mr Mohamed Ibrahim ("Mr Ibrahim") clarified that the appellants' position was that the Company's COMI was in Singapore. This was because Mr Li Yu was the centre of gravity

of the Company's business, directing its operations in various jurisdictions from Singapore. Mr Ibrahim further clarified that save for the receipt of funds by EF Marine in Singapore, the Company's insurance activities including sale of insurance policies did not take place in Singapore.

40 The appellants emphasised that the Company had no operational connection with Bermuda, describing the fact that it was licensed and regulated in Bermuda as a mere "legal structure" and framework. When the Proceeding was commenced, it was evident that the Company had no corporate secretary, auditor, registered office or PR in Bermuda (Judgment at [54]). It also had no office or employees in Bermuda (Judgment at [54]). The appellants relied upon the Judge's observation that there was no evidence that the Company had assets in Bermuda and its only bank account there had previously been closed (Judgment at [54]). In fact, the BMA's affidavit filed in the Proceeding deposed that "the Company truly has no presence in Bermuda and that it is effectively a shell" and it appeared that "all insurance operations [were] being run by or through EF Marine in Singapore, an entity and jurisdiction over which the [BMA had] no control or input". For these reasons, the appellants submitted that the Company's COMI was not in Bermuda.

41 The JPLs disagreed. The JPLs emphasised that (a) the Company was registered under the Bermuda IA as a Class 2 Insurer and was subject to the supervision of and regulations issued by the BMA, (b) the Company was required to appoint a PR and did appoint one (at least until 10 September 2021), and (c) the Company was obliged to maintain and did maintain its statutory books and records in Bermuda. Aside from the fact that the Company was incorporated in Bermuda and had its last known address there, they pointed to various other facts which identified the Company's COMI as being in Bermuda.

42 The JPLs submitted that little or no weight should be given to the Company not having an office, directors or officers in Bermuda at the material time. As the Company's regulatory non-compliance brought about this state of affairs, regarding it as relevant to the COMI analysis would be to endorse the breach as a means of circumventing the Company's true COMI *ie* the place where it was licensed to carry on its insurance business.

43 The JPLs submitted that the Company's COMI was in Bermuda and not in Singapore because its primary business, its insurance activities, would have been seen by its policyholders as taking place in Bermuda. Two reasons were offered in support. First, as the Company was incorporated and licensed to carry out insurance business in and from within Bermuda, its policyholders would have regarded their policies as being issued by an insurer located and regulated in Bermuda. Second, as part of the mutual insurance scheme, policyholders were required to obtain an interest in the Company (by purchasing a share in BSP as the Company's parent) (see [4] above).

44 Finally, the JPLs contended that the fact that Mr Li Yu had wrongly directed policyholders to pay premiums to EF Marine should not impact the Company's COMI being in Bermuda. EF Marine was not regulated or licensed to conduct insurance related activities in Bermuda or Singapore. In any event, EF Marine had been receiving such premiums for and on behalf of the Company.

Our decision

45 As stated above, the starting point of the COMI analysis is the presumption in Art 16(3) of the SG Model Law. As the Company was incorporated in Bermuda, its registered office was presumed to be its COMI,

unless there was evidence to the contrary. In our view, the evidence relevant to the COMI analysis was consistent with the presumption and pointed unequivocally to the Company's COMI being in Bermuda.

46 In our view, the evaluation must start with an examination of what the Company's business was. As the Company carried on a regulated business, where it was licensed to operate and was regulated, and the terms of its licence, were pertinent. The Company was licensed to carry on insurance business "in and from within" Bermuda, and for this purpose was incorporated there. This appeared to be its sole business, and there was no suggestion that it carried on any other type of business activities. Section 3 of the Bermuda IA provides that no one shall carry on insurance business "in or from within Bermuda" unless registered by the BMA as an insurer under s 4. The Company was registered under s 4 of the Bermuda IA as a Class 2 Insurer effective on 15 July 2010. This authorised it to carry on business in or from within Bermuda as an insurer, subject to the provisions of the Bermuda IA. As a Bermuda-licensed insurer, the Company was subject to regulatory requirements under the Bermuda IA, including maintaining a principal office in Bermuda, appointing a PR in Bermuda, maintaining a registered office in Bermuda, filing statutory financial returns in Bermuda, and keeping statutory books and records in Bermuda.

47 Accordingly, the Company's business activities and record keeping were centred in Bermuda. It was subject to the oversight of the regulator in Bermuda, the BMA, and was required to comply with various statutory obligations for this purpose. Pursuant to the terms of its licence, the Company was not permitted to carry on insurance activities outside of Bermuda (and unrelated to Bermuda)

48 The touchstone for assessment of COMI is the perception of third parties, especially creditors, as to where the debtor would open primary insolvency proceedings based on readily identifiable factors. The Company's principal creditors, its policyholders, would have thought that they were procuring insurance coverage from a Bermudan incorporated, licensed and regulated entity. This perception would have been reinforced by two further facts. First, under the mutual insurance scheme, the policyholders were required, as a condition of their policies, to obtain an interest in the Company (by purchasing a share in the Company's parent, BSP) (see [4] above), which they were to hold for the term of their coverage. Second, the insurance premiums were paid into the Company's bank account in Bermuda with the Hongkong and Shanghai Banking Corporation ("HSBC"). This only changed in or around 19 December 2021 based on instructions from Mr Li Yu. The policyholders would therefore have expected to look to the Company in Bermuda for matters concerning their policies including claims that they wished to make thereunder. Other creditors would also have perceived that they were extending credit to a Bermudan incorporated, licenced and regulated entity. Third parties, particularly the creditors, would therefore have regarded that the Company's COMI was in Bermuda and where its primary insolvency proceedings would be opened.

49 That leaves the appellants' argument that the Company's business activities were in other jurisdictions and that there was an absence of any presence in Bermuda at the relevant time. Is that relevant to the COMI analysis? We consider this next.

Relevance of activities of a regulated company, if illegitimate

50 The appellants' assertion that the Company had business interests in various countries was bare (see [38] above). There was an absence of objective evidence to support this claim. However, even if we accepted the appellants' contention that many of the Company's insurance contracts were concluded in China, Ukraine, and Russia, with the concurrence of the Company's then PR, the fact remains that such policies would have been issued pursuant to a licence under s 3 of the Bermuda IA *ie for* insurance business to be carried on in and from within Bermuda.

51 In our view, if the Company had *conducted* insurance business in breach of its licence *ie* not in and from within Bermuda, that would not be relevant in assessing the location of its COMI. One of the factors for assessing COMI stated in the *2013 Guide* was the "location in which the debtor was subject to supervision or regulation" (*2013 Guide* at [147]). The Company was carrying on a regulated activity in a regulated industry (insurance business) under Bermuda's authority and was subject to Bermuda's supervision and regulation. In our judgment, this factor was at the fore of the COMI analysis in the present appeal.

52 Further, excluding from the COMI analysis activities that did not comply with the terms of the Company's licence was consistent with the objective approach of determining COMI (see [37] above). The policyholders' reasonable expectation would be that the Company would conduct its business activities according to the terms of its licence and the applicable laws. Obviously, business activities that did not conform with this would not have factored in their objective assessment of the Company's COMI.

53 We should add that the situation would be different if the Company *legitimately* carried out insurance business through subsidiaries or agreements with other entities that were licenced outside Bermuda. But that was not the case here. Notably, EF Marine did not collect premiums on behalf of the Company in Singapore because it was a licenced subsidiary of the Company or had an agreement with it. It did so because it was the managing agent of the Company's reinsurer Swiss Re. That the Company did not operate in this manner sets the present case apart from *In re British American Insurance Company Limited* 425 B.R. 884 *(*"*BAICO*") and *In re Bear Stearns High-Grade Structured Credit* 374 B.R. 122 ("*Bear Stearns*") which were cited and relied upon by the appellants.

54 In *BAICO*, the British American Insurance Company Limited ("BAICO"), an insurance company incorporated under the laws of the Bahamas, had branch operations in around 16 other countries. It also operated through subsidiaries in various other countries, including Trinidad and Tobago ("Trinidad") (*BAICO* at p 2-3). BAICO was placed under judicial management in the Bahamas. An application was brought in the US Bankruptcy Court, S.D. Florida by the judicial manager for recognition of the Bahamas judicial management proceeding as either a foreign main or a foreign non-main proceeding. The court took the view that there was no evidence to show that BAICO had its COMI or an establishment in the Bahamas, other than the appointment of the judicial manager which was regarded as insufficient. The court also found that the activities of the judicial manager did not "constitute business activities of BAICO" (*BAICO* at p 26). Therefore, recognition of the Bahamas proceeding as a foreign main or non-main proceeding was refused. In reaching this conclusion, the court observed that there was overwhelming evidence that BAICO's headquarters were not in the Bahamas. BAICO had outsourced "essentially all of its central management" to its wholly owned

subsidiary ("BA Management") in Trinidad, pursuant to a services agreement (*BAICO* at p 22-23). Materially, the court found that BAICO had not done anything improper by acting "primarily through a subsidiary" and it had "no tie to the Bahamas other than was absolutely necessary to maintain its corporate existence and insurance licence" (*BAICO* at p 22-23).

55 *Bear Stearns* involved two funds (the "Funds") that were Cayman Islands registered companies. Pursuant to an administrative services agreement between the Funds and a Massachusetts corporation, the latter was appointed as the administrator of the Funds (the "Administrator"). The Administrator provided many services to the Funds, including acting as administrator, registrar and transfer agent (*Bear Stearns* at p 1-2). Pertinently, there was no suggestion that this arrangement was impermissible. Joint provisional liquidators were appointed when the Funds were wound up in the Cayman Islands. The joint provisional liquidators sought recognition of the Cayman Island proceedings as a foreign main proceeding, in the alternative, as a foreign non-main proceeding, before the US Bankruptcy Court S.D. New York (*Bear Stearns* at p 2 and 4). The court found that the Funds' COMI was in the US and not in the Cayman Islands. Registration was the only connection the Funds had with the Cayman Islands. The management of the Funds, their personnel, records and assets were in the US (*Bear Sterns* at p 6-7). On the same facts, the court found that the Funds did not have an establishment in the Cayman Islands as well (*Bear Stearns* at p 8). It was apparent that the facts in both these cases were quite different from the present case.

56 Two other cases were relevant. The first was *In re Oi Brasil Holdings Coöperatief U.A.* 578 BR 169 (Bankr SDNY, 2017) ("*In re Oi Brasil*"). In *In re Oi Brasil*, a recognition order for Brazilian bankruptcy proceedings was issued by the US Bankruptcy Court S.D. New York. One of the debtor's largest

creditors did not resist the making of the order, choosing to remain silent because it had devised a strategy to block the debtor's restructuring in the Brazilian proceedings. At about that time, the creditor had opened bankruptcy proceedings against the debtor in the Netherlands resulting in the appointment of an insolvency trustee. The insolvency trustee subsequently applied to the US Bankruptcy Court S.D. New York to (a) reverse the earlier recognition of the Brazilian bankruptcy proceedings as a foreign main proceeding, and (b) seek recognition of the Dutch bankruptcy proceedings as a foreign main proceeding. In rejecting the application, the court held that the actions of the creditor in deliberately remaining silent for strategic reasons was "an independent basis to decline to exercise [the court's] discretion to modify or terminate recognition" (*In re Oi Brasil* at p 235. The court found that the actions of the creditor fell within the realms of the COMI manipulation cases (*In re Oi Brasil* at p 240), observing that "issues of bad faith and other inequitable conduct" had to be taken into account when considering the factors relevant to determining COMI (*In re Oi Brasil* at p 243).

57 The second case was *In re Fairfield Sentry Ltd* 714 F 3d 127 (2nd Cir, 2013) ("*In re Fairfield*"). While *In re Fairfield* is frequently cited for the principle that COMI should be assessed as at the date of the application for recognition, it was also relevant for another reason. It was observed there that consideration could be given to the period between the commencement of the foreign proceeding and the application for recognition in order to ascertain if there had been any bad faith manipulation of COMI by the debtor (*In re Fairfield* at 138).

58 While *In re Oi Brasil* and *In re Fairfield* were not exact analogues for the present matter, we were of the view that for the purpose of the COMI analysis, a material distinction could not be drawn between conduct that was

tarred by bad faith and inequitable conduct, and business activities of a regulated entity that were not permitted under the terms of its licence or the applicable laws. The common thread is that only legitimate factors and conduct can be taken into account in assessing COMI. This stands to reason as it is self-evident that only legitimate conduct could and would be objectively and readily ascertainably by third parties.

59 For the reasons above (see [45]–[57]), we were of the view that where a regulated debtor carried out business activities in a manner that was not in conformity with its licence, that would presumptively be not relevant for the purpose the debtor's COMI analysis. Even if the Company's insurance business was carried on outside Bermuda, as the appellants asserted, that would not be relevant for the purpose of analysing the Company's COMI, insofar as such activities were in breach of the terms of its licence.

60 There is a final point which we address for completeness. We placed no weight on the fact that the Company's directors were based in Singapore, and that the payment of premiums flowed into a bank account in Singapore. As noted earlier, payment had previously been made into the Company's HSBC account in Bermuda (see [48] above). That account was closed, and Mr Li Yu was not able to re-open it because of the Covid pandemic. Before us, Mr Ibrahim agreed that notwithstanding payment was received in Singapore, this was a temporary arrangement necessitated by the COVID pandemic and therefore should not detract from the fact that payment should have been made to an account in Bermuda.

A failure by regulated companies to fulfil statutory obligations

61 For very much the same reasons as above, we rejected the appellants' argument that the Company's failure to comply with its statutory obligations as a licenced insurer in Bermuda was relevant to the COMI analysis.

62 It was undisputed that the Company eventually did not comply with its statutory obligations (see [5] above). If the Company was only licensed to carry out insurance business in and from within Bermuda, subject to such conditions as set out in its licence and the relevant legislation, it was counterintuitive to then contend that such noncompliance was relevant to the COMI analysis. Indeed, accepting the argument would be to take into account business activities that were not legitimate, a point we have addressed above.

63 The *2013 Guide* makes the position clear. In addition to listing "the location in which the debtor was subject to supervision or regulation" as a relevant factor to the COMI analysis, it also lists "the location whose law governed the preparation and audit of accounts and in which they were prepared and audited" (*2013 Guide* at [147]). These factors pointed to the Company's COMI being in Bermuda. In our view, the COMI analysis ought to proceed on the basis of what the situation would be if the Company had met its obligations and not otherwise. It would be plainly wrong to allow, and it would be seen as encouraging, an errant company to capitalise on its breach of statutory obligations to its advantage.

64 For the same reason, we rejected the appellants' submission that the presumption in Art 16(3) of the SG Model Law was not applicable because the Company no longer had a registered office in Bermuda. The Company did not have a registered office in Bermuda only because it had failed to comply with

its continuing obligation to maintain one there. In our view, it would be inappropriate to permit the Company to rely on its own breach to displace the presumption in Art 16(3).

65 We therefore agreed with the JPLs that no weight should be given to the fact that the Company did not comply with its statutory obligations.

Conclusion on the Company's COMI

66 The presumption in Art 16(3) applied and the presumptive starting point was that Bermuda was the Company's COMI. There was no relevant evidence to rebut it. Indeed, the evidence as outlined above (see [45]–[48]), pointed to the Company's COMI being in Bermuda. We should make it clear that our observations and conclusion above are restricted to the issue of the Company's COMI and should not be regarded as expressing any views on the legality or enforceability of any insurance contracts and policy issued by the Company, or any related contracts.

Relevance of the activities of the foreign representative in the COMI analysis

67 In the Application, the JPLs argued that their actions in dealing with the Company's affairs were relevant to the COMI analysis and went towards demonstrating that the Company's COMI was in Bermuda. The JPLs explained that they had been reviewing outstanding claims, liaising with the Company's underwriting agent and reinsurer, and providing regular updates to the BMA and the Supreme Court of Bermuda. However, the Judge declined to consider the activities of the JPLs as relevant to the determination of the Company's COMI, citing *Re Tantleff, Alan* [2023] 3 SLR 250 ("*Re Tantleff*") at [45] (Judgment at [53]). Before us, counsel for the JPLs Mr Allister Tan submitted

that the activities of the JPLs remained a relevant consideration in the COMI analysis.

68 In *Re Tantleff* (at [45]–[52]), the General Division of the High Court held that the actions of a foreign representative were irrelevant to the assessment of COMI, rejecting the approach taken in the US cases of *In re Fairfield*, *In re Oi Brasil*, and *In re British American Isle of Venice (BVI) Ltd* 441 BR 713 (citing *Zetta Jet 2* at [101]–[103]). The court reasoned that to do so would allow the parties to choose their COMI in an artificial manner. This was because the work done by the foreign representative would flow from an assumption of jurisdiction by the foreign court (*Re Tantleff* at [50] citing *Zetta Jet 2* at [102]). Although *Re Tantleff* recognised that the US cases had set a relatively high threshold for a shift in COMI as a result of the actions of the foreign representative, it nonetheless held that it would be best to assess COMI based on the activities of the company before the foreign proceeding commenced. This was despite the court finding that the relevant date for determining COMI was the date of the application for recognition (*Re Tantleff* at [50]–[51]). A similar position was expressed in *Re Zetta 2*.

69 It was ultimately not necessary for us to address this issue in view of our conclusion that the Company's COMI was in Bermuda. However, we had doubts as to the correctness of the position expressed in *Re Tantleff*, that there was an absolute bar against taking into account work done by the foreign representative for the purposes of assessing COMI. While we agreed with *Re Tantleff* and *Zetta Jet 2* that there was a need to prevent parties from choosing their COMI in an artificial manner, it was doubtful that this justified an absolute bar against taking such conduct into account. It seemed to us that, once it was accepted that the date of the application for recognition was the reference point for the COMI analysis, all factors must come into play regardless of whether

some of the factors were attributable to the conduct of the foreign representative. Indeed, *Re Tantleff* (at [50]) acknowledged that there was an inconsistency between accepting the relevant date for assessing COMI as the date of the application for recognition and disregarding the work done by the foreign representative in the interim. It was difficult to see why the foreign representative's activities would not be relevant if they had been undertaken over a long period of time. Creditors who dealt with the foreign representative would have had reference to such activities in forming their views as to where the COMI of the company was. The question was ultimately fact sensitive, and the court should be permitted to assess all the factors, bearing in mind the high threshold that must be satisfied for a shift in COMI by the activities of the foreign representative.

70 In the circumstances, we were of the tentative view that the US approach as laid out in *In re Oi Brasil* citing (*In re Fairfield*) was helpful (see *Re Tantleff* at [47]–[49]) and more principled. However, in view of our conclusion on COMI and as the issue was not fully ventilated, this is a question that ought to be fully considered in an appropriate case in the future.

Whether recognition of the Proceeding was contrary to Singapore's public policy

71 Finally, we address the issue of whether the Proceeding was contrary to Singapore's public policy warranting the application of Art 6 of the SG Model Law. As noted above (see [14]), the appellants made two arguments.

72 First, that there was breach of natural justice and due process in the Proceeding. This was because service of the application to wind-up was effected on the Company and its directors only *after* the Winding-Up Order was made. It was alleged that the BMA served the application for winding-up and the

supporting affidavit at the offices of the PR on 4 October 2022 despite the BMA being aware that (a) the PR had resigned with effect from 1 November 2021 (Judgment at [45]), and (b) the Company did not have a registered office in Bermuda. According to the appellants, the BMA should have at the very least ensured that notice of the Proceeding was provided to the Company's directors. Service of the documents on the Company was therefore ineffective. As such, recognition of the Proceeding and Winding-Up Order ought not to be granted as the rules of natural justice had been breached and the Company was deprived of a fair opportunity to be heard.

73 Second, that the JPLs had made misrepresentations in the Application because they had simply adopted the BMA's allegedly false allegations made in the Proceeding. The JPLs had also failed to protect the interests of the creditors by commencing the Application and incurring excessive costs of $150,000 (as of 1 February 2023).

74 We did not accept either submission.

75 In *Re PT Garuda Indonesia (Persero) Tbk and another matter* [2024] 3 SLR 254 ("*Garuda"*), the Singapore International Commercial Court examined the public policy exception in Art 6 of the SG Model Law. Art 6 provides as follows:

> Nothing in this Law prevents the Court from refusing to take an action governed by this Law, if the action would be contrary to the public policy of Singapore.

76 *Garuda*, held that a challenge under Art 6 would only succeed if the fundamental public policy of Singapore was engaged (*Garuda* at [95]). *Garuda* observed that the threshold for refusal of recognition under Art 6 the SG Model Law was not lower than under Art 6 of the Model Law as a result of omission

of "manifestly" in the former. In this regard, *Garuda* disagreed with the position expressed in *Re Zetta Jet Pte Ltd and others* [2018] 4 SLR 801 at [21]–[23] ("*Re Zetta"*). We note that the Judge followed the position in *Re Zetta* though he did not have the benefit of the judgment in *Garuda* when determining the matter (see Judgment at ([38]–[42]). We agreed with the view expressed in *Garuda*. In our judgment, *Garuda* correctly held that although the omission of "manifestly" "alone was insufficient to conclude that a lower threshold for finding a breach of public policy was intended" (*Garuda* at [84]), ultimately, a high threshold had to be met before recognition would be refused (*Garuda* at [85]–[88]).

77 We also agreed with the observation in *Garuda* that when deciding whether to deny recognition on the basis of public policy, the court must be sensitive "to procedural and substantive differences between domestic insolvency laws and foreign insolvency laws". As *Garuda* explained, the "fact that foreign insolvency laws and procedures operate differently from what is normally expected and experienced in the domestic insolvency regime cannot, without more, give rise to a finding that the foreign proceeding is abhorrent and contrary to Singapore public policy" (*Garuda* at [95], citing *Stocznia Gdynia SA v Bud-Bank Leasing SP* [2010] BCC 255 at [27]). A contrary approach would be against the view that a recognition proceeding is "a light-touch process" (*Garuda* at [95]).

78 Further, we broadly agreed with the non-exhaustive list of situations stated in *Garuda* at [96] that might fall within the public policy exception :

> (a) where recognition is sought in respect of a foreign proceeding commenced in breach of a moratorium over legal proceedings (see, *eg*, *In re Gold and Honey, Ltd* 410 BR 357 (2009));

> (b) where the relief sought under the Model Law is prohibited in the forum state or where compliance with orders for such reliefs would open individuals to criminal prosecution (see, *eg*, *In re Toft* 453 BR 186 (Bankr SDNY, 2011));
>
> (c) where the foreign representatives acted in bad faith or failed to make full and frank disclosure of material facts to the receiving court (see, *eg*, *In re Creative Finance Ltd (In Liquidation)* 2016 BL 8825 (Bankr SDNY, 2016));
>
> (d) where recognition is sought of a foreign proceeding commenced in breach of the recognising court's order granted in a prior proceeding (see *Zetta Jet* ([83] supra) at [25]); or
>
> (e) where there is a failure to accord due process to the creditors and other relevant stakeholders in the foreign insolvency process.

It is apparent that these situations related to the integrity of the foreign proceedings, the consequences of granting the relief sought, and the integrity of the conduct of the foreign representative in relation to the application for recognition.

79 The appellants' breach of natural justice and due process argument fell within the fifth category of situations listed above. However, we were not satisfied that there was a due process issue in the Proceeding. The pith of the appellants' argument was that proper service of the application for winding-up was not effected on the Company. It seemed to us that the critical question was whether adequate notice was given to the Company (of the application for winding-up). This was a matter of Bermudan law. To this end, the Judge had already found that no evidence was provided by the appellants to show that the service of the application for winding-up at the office of the PR was impermissible as a matter of Bermudan law, or that the service requirements under Bermudan law were not satisfied (Judgment at [45]–[46]). Accordingly,

there was no evidential basis for the appellants' submission that there had been a due process violation.

80 We observed that Mr Li Yu and/or the appellants could have addressed the alleged due process issue by applying to set aside the Winding-Up Order in the Bermudan courts, if there was any merit to the argument. That would have been the appropriate forum to make the challenge rather than a recognition application before the Singapore courts.

81 The appellants' second argument that the JPLs made misrepresentations in the Application and incurred excessive costs fell into the third category of situations listed above. The appellants alleged that the JPLs had made misrepresentations about the role of the main creditor of the Company, EF Marine, which had been incorporated in Singapore and was owned and controlled by Mr Li Yu. Specifically, they alleged that the JPLs had grossly mischaracterised EF Marine's role as receiving insurance premiums for and on behalf of the Company in Singapore. They further alleged that the JPLs had falsely claimed that Mr Li Yu had not cooperated with their requests for information. We agreed that, if true, these allegations could have been a basis for refusing recognition under the public policy exception. However, the allegations were bare, despite their gravity. Indeed, as the Judge observed (Judgment at [48]), the specific allegations by the JPLs, which the appellants claimed were false, appeared to be accurate on the face of the evidence. Thus, there was no basis for intervention.

82 Further, it was difficult to see how the appellants' allegation that the JPLs had failed to protect the interests of the creditors by commencing the Application and incurring excessive costs was a matter of public policy. This had nothing to do with the integrity of the Proceeding, the consequences of

granting the relief sought or the conduct of the JPLs as regards the Application. Art 6 was therefore not engaged. Indeed, it was difficult to understand how the JPLs were acting against the interests of the creditors when they had been authorised by the Supreme Court of Bermuda to bring the Application as foreign representatives. In any event, the right forum for these issues to be ventilated was the courts of Bermuda as the issue concerned the conduct of provisional liquidators the courts there had appointed.

83 We therefore agreed with the Judge that the public policy exception in Art 6 was not engaged on the facts.

Request for further arguments

84 After the present appeal was dismissed on 1 July 2024, the appellants wrote in on 5 July 2024 to request leave to present further arguments (pursuant to O 19 r 34 of the Rules of Court 2021 ("ROC 2021")) on four points, namely, that:

(a) The JPLs did not lead any evidence that the regulatory offences in Bermuda amounted to illegality;

(b) The JPLs did not lead any evidence that operating offshore activities out of China, Russia and Ukraine was illegal in Bermuda;

(c) Closure of the HSBC account was probably due to fines imposed by the UK regulators on the HSBC group; and

(d) Claims by vessels on policies issued by the Company were only contingent liabilities which crystallised as debts only when there were settlements or judgments in favour of vessel owners.

85 We rejected the appellants' request. Order 19 r 34 ROC 2021 did not permit requests for further arguments as of right. Instead, it required a direction from this court for parties to provide further arguments. The onus was thus on the appellants to provide good reasons to justify deferring the finality of the appeal process, which they failed to do. There was no explanation as to why the further arguments the appellants sought to raise were only presented at this stage. In fact, the closure of the HSBC account already formed the subject of a question posed by the court to the parties in its letter dated 27 June 2024.

86 In any event, the further arguments had no impact on the outcome of the present appeal. The third and fourth arguments did not go towards the determination of the COMI issue (or any other issue) in the appeal. As for the first and second arguments, given the status of the Company as a Bermudan licenced insurer, and the terms of the licence it was operating under, it was for the appellants to show how and why the Company's alleged insurance activities taking place outside of Bermuda were legal and legitimate, and should be taken into account when analysing its COMI.

Conclusion

87 For the reasons above, we dismissed the appeal. Costs of the appeal fixed at $40,000 inclusive of disbursements were awarded to the JPLs to be paid by the appellants.

Sundaresh Menon
Chief Justice

Belinda Ang Saw Ean
Justice of the Court of Appeal

Kannan Ramesh
Judge of the Appellate Division

Mohamed Ibrahim s/o Mohamed Yakub and Yasmin Binte Abdullah (Achievers LLC) for the appellants;
Siraj Omar SC, Allister Brendan Tan Yu Kuan and Joelle Tan (Drew & Napier LLC) for the respondents.