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

[2025] SGHC(A) 1

Appellate Division / Civil Appeal No 31 of 2024

Between

Victory International Holdings Pte Ltd

… *Appellant*

And

(1) Cosimo Borrelli
(2) Clifford Chance Pte Ltd

… *Respondents*

In the matter of Originating Application No 1214 of 2023

Between

Victory International Holdings Pte Ltd

… *Claimant*

And

(1) Cosimo Borrelli
(2) Clifford Chance Pte Ltd

… *Defendants*

JUDGMENT

[Companies — Receiver and manager – Accounts]
[Companies — Receiver and manager – Duties to chargor]
[Civil Procedure — Costs — Assessment – s 120 of the Legal Profession Act 1966 (2020 Rev Ed)]

TABLE OF CONTENTS

Victory International Holdings Pte Ltd
v
Borrelli, Cosimo and another

[2025] SGHC(A) 1

Appellate Division of the High Court — Civil Appeal No 31 of 2024
Kannan Ramesh JAD, See Kee Oon JAD and Mavis Chionh Sze Chyi J
25 October 2024

16 January 2025 Judgment reserved.

See Kee Oon JAD (delivering the judgment of the court):

Introduction

1 The appeal before us presents two issues of importance. The first issue relates to the scope of a receiver's duties vis-à-vis the chargor, *viz*., whether and when a receiver is obliged to provide information and/or produce documents at the chargor's request. The second issue pertains to when a solicitor's bill of costs may be assessed under s 120(1) of the Legal Profession Act 1966 (2020 Rev Ed) (the "LPA"), and when payment is deemed to have taken place for the purposes of s 122 of the LPA.

2 The appellant, Victory International Holdings Pte Ltd ("Victory"), brings this appeal ("AD 31") against the decision of the Judge of the General Division of the High Court (the "Judge") in HC/OA 1214/2023 ("OA 1214"). Victory and OPV Pharma Holdings Ltd ("Navis") were originally shareholders

in OPV Pharmaceutical Holdings Pte Ltd ("OPV SG"). Victory held 3.5m shares (the "Victory Shares") while Navis held the remaining 6.5m shares. Pursuant to the shareholders' agreement dated 17 September 2012 (the "SHA"), Navis, as the majority shareholder, had drag-along rights.

3 Victory was the claimant in OA 1214. The dispute in OA 1214 can be traced back to Victory's default in repaying a loan of US$2.5m under a Facility Agreement dated 13 June 2017 which it entered into with Navis (the "Loan" or the "Facility Agreement"). Victory and Navis had also entered into a share pledge on the same date by which the Victory Shares were assigned by Victory as the chargor and charged to Navis as the secured party (the "Share Pledge"). On 8 June 2021, Navis issued a notice to Victory stating its intention to sell its shares in OPV SG to RV Healthcare Pte Ltd ("RV Healthcare"). Thereafter, on 6 July 2021, Navis exercised its drag-along rights by issuing a drag-along notice to compel the sale of the Victory Shares to RV Healthcare. Victory refused to comply with the drag-along notice. On 8 July 2021, Navis issued a default notice to Victory pursuant to the Facility Agreement on the basis that the Loan had not been repaid. Victory disputed the notice and did not repay the Loan.

4 Pursuant to powers under the Share Pledge, by a Deed of Appointment dated 13 August 2021 (the "Deed of Appointment"), Navis appointed Mr Cosimo Borrelli ("Mr Borrelli" or alternatively, the "Receiver") and Mr Patrick Bance ("Mr Bance") as receivers of the Victory Shares (collectively the "Receivers"), to complete the drag-along sale of the Victory Shares. The drag-along sale was completed in October 2023. At present, Mr Borrelli is the sole receiver.

5 In OA 1214, Victory sought, amongst other things, the following orders:

(a) that Mr Borrelli, within three days from the date of the order, be made to furnish a copy of the executed drag-along sale and purchase agreement between Victory and RV Healthcare (the "Minority SPA");

(b) that Mr Borrelli, within seven days from the date of the order, be made to furnish a full account of the sale proceeds received from RV Healthcare under the Minority SPA (the "Sale Proceeds"), and the application of the Sale Proceeds against the secured liability under the Facility Agreement, with a detailed calculation of costs and expenses incurred and interest accrued;

(c) that Mr Borrelli, within seven days from the date of the order, be made to furnish a report stating:

(i) when the Receivers were first made aware that they could proceed with the sale of the Victory Shares after the arbitral tribunal declined to grant Victory's interim injunction application on 25 July 2023;

(ii) what steps were taken by the Receivers in discharging their responsibilities as receivers to sell the Victory Shares under the Share Pledge; and

(iii) what steps will be taken by Mr Borrelli to collect the outstanding consideration for the sale of the Victory Shares under the Minority SPA.

(d) if the court were to find that the Receivers were negligent in carrying out their duties as receivers, that the court grant any consequential relief for losses incurred by Victory;

(e) that Mr Borrelli and/or Clifford Chance Pte Ltd ("CCPL"), within seven days from the date of the order, be made to deliver to and file and serve on Victory CCPL's bill of costs for legal fees incurred by the Receivers in connection with the Share Pledge, pursuant to ss 120, 124 and/or 125 of the LPA; and

(f) that CCPL's bill of costs for legal fees in connection with the Share Pledge be assessed by the court, pursuant to ss 120 and/or 124 of the LPA and/or O 21 r 16 of the Rules of Court 2021 (the "ROC 2021"), and the costs of the assessment be fixed.

6 The defendants in OA 1214 and respondents in AD 31 are Mr Borrelli and his solicitors, CCPL. The Judge did not grant most of the relief sought by Victory in OA 1214. Before us, Victory appeals against the following parts of the Judge's decision: (a) that Mr Borrelli need not provide a report of, amongst other things, the steps taken to realise assets during the ongoing receivership (the "Report"), and (b) that CCPL's bill of costs for legal fees in connection with the receivership ("CCPL's bill") need not be assessed by the court. Victory seeks the following orders on appeal: (a) that Mr Borrelli provides the Report; and (b) that CCPL's bill be assessed pursuant to, amongst other things, s 120 of the LPA.

7 At the conclusion of the hearing on 25 October 2024, we reserved judgment. Having considered the parties' submissions, we partially allow the appeal to the extent that we order CCPL to deliver CCPL's bill for assessment by the court, and direct the respondents to serve CCPL's bill on Victory. We set out the reasons for our decision below.

Background facts and chronology

Facility Agreement and Share Pledge

8 Navis, Victory and OPV SG entered into the SHA on 17 September 2012.[1]

9 On 13 June 2017, Victory and Navis entered into the Facility Agreement. The sum of US$2.5 million under the Facility Agreement was an onward loan from OPV SG to Navis under a loan agreement entered into on 13 June 2017 (the "Navis Loan Agreement").[2]

10 As security for Victory's repayment of the Loan under the Facility Agreement, on 13 June 2017, Victory and Navis entered into the Share Pledge which required Victory to assign and charge its 35% shareholding in OPV SG to Navis.[3]

11 The relevant terms of the Facility Agreement and Share Pledge are as follows:[4]

(a) Clause 6.1 of the Facility Agreement provides that Victory was to "repay the Loan in full on the Final Repayment Date". The Final Repayment Date was defined in Clause 1.1 of the Facility Agreement as "the date falling 3 years from the Drawdown date" or "the date on which [Victory] ceases to hold 35% of the Shares in [OPV SG]", whichever is

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1 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at 75 and 91.

2 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at paras 10–11.

3 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at para 12.

4 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at para 13 and pp 131–134.

earlier. The Final Repayment Date was eventually 19 June 2020, which was three years from the drawdown date of 19 June 2017;

(b) Clause 11.3 of the Share Pledge provides, amongst other things, that Victory (as the Chargor) "shall alone be liable for the payment of [the receiver's] remuneration";

(c) Under cl 11.4(a) of the Share Pledge, "a Receiver will be deemed to be the agent of [Victory] for all purposes and accordingly will be deemed to be in the same position as a Receiver duly appointed by a mortgagee under the Property Act" and Victory alone (as the Chargor) is "responsible for the contracts, engagements, acts, omissions, defaults and losses of a Receiver and for liabilities incurred by a Receiver";

(d) Under cl 12.6 of the Share Pledge, a Receiver is entitled to conduct the sale of the Shares "in any manner and on any terms which he thinks fit";

(e) Clause 14 of the Share Pledge was a "waterfall" provision in that it provided for the order of priority in which the Sale Proceeds were to be applied; and

(f) Under cll 15(a) and 15(b) of the Share Pledge, Victory (as the Chargor) is liable to "pay all reasonable costs and expenses (including legal fees) incurred in connection with this Deed by the Secured Party, Receiver, attorney, manager, agent or other person appointed by the Secured Party under this Deed" and "keep each of them indemnified against any failure or delay in paying those costs of expenses".

Sale of Navis's shareholding in OPV SG and the draft Minority SPA

12 On 8 June 2021, Navis issued a sale notice to Victory pursuant to cl 16.5 of the SHA. In the sale notice, Navis stated its intention to sell its 65% shareholding in OPV SG to RV Healthcare.[5]

13 Navis issued a drag-along notice to Victory pursuant to cl 16.6 of the SHA and Article 24 of the memorandum and articles of association of OPV SG on 6 July 2021. In the drag-along notice, Navis required Victory to transfer Victory's 35% shareholding in OPV SG to RV Healthcare on the same terms listed in the schedule to the sale notice dated 8 June 2021.[6]

14 On 8 July 2021, Navis issued a notice to Victory stating that an event of default had arisen under cl 12.1 of the Facility Agreement as Victory had not repaid "the Loan together with accrued interest when due on 19 June 2020 (the Final Repayment Date)". In its notice, Navis demanded the payment of US$3,724,455.03 by 9 July 2021.[7]

15 The next day, on 9 July 2021, Drew & Napier LLC ("D&N"), Victory's solicitors, sent a letter to Navis rejecting the allegation that Victory's failure to repay the Loan in the circumstances amounted to an event of default under the Facility Agreement. They further emphasised that it was unreasonable to demand repayment of the full sum within one working day of the notice of an event of default.[8]

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5 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at 141 and 143.

6 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at 150.

7 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at 153–154, paras 2(a) and 3(b).

8 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at 158, paras 2–3.

16 On 26 July 2021, Navis sent a letter to D&N stating that the sale of Navis's shares in OPV SG to RV Healthcare had been completed. Navis asked for Victory's confirmation by the next day, 27 July 2021, that Victory would comply with the drag-along notice. Navis also enclosed a draft of the Minority SPA which involved a drag-along sale and purchase agreement between Victory and RV Healthcare.[9]

17 Notably, under cl 3.2 of the Minority SPA, the consideration for the sale of the Victory Shares was to be paid in two tranches: (a) US$3,237,500 (the "Initial Purchase Price"); and (b) US$262,500 (the "Deferred Purchase Price").[10] Furthermore, under cl 6.7 of the Minority SPA, there was to be a loan adjustment amount (the "Loan Adjustment Amount") paid by RV Healthcare to Victory. The Loan Adjustment Amount was 35% of the sum due to OPV SG under the loan agreement between OPV SG and Navis (the "Loan Repayment"). This proportion of 35% corresponded to Victory's "Equity Proportion" in OPV SG.[11]

18 On or around 19 August 2021, RV Healthcare's solicitors, Eugene Thuraisingam LLP, informed D&N that the Receivers had been appointed vis-à-vis the Victory Shares.[12]

19 D&N sent a letter to Navis on 1 September 2021 setting out, amongst other things, Victory's position that Navis had breached the Share Pledge and that Victory was electing to "avoid and rescind" the Share Pledge.[13]

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9 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at 160.

10 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at 164.

11 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at 197.

12 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at para 20.

13 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at 210, paras 33–34.

20 On 8 September 2021, Navis sent a letter to D&N confirming that Navis had appointed the Receivers.[14]

HC/S 781/2021 and the arbitration proceedings

21 On 16 September 2021, Victory commenced HC/S 781/2021 ("Suit 781") against Navis and Navis Asia Fund VI Management Company Limited ("Navis Asia"), which legally and beneficially owned 100% of Navis. On the application of Navis and Navis Asia, Suit 781 was stayed in favour of arbitration on 28 February 2022 (this decision was upheld on appeal, save for some variations, on 4 April 2022[15]). Victory commenced arbitration against Navis in the Singapore International Arbitration Centre on 4 May 2022.[16]

22 The arbitral tribunal rejected Victory's application for an interim injunction to restrain Navis and the Receivers from dealing with the Victory Shares on 25 July 2023. The arbitral tribunal found, amongst other things, that damages were an adequate remedy. Given the tribunal's decision, Victory accepted that the Receivers may proceed to sell the Victory Shares.[17]

Execution of the Minority SPA

23 D&N sent three letters to CCPL requesting an update from the Receivers in respect of the sale of the Victory Shares. On 31 July 2023, D&N sent a letter to CCPL requesting, amongst other things, an update on the progress of negotiations with RV Healthcare on the sale of the Victory Shares by 4 August 2023. There was no response to this letter. On 7 August 2023, D&N sent a

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14 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at para 22.

15 HC/ORC 1857/2022 dated 4 April 2022 at para 2.

16 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at paras 24–27.

17 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at paras 28–29.

follow-up email to CCPL requesting a response by 10 August 2023. There was no response to this email as well. On 15 August 2023, D&N sent a letter to CCPL demanding, amongst other things, an update on the progress of the negotiations with RV Healthcare on the sale of the Victory Shares.[18]

24 On 22 August 2023, CCPL sent a letter to D&N briefly indicating, amongst other things, that the negotiations with RV Healthcare were "well-advanced". On 19 September 2023, D&N responded to CCPL's letter dated 22 August 2023- protesting that the said letter provided no details. Allen & Overy LLP ("A&O"), who were solicitors for Navis, were copied in D&N's letter. In particular, this letter stated Victory's objections to the unexplained undue delay by the Receivers in executing the Minority SPA and demanded a full update on the negotiations with RV Healthcare by 22 September 2023.[19]

25 That same day, on 19 September 2023, D&N sent a letter to A&O stating, amongst other things, Victory's entitlement to 35% of the Loan repaid to OPV SG under the Loan Adjustment Amount and Victory's strong objection to the undue delay on the part of the Receivers in executing the Minority SPA. On 22 September 2023, CCPL sent a letter to D&N objecting to Victory's demand for the Receivers' communications with RV Healthcare and Navis on a supposed lack of basis. The Receivers also stated that they would "provide a full statement of account upon the sale of the Shares".[20]

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18 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at paras 31–33.

19 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at paras 34–35.

20 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at paras 36–37 and at 289, paras 6 and 8.

26 On 28 September 2023, A&O responded to D&N's letter dated 19 September 2023 (see [25] above) stating that Navis rejected the allegations raised therein.[21]

27 The Minority SPA was signed on 5 October 2023 and its completion date was 26 October 2023. Mr Bance resigned as a receiver on 5 October 2023, leaving Mr Borrelli as the sole receiver.[22]

28 On 6 October 2023, D&N requested for a copy of the signed Minority SPA from CCPL by 9 October 2023.[23] This letter stated that Mr Borrelli was responsible for the collection of all monies that might become due and payable to the seller under the Minority SPA as consideration for the sale of the Victory Shares, including but not limited to the Loan Adjustment Amount (see [16] above).[24] D&N did not receive a copy of the Minority SPA by 9 October 2023 or any response to its letter.

29 D&N sent a second letter on 13 October 2023. Later that day, on 13 October 2023, CCPL sent a letter to D&N stating that Mr Borrelli would "respond more fully" to D&N's letters in due course. On 25 October 2023, CCPL sent D&N a letter stating that Mr Borrelli's duties did not extend to providing Victory with a copy of the Minority SPA but that a provision relating to the Loan Adjustment Amount had been included in the Minority SPA and it would be payable by RV Healthcare to Mr Borrelli as a receiver.[25]

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21 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at 292.

22 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at para 39.

23 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at para 41.

24 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at 299, para 8.

25 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at paras 42–44.

30 On the same day, D&N sent a letter to CCPL recounting and summarising the correspondence exchanged between the parties. In that letter, D&N, on behalf of Victory, also demanded: (a) a copy of the signed Minority SPA as soon as possible and, in any event, prior to the completion on 26 October 2023, and (b) a full statement of account from Mr Borrelli.[26]

31 The sale of the Victory Shares to RV Healthcare was completed on 26 October 2023.[27] CCPL refuted Victory's requests in its letter dated 26 October 2023.[28] On 31 October 2023, CCPL sent a letter to D&N enclosing a brief statement of account (the "Interim Statement"). Based on the Interim Statement, Victory still owed Navis US$2,497,971.58 after the collection of the Initial Purchase Price of US$3,237,481.67 (after deduction of bank charges of US$18.33), from which the Receivers' expenses totalling US$696,929.56 and stamp duty amounting to US$3,264.34 were deducted. CCPL also informed Victory that Mr Borrelli expected to receive the Loan Adjustment Amount from RV Healthcare shortly and that he would provide a statement of account following receipt and application of this payment.[29]

32 On 8 November 2023, D&N sent a letter to CCPL in which Victory, amongst other things, again requested a copy of the signed Minority SPA, a list of invoices issued for CCPL's incurred legal fees of US$546,536.56, and an update on the status of the Loan Adjustment Amount.[30]

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26 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at para 45.

27 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at para 5.

28 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at para 46.

29 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at paras 47–48.

30 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at 398, paras 4(c), 6(b) and 9(b).

33 Cavenagh Law LLP ("Cavenagh Law"), another of Mr Borrelli's solicitors, sent a letter to D&N on 14 November 2023 to confirm that the Receiver had received the Initial Purchase Price of US$3,237,500. Cavenagh Law also confirmed the existence of the Deferred Purchase Price of US$262,500 which was to be payable according to the terms of the Minority SPA.[31] The letter also stated as follows:[32]

> 5. On 31 October 2023, your client was provided with a full and proper account of the Receiver's dealing with the Shares and how the funds received under the Minority SPA were applied (the "Statement of Account"). The Receiver has also provided regular detailed updates and addressed all reasonable queries raised by your client in connection with the terms of the Minority SPA and the sale process. In addition to this, our client has and will continue to discharge the duties he owes as Receiver in good faith. Our client has also confirmed in our correspondence with you that he has discharged such duties in good faith on a number of occasions.
>
> 6. In light of the above and your client's inability to articulate any basis for suggesting that the Receiver has failed to discharge his duties, your request for additional information and documents to enable your client to "verify" that the Receiver has discharged his duties lack merit.
>
> …
>
> 10. The Receiver is entitled to claim all reasonable costs and expenses (including legal fees) incurred in connection with the Share Pledge. The Receiver has necessarily incurred such fees since its appointment over two years ago in connection with the sale of the Shares and has confirmed the amount of these fees to your client. However, the Receiver is under no obligation to provide the information requested in your letter (much of which is privileged) in connection with such fees.

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31 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at 402, paras 7–8.

32 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at 402–403, paras 5, 6 and 10.

34 As of 30 November 2023, Victory had not received a copy of the signed Minority SPA. Victory also had not received any updates from Mr Borrelli about the status of the Loan Adjustment Amount, amongst other things.[33]

35 Victory commenced OA 1214 on 1 December 2023 against Mr Borrelli and CCPL.

The decision below

36 The Judge only allowed OA 1214 to the extent of ordering Mr Borrelli to furnish a copy of the Minority SPA to Victory. None of the other orders sought by Victory in OA 1214 were allowed: *Victory International Holdings Pte Ltd v Borrelli, Cosimo and another and another matter* [2024] SGHC 79 (the "Judgment") at [6]. We briefly summarise the Judge's reasons insofar as they are relevant to the issues before us.

37 The Judge explained that the nature of the relationship between a receiver, a mortgagor/chargor and a mortgagee/chargee is tripartite in nature. The scope of a receiver's agency relationship is limited because his primary duty is to the mortgagee/chargee who appointed him, not his principal (*ie*, the mortgagor/chargor): Judgment at [70]–[71]. Importantly, the Judge summarised the following as the "peculiar incidents" of a receiver's agency that are relevant here (Judgment at [74]):

> (a) Even though the mortgagor/chargor is the principal, it has no say in the appointment or identity of the receiver and is not entitled to give any instructions to the receiver. It is also not entitled to dismiss the receiver.

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[33] 1st Affidavit of Nguyen Suong-Hong dated 1 December 2023 at para 51.

(b) There is no contractual relationship between the mortgagor/chargor and the receiver.

(c) The receiver owes duties to both the mortgagee/chargee, and the mortgagor/chargor. This creates a tripartite relationship between the mortgagor/chargor, the receiver, and the mortgagee/chargee.

(d) The duty owed by the receiver to the mortgagor/chargor is not owed to him individually but to him as one of the persons interested in the equity of redemption. In other words, this right possesses a "class character".

(e) Despite the foregoing, the receiver's primary duty in exercising his powers of management is to try and bring about a situation in which the secured debt is repaid.

(f) Therefore, the receiver is not managing the mortgagor/chargor's property for the benefit of the mortgagor/chargor, but the security, the property of the mortgagee/chargee, for the benefit of the mortgagee/chargee.

Duties owed by a receiver

38 The Judge found that the duties that a receiver owes to a mortgagor/chargor are primarily equitable in nature: Judgment at [76]–[77]. As to the content of the duties owed by a receiver, the Judge observed as follows. First, the receiver owes little by way of duties individually to the mortgagor. Second, a receiver's primary duty is owed to the mortgagee/chargee, and not to the mortgagor/chargor. Third, the receiver's duties to the mortgagor/chargor are derived primarily in equity, although statute or contract can provide for additional duties. Fourth, when exercising its power of sale of a mortgaged

property, a receiver owes, to the mortgagor/chargor, a duty of good faith and a duty to take reasonable care to obtain a proper price: Judgment at [80].

39 Furthermore, the Judge held that a receiver does have a duty to account to the mortgagor/chargor under Singapore law. However, that duty is a limited one. The receiver should generally be left alone. Otherwise, the receiver could be burdened by repeated applications for information during the course of the receivership, especially where such information is requested more to "appease fears" rather than to establish any specific wrongdoing: Judgment at [85], [89]–[90] and [93].

40 To determine when a receiver needs to produce documents in line with his duty to account, the Judge proposed the following framework (Judgment at [105]):

> (a) Do the documents exist? If the answer is "yes", proceed to (b). If the answer is "no", skip (b) and proceed straight to (c).
>
> (b) Does the mortgagor/chargor own the documents? This depends upon the capacity in which the receivers were acting when they created those documents. If the answer is "yes", proceed to question (c). If the answer is "no", the court is unlikely to order production.
>
> (c) Will production of the documents be of such utility as to be warranted? This depends on several factors:
>
> > (i) If the receivership is still subsisting, the court's discretion should be guided by the mortgagor's/chargor's "need to know" the contents of the documents.

(ii) If the receivership has ended, and the documents being requested are owned by the mortgagor/chargor, the court will be more likely to answer this question in the affirmative unless the receiver can provide strong reasons as to why production of the documents should be refused.

Producing the Minority SPA

41 Applying the test outlined above, the Judge held that Mr Borrelli should produce a copy of the Minority SPA to Victory for two reasons. First, Victory did have a claim to ownership over the Minority SPA. Second, and furthermore, the Minority SPA was a basic document that Victory needed to know about: Judgment at [109].

Providing the Report to Victory

42 However, the Judge held that Mr Borrelli did not have to provide the Report to Victory. Since the Report did not exist, Victory could not assert ownership over it. Furthermore, Victory did not demonstrate its entitlement to the Report on a "need to know" basis: Judgment at [123]–[124].

43 Even if it were true that Mr Borrelli still came under a residual equitable duty to exercise reasonable care in conducting the sale of the Victory Shares, the supposed delay of nine weeks did not amount to a breach of such a duty. Moreover, Victory could not say that the Minority SPA could be concluded within one week of the arbitral tribunal's decision on the basis of, amongst other things, the existence of a draft Minority SPA: Judgment at [126].

Delivering CCPL's bill of costs

44 The Judge held that CCPL did not have to deliver its bill of costs to Victory.

45 First, Victory had no standing under s 120(1) of the LPA to apply for an assessment of CCPL's bill of costs. Under s 120(1) of the LPA, a person must fall within one of two categories of persons so as to have standing: (a) "the party chargeable"; or (b) "any person liable to pay the bill either to the party chargeable or to the solicitor": Judgment at [133].

46 Victory was not the "party chargeable" with CCPL's bill; the person liable to pay the bill to CCPL was Mr Borrelli, CCPL's client on record: Judgment at [136]. Furthermore, the party who is "liable to pay the bill … to the party chargeable" was Navis. The "tripartite contractual arrangement" was such that: (a) Mr Borrelli engaged CCPL and was the client on record; (b) Navis separately appointed the Receivers and agreed to indemnify them for all costs and expenses, including all legal expenses; and (c) Victory is obliged under cl 15 of the Share Pledge to indemnify Navis for all reasonable costs and expenses, including legal fees. Thus, Victory was one step removed from being a party entitled to seek an assessment of CCPL's bills: Judgment at [137].

47 Second, even if Victory had standing, Victory did not discharge its burden of proving "special circumstances" within the meaning of s 122 of the LPA: Judgment at [141]. Victory's allegation of overcharging by CCPL was a bare accusation and did not amount to a "special circumstance": Judgment at [143]. Victory's second argument on its lack of control over the legal fees charged and its obligation to indemnify those legal costs did not constitute a "special circumstance": Judgment at [148]. Finally, the information in the bill

of costs would likely be subject to legal professional privilege: Judgment at [149].

48 Victory filed its notice of appeal against the Judge's decision on 16 April 2024.

Parties' positions on appeal

Appellant's Case

Producing the Report

49 Victory submits that a "practical exercise" of the duty to account, the duty to act in good faith and/or the duty to take reasonable care to obtain the proper price requires a receiver to pursue all consideration for the purposes of obtaining repayment. Mr Borrelli ought to be reasonably diligent in taking steps to collect the deferred consideration and account for these steps to Victory.[34]

50 Furthermore, contrary to the Judge's application of the "need to know" test, the appropriate test is the "prejudice" test as set out in *Re Geneva Finance; Quigley (Receiver and Manager appointed) v Cook and others* (1992) 7 ACSR 415 ("*Re Geneva*") (the "prejudice" test): whether the production of the document would impede the receiver in the proper exercise of his functions or would impinge prejudicially upon the position of the debenture holder by threatening or imperilling the assets which are subject to the charge.[35]

51 Applying the "prejudice" test, Mr Borrelli should be ordered to produce the Report because he has not provided any evidence on how the production of

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[34] Appellants' Case dated 15 July 2024 ("AC") at paras 14, 27(i), 29, 33 and 49.

[35] AC at paras 27(ii)–(iii), 55 and 60–63.

the Report would impede him in the proper exercise of his functions or impinge prejudicially upon the position of Navis by threatening or imperilling the Victory Shares.[36]

52 Alternatively, the Judge erred in applying the "need to know" test as Victory needed to know the status of certain deferred consideration pursuant to the Minority SPA, and Mr Borrelli should therefore produce the Report.[37]

Delivering CCPL's bill of costs

53 Victory further submits that it has standing under s 120(1) of the LPA.[38] The express terms of the Share Pledge made clear that Victory was ultimately responsible to directly indemnify Mr Borrelli's legal fees under cl 15(a) of the Share Pledge and to keep both the Receivers and Navis indemnified individually under cl 15(b).[39] Furthermore, with reference to the Interim Statement, Mr Borrelli appears to have directly deducted his fees and expenses from monies received from the sale proceeds of the Victory Shares, in line with the order of priority for application of the Sale Proceeds as specified in cl 14 of the Share Pledge.[40] Even if the court finds that Navis was liable to pay CCPL's bill to Mr Borrelli, the court is not precluded from finding that Victory was also liable to do so under the Share Pledge.[41]

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36 AC at paras 65–70.

37 AC at paras 27(iv) and 73.

38 AC at paras 27(v) and 76.

39 AC at para 77.

40 AC at paras 78 and 80–81.

41 AC at para 85.

54 Furthermore, Victory submits that there are special circumstances here because of the existence of overcharging on the facts in CCPL's bill.[42]

55 Alternatively, the court has the power under s 78 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA") to assess the disbursements of a privately appointed receiver, which includes the receiver's legal fees.[43] Victory proffers two reasons for this. First, disbursements incurred by court-appointed receivers under O 30 r 3 of the Rules of Court 2014, which is similar to s 78 of the IRDA, have to be approved. There is no reason for the court to not have a similar power to assess the disbursements of privately appointed receivers, particularly their legal fees.[44] Second, assessment under s 78 of the IRDA is appropriate in the current circumstances.[45]

56 In the further alternative, the court has an inherent jurisdiction to assess disbursements of a privately appointed receiver and should exercise this jurisdiction to order assessment.[46]

Respondents' Case

Producing the Report

57 The respondents make four submissions. First, there is no basis for Victory to compel Mr Borrelli to create and produce the Report. Such a report does not exist and there is no authority to show that a privately appointed receiver is obliged to incur time and costs to *create* documents to address the

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42 AC at paras 96–97.

43 AC at paras 27(vi) and 102.

44 AC at paras 103–106.

45 AC at paras 108, 112 and 122.

46 AC at paras 27(vii), 123–125 and 128.

alleged concerns of a mortgagor.[47] Furthermore, pursuant to cl 12.6 of the Share Pledge, the receiver is entitled to conduct the sale of the Shares in any manner he thinks fit. It necessarily follows that Mr Borrelli was also entitled to decide *when* to execute the Minority SPA; there is even less basis to order Mr Borrelli to generate the Report. Even if the positive duties to act as proposed by Victory did exist, they would be ousted and/or inconsistent with the express terms of the instrument under which Mr Borrelli was appointed.[48]

58 Second, even if the creation and production of the Report does not conflict with Mr Borrelli's duties to Navis as the mortgagee, Mr Borrelli has clearly already exercised his discretion not to produce such a report on the basis that doing so would be prejudicial to the receivership.[49] There is a real risk of legal proceedings being commenced against Mr Borrelli if the Report is produced.[50] The burden was on Victory to show that Mr Borrelli had either exercised his discretion in bad faith or that such a decision was one which no reasonable receiver would have made. Victory did not do so.[51]

59 Third, and in any event, Victory is not entitled to the Report. To begin with, the applicable test is the "need to know" test as applied by the Judge.[52] Next, the information sought in the Report is known by Victory and/or irrelevant.[53] Insofar as Victory is seeking details on the further steps to be taken by Mr Borrelli to collect the outstanding consideration under the Minority SPA,

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47 Respondent's Case dated 12 August 2024 ("RC") at paras 22–25, 44–46 and 50.

48 RC at paras 63–66.

49 RC at paras 70–72 and 76–77.

50 RC at para 81.

51 RC at paras 26–27 and 82.

52 RC at para 84.

53 RC at paras 95–96.

Victory is aware that there is simply no guarantee that there will be any further sums payable under the Minority SPA as these are subject to the satisfaction of certain conditions which are completely outside of Mr Borrelli's control.[54]

60 Finally, there is no legal basis to treat the generally established duties as a composite one or one where the "practical exercise" leads to a duty to be "reasonably diligent". Mr Borrelli's primary duty is to Navis.[55] Moreover, none of the categories of deferred consideration fall within Mr Borrelli's control; it is "neither commercial nor practicable" for Mr Borrelli to undertake the actions that Victory claims he should have done.[56] It is also unclear how a duty to be "reasonably diligent" leads to Victory being entitled to the Report.[57]

Delivering CCPL's bill of costs

61 The respondents make five submissions in respect of CCPL's bill of costs. First, Victory has no standing under s 120(1) of the LPA because it is neither the "party chargeable", nor the party "who is liable to pay the bill … to the party chargeable" under the plain and ordinary meaning of the provision.[58] Importantly, Victory may seek recourse against Navis pursuant to the terms of the Share Pledge.[59] Furthermore, as a matter of law, where payment has already been made to the solicitor, a third party's recourse is against the client. Here,

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54 RC at paras 29–33 and 103.

55 RC at paras 111–112.

56 RC at para 114.

57 RC at paras 36 and 115.

58 RC at paras 39(a), 117(a) and 122.

59 RC at para 132.

that would mean that Victory's recourse lies in a claim against Navis, not CCPL.[60]

62 Second, even if there is standing, Victory has not proven "special circumstances" within the meaning of s 122 of the LPA given that CCPL's bill has already been paid by Navis.[61]

63 Third, the undisputed fact that the narratives explaining CCPL's fees (and therefore work done) are legally privileged and confidential is a strong and important factor militating against delivery and assessment of CCPL's bill of costs.[62]

64 Fourth, Victory should not be permitted to raise its new point on appeal in relation to an assessment under s 78 of the IRDA.[63] Even if it is allowed to do so, s 78 of the IRDA simply does not allow an assessment of CCPL's bills since it is an application against the Receiver directly (rather than CCPL) – the failure to afford Mr Borrelli an opportunity to respond to such an application is fatal.[64] In any event, s 78 of the IRDA does not permit the assessment of a receiver's solicitor's fees.[65] Further, and/or in the alternative, the criteria for assessment under s 78 of the IRDA has not been met because Victory has not shown how "special circumstances" exist.[66]

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60 RC at para 135.

61 RC at paras 39(b), 117(c) and 138–139.

62 RC at paras 39(c) and 150.

63 RC at paras 155–159.

64 RC at paras 160–161.

65 RC at paras 163–175.

66 RC at paras 39(d) and 181–182.

65 Finally, there is no basis for the court to exercise its inherent jurisdiction to order an assessment under s 120 of the LPA.[67]

Issues to be determined

66 There are two issues that arise for our consideration. First, whether Mr Borrelli should be ordered to produce the Report. Second, whether the respondents should be ordered to deliver CCPL's bill of costs for assessment.

Whether Mr Borrelli should be ordered to produce the Report

67 We agree with the Judge that Mr Borrelli should not be ordered to produce the Report. We are of this view as the Receiver has no obligation to provide the information sought therein. We begin by setting out the applicable law in respect of the duties owed by a privately appointed receiver vis-à-vis a chargor when exercising the power of sale. We do so as it is important to contextualise the receiver's obligation to provide information to the chargor during the receivership within the broader framework of the receiver's duties to chargor (and indeed the chargee) when exercising the power of sale. This context shapes and delineates the contours of and explains the purpose of the obligation. For the sake of convenience, our references to a "chargor" and "chargee" are meant to refer to a "chargor and/or mortgagor" and "chargee and/or mortgagee", respectively.

Duties owed by a privately appointed receiver

General principles

68 We agree with the Judge's description of the tripartite relationship between a chargor, a chargee, and a receiver (see [37] above). Essentially, a

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67 RC at paras 39(e) and 183–184.

chargor gives the chargee rights and powers over the former's property, and agrees to the chargee using those rights and powers in their own interests to achieve repayment of the debt. To secure its rights, the chargee appoints a receiver: Gavin Lightman et al, *Lightman & Moss on the Law of Administrators and Receivers of Companies* (Sweet & Maxwell, 5th Ed, 2012) ("*Lightman & Moss*") at paras 13-001–13-002. As such, the receiver becomes an agent for both the chargee that appoints the receiver, and the chargor. We should add, however, that the receiver is not an agent of the chargor in the strict legal sense, or in the same sense that its directors are: *BP Singapore Pte Ltd v Jurong Aromatics Corp Pte Ltd (receivers and managers appointed) and others and another appeal* [2020] 1 SLR 627 ("*BP Singapore*"), at [30]. The receiver is an agent only to the extent of being able to deal with the chargor's assets that are the subject of the security.

69 The English Court of Appeal in *Gomba Holdings UK Ltd and others v Minories Finance Ltd and Others* [1988] 1 WLR 1231 ("*Gomba (CA)*"), at 1233, took a similar view:

> … The agency of a receiver is not an ordinary agency. It is primarily a device to protect the mortgagee or debenture holder. Thus, the receiver acts as agent for the mortgagor in that he has power to affect the mortgagor's position by acts which, though done for the benefit of the debenture holder, are treated as if they were the acts of the mortgagor. The relationship set up by the debenture and the appointment of the receiver, however, is not simply between the mortgagor and the receiver. ***It is tripartite and involves the mortgagor, the receiver and the debenture holder. The receiver is appointed by the debenture holder, upon the happening of specified events, and becomes the mortgagor's agent whether the mortgagor likes it or not.*** And, as a matter of contract between the mortgagor and the debenture holder, the mortgagor will have to pay the receiver's fees. Further, the mortgagor cannot dismiss the receiver since that power is reserved to the debenture holder as another of the contractual terms of the loan. ***It is to be noted also that the mortgagor cannot instruct the receiver how to act, in the conduct of the receivership.***

> [emphasis added in bold italics]

70 The receiver's primary duty is therefore to the chargee. The scope of duties owed by a receiver has to be considered in light of this tripartite relationship.

Scope of duties owed by a privately appointed receiver to a chargor when exercising the power of sale

71 Consistent with the receiver's primary duty being to the chargee, the duties owed by a receiver to the chargor are limited. A receiver is appointed by the chargee and has a close association with the latter. Moreover, a receiver owes fiduciary duties to the chargee: *Gomba (CA)* at 1233. In carrying out his functions, a receiver can give priority to the interests of his appointor (*ie*, the chargee) in deciding whether, and if so when and how, he should exercise the powers vested in him: *Lightman & Moss* at para 13-015. The Court of Appeal in *BP Singapore* at [31], described the duties owed by a receiver in similar terms:

> 31 Unlike the directors of the company, the receivers and managers are, after all, duty-bound to carry out their functions in the interests of those who appointed them in the first place – the security holders. As the Judge correctly noted (see *Jurong Aromatics (HC)* at [69], citing David Milman in "Receivers as Agents" (1981) 44(6) MLR 658 at 660–663), the receiver and manager actually owes little by way of duties as an agent to the company. That a security document confers upon the receiver the power to carry on the company's business and the right to do so as agent of the company is simply an arrangement "to enable the mortgagee to enjoy the advantage of his nominee, the receiver, displacing the mortgagor from control of the mortgaged property and from receipt of the income derived from it whilst at the same time avoiding assuming the liabilities of a mortgagee in possession": *Lightman & Moss* at para 10-013. …

72 We also agree with the Judge that the duties owed by a receiver to a chargor are primarily equitable in nature (see [38] above). A charge is merely a security for the payment of a debt or the performance of an obligation. It is with

the intention of ensuring that the chargee or receiver acts fairly that equity affords certain protections to the chargor and any other persons who are interested in the equity of redemption: *Lightman & Moss* at para 13-002. The scope or content of the duties must depend on and reflect the special nature of the tripartite relationship arising under the terms of the contracts and the appointments of receivers, and in particular the role of the receivers in securing repayment of the secured debt, and the primacy of their obligations to the chargee: *Silven Properties Ltd v Royal Bank of Scotland plc* [2004] 1 WLR 997 ("*Silven Properties*") at [27] and [29].

73 The relevant case law suggests that the equitable duties that a receiver owes to a chargor when exercising the power of sale are limited to the duty of good faith, the duty to take reasonable care to obtain a proper price, and a limited duty to account.

74 There is no duty to exercise the power of sale at any one specific point in time. The receiver is entitled to determine the time for sale so long as he acts in good faith: *Roberto Building Material Pte Ltd and others v Oversea-Chinese Banking Corp and another* [2003] 3 SLR(R) 217 ("*Roberto Building Material*") at [51]. In addition, a receiver owes a duty to the chargor to exercise reasonable care to obtain the proper price when exercising his power of sale: *Downsview Nominees Ltd v First City Corporation Ltd* [1993] AC 295 at 315.

75 Further and relatedly, a receiver also owes a duty to account to the chargor. We agree with the observations of the General Division of the High Court in *Hang Huo Investment Pte Ltd v Wong Pheng Cheong Martin* [2024] SGHC 32 ("*Hang Huo Investment*"), at [117]:

> 117 Where private receivers are appointed as agents of the company, they owe a similar duty to account to the company. Modern debentures and mortgages almost invariably provide

> that any receiver appointed by the debenture holder or mortgagee shall be the agent of the company: *The Law Relating to Receivers, Managers and Administrators* at p 10; Saheran Suhendran bin Abdullah, Lim Tian Huat & Edwin Chew, *Corporate Receivership: The Law and Practice in Malaysia and Singapore* (Butterworths Asia, 1997) ("*Corporate Receivership*") at pp 100 and 102. This serves to reduce the potential liability of the debenture holder or mortgagee for any damaging consequences of the use of the receivership procedure: Gavin Lightman *et al*, *Lightman & Moss on the Law of Administrators and Receivers of Companies* (Sweet & Maxwell, 6th Ed, 2017) at para 1002. The receiver's agency must be qualified by the purpose of his appointment, *viz*, the realisation of the assets of the company primarily for the benefit of the debenture holder or mortgagee. The duties of the receiver towards the company would thus include all the ordinary duties of an agent save for those that are inconsistent with the purpose of his appointment and his primary duty to the debenture holder or mortgagee: *Corporate Receivership* at p 108. The fiduciary duty of an agent to account to the company ought to remain, as such a duty does not derogate from the receiver's duty to the debenture holder or mortgagee: *Corporate Receivership* at p 114.

76 This duty to account extends to accounting for the chargor's surplus assets, the conduct of the receivership, and accounting for the remuneration for work done during the receivership: *Hang Huo Investment* at [119]. However, this duty to account to the chargor must be a *limited* one in view of the primacy of the duties owed to the chargee.

77 We summarise the duties owed by a receiver to a chargor when the former exercises the power of sale:

(a) a duty to act in good faith;

(b) a duty to exercise reasonable care to obtain a proper price for the sale; and

(c) a limited duty to account for the chargor's surplus assets, the conduct of the receivership, and the remuneration for the work during the receivership.

78 Further, where a receiver chooses to carry on the chargor's business, the receiver must exercise due care (or due diligence): *Medforth v Blake* [2000] Ch 86 at 98–99. The duty of due diligence is not relevant where the receiver simply exercises the power of sale as opposed to carrying on the chargor's business.

79 Having set out the duties of the receiver to the chargee and the chargor, we turn to consider the applicable principles when considering whether the receiver needs to disclose particular information to the chargor.

Applicable principles for provision of information by a receiver

General principles

80 The Judge applied the "ownership" and "need to know" tests in his proposed framework for determining whether there was a need for Mr Borrelli to produce the Report (see [40] above). With respect, we have some reservations as to the appropriateness of the framework as suggested by the Judge. We explain below.

81 We begin by examining Victory's request from first principles. It is important to bear in mind that the obligation in question concerns provision of information by the receiver to the chargor, and not documents. Documents are only pertinent to the extent that they are repositories of information that is being sought by the chargor from the receiver. The question therefore remains whether the receiver is obliged to provide the information sought.

82 As highlighted above at [76], the receiver's primary duty in exercising the power of sale is owed to the chargee. That duty is focused on realising the secured asset(s). The receiver is in a tripartite relationship with the chargor and the chargee as agents for both ([68] above). However, the receiver's duty to the chargor is a *limited duty*, arising because of the receiver's power to affect the

assets and business of the chargor. Thus, absent any contrary statutory provision or specific provision in the security documents, any right that a chargor may have to information from the receiver is circumscribed by the receiver's primary duty to the chargee: *Gomba Holdings UK Ltd and others v Homan and another* [1986] 1 WLR 1301 ("*Gomba (HC)*") at 1307E. As noted in *Gomba (HC)*, if the receiver considers that disclosure of information would be contrary to the interests of the chargee in realising the security, the receiver is entitled to and indeed may be duty bound to the chargee to withhold disclosure. Accordingly, as rightly observed by Hoffman J in *Gomba (HC)* at 1307E, the receiver's primary duty to the chargee qualifies the right to information, and there is no free-standing or general obligation to provide information to the chargor during the currency of the receivership. In this regard, the receiver is the best judge of the commercial consequences of disclosure: *Gomba (HC)* at 1307F and 1308D. Nevertheless, a chargor may challenge the receiver's decision to withhold information on the ground of bad faith or that it was a decision which no reasonable receiver could have made: *Gomba (HC)* at 1307F.

83 Given this context, the chargor's right to information from the receiver is on a "need to know" basis *for the purpose of enabling the board to exercise its residual rights or perform its duties* – see *Gomba (HC*) at 1308A. We agree with the Judge that this is the appropriate test. Further, even where there is a "need to know" as described, the receiver's obligation to provide information is subordinated to his primary duty not to do anything which may prejudice the interests of the chargee: see *Gomba (HC)* at 1308D.

The "need to know" test

84 Victory submits that instead of the "need to know" test, the Judge should have applied the "prejudice" test stated in *Re Geneva* (see [50] above). We do not agree.

85 In *Re Geneva*, the directors of a company had requested access to the records of a company – Geneva Finance Ltd. The receiver and manager applied to the Supreme Court of Western Australia under s 324F of the Companies Act (Western Australia) Code for directions as to whether the receiver and manager was obliged to give access to the company or to its directors certain records belonging to the former: *Re Geneva* at 417. In setting out the applicable principles for when access should be granted in the context of a receivership, the court found that a receiver would be justified in refusing to grant access to the documents where to do so would impede the receiver in the proper exercise of his functions or would impinge prejudicially upon the position of the debenture holder by threatening or imperilling the assets which are subject of the charge – the "prejudice" test: *Re Geneva* at 432.

86 The starting point of the court's analysis in *Re Geneva* was the far-reaching right of a director to access the books and records of a company at common law: *Re Geneva* at 422–423 and 425–426. It was observed that the court only had a "residual discretion whether or not to order inspection". In view of this, a director did not have to demonstrate a "need to know" or furnish reasons before exercising the right of access to documents: *Re Geneva* at 426. The question then was whether this duty was attenuated by the appointment of a receiver. The court concluded that it was so attenuated because of the receiver's pre-eminent position in realising the assets of the company for the benefit of the chargee: *Re Geneva* at 426. However, while receivership may dominate a company's affairs, it does not permeate the internal domestic structure of a company such as its board. A receivership does not ordinarily destroy the chargor company's own organs through which it conducts its affairs: *Re Geneva* at 427. Accordingly, the court held that the focus of the inquiry should be to "look at the effect which the exercise of the power will have on the receiver's functions rather than to concentrate on the identification and

delineation of the residual duties reposed in the directors": *Re Geneva* at 428–429.

87 The court also distinguished *Gomba (HC)* for the following three reasons (in bold italics), at 430:

> The question is not who has the higher duty, as between receiver and directors, in relation to assets which are subject to the security and which the receiver has in his possession and control. That question must always be answered in favour of the receiver unless the receiver has abandoned the asset or is acting in breach of duty. ***The real question is whether the directors, wishing to exercise a power which they would otherwise have, can do so without prejudicing the legitimate interests of the receiver and the secured creditor in the realisation of the assets***. The other matter which is significant is that *Gomba Holdings (UK) Ltd v Homan*, supra, was concerned primarily with information which related to the conduct of the receivership and the activities of the receiver. ***In the application before me, the documents to which access is sought relate primarily to the affairs of the company prior to the commencement of the receivership***, although there must necessarily be some flow over into the latter category. The directors do not need to have resort to the common law to insist on inspection of the accounting records arising from the receivership. That is provided for in the Code, s 324B. … Finally, the fact situation in *Gomba Holdings (UK) Ltd v Homan*, supra, raised a serious possibility that the disclosure of information to the directors would prejudice the debenture holders' realisation of assets because of the way in which the applicant director had conducted himself. ***There is no evidence before me raising the apprehension of such a risk***.
>
> [emphasis added in bold italics]

88 In putting forward its submissions, Victory appears to assume that *Re Geneva* is on all fours with the present case. This is not so. In *Re Geneva*, the court was concerned primarily with balancing the common law and statutory right of the directors to have access to documents and information, and the receiver's primary duty to the chargee. In the present case, there is no such right to begin with. Here, Victory is seeking information from Mr Borrelli by

requiring him to produce the Report. The information sought is not for the purpose of Victory's directors discharging their residual duties. Rather, it is essentially for the purpose of seeking an explanation from Mr Borrelli as regards certain actions he has taken or failed to take as receiver with a view to holding him accountable. This request is premised on a free-standing obligation on the receiver's part to provide information, subject only to the "prejudice" test. However, as *Gomba (HC)* makes clear (at 1307G), there is no general obligation to provide the information that is being sought by way of the Report during the currency of the receivership. Moreover, given the purpose for which the information is sought, it is difficult to see how the request cannot be seen as prejudicial to the receivership.

89 In any event, the "need to know" test as laid down in *Gomba (HC)* does encapsulate the "prejudice" element set out in *Re Geneva*. In applying the "need to know" test, the following matters will be considered: whether the chargor has demonstrated the "need to know" the information sought for the purpose of enabling its board or its directors to discharge its or their residual functions; and in the event that is demonstrated, whether the information, if produced, would be contrary to the interests of the chargee. The latter is akin to the "prejudice" test. Once the chargor has demonstrated a need to know for the described purpose, the burden shifts to the receiver who resists disclosure to demonstrate that disclosure will be contrary to the interests of the chargee. At that stage, the receiver's motivations and reasons for resisting disclosure will be scrutinised. If the receiver's refusal to provide disclosure is in bad faith or is a decision that no reasonable receiver could have made, disclosure will be ordered: *Gomba (HC)* at 1307F.

90 In our view, the above approach is the appropriate test. The "need to know" test (for the purpose of enabling the board to discharge its residual

functions) serves as a necessary threshold to sieve out unjustified requests from the chargor given the paramount duty of the receiver to the chargee. Once a "need to know" has been demonstrated, it is incumbent on the receiver to show prejudice (to the chargee) if disclosure is to be denied. The flaw in the "prejudice" test operating on its own is that it assumes that the information sought by the chargor is in fact needed by the board for the purpose of discharging its duties.

91 The "need to know" test coheres with a receiver's obligations and duties. This test also does not limit the ability of a director of a chargor company from carrying out his functions. The "need to know" test thus strikes the appropriate balance between the duties owed by a receiver and the obligations of directors to their companies.

92 We also take into account the following pertinent considerations. First, and as pointed out above, the inquiry before us essentially relates to whether the court should order the receiver to provide information. The inquiry does not turn on whether the requested information may be found in any existing document or otherwise. In this connection, with respect, the Judge's reliance on whether the document exists as the threshold factor in Step (a) of his proposed framework (see [40] above) is incorrect. The pivotal question is whether the chargor needs to know the information for the specific purpose of the board being able to discharge or perform its duties. *Gomba (HC)* at 1308B provides an illustration of this, namely where the board may need information in order to exercise the company's right to redeem the loan.

93 Second, the question of ownership of documents that were created during the receivership is relevant only in relation to the specific question of the receiver's obligation to hand them over to the chargor post-receivership. Such

documents in the receiver's possession must be handed over to the company post-receivership. *Gomba (CA)* makes this clear, as cited in *Boulos v Carter and another (as receivers and managers of TARBS World TV Australia Pty Ltd)* (2005) 220 ALR 572 ("*Boulos*") at [47]–[48] and [50]. The test to determine "ownership" of documents in the tripartite situation of a receivership "depends on whether the documents were brought into being in discharge of the receivers' duties to the mortgagor or the debenture holder or neither": see *Gomba (CA)* at 1234A. It must be noted, however, that even in respect of information contained in documents that may be described as the company's, applying the test stated above, there is no automatic right to the information (or document) *during the currency of the receivership*. The "need to know" test still has to be satisfied as regards the information in such documents, and the statement in *Boulos* at [50] should be understood in this manner. As such, we do not think that it was necessary for the Judge to adopt Step (b) in his proposed framework to look further to the capacity in which the receivers were acting when the documents were brought into existence to determine "ownership" of the documents – the question of "ownership" would only be relevant once the receivership has come to an end, a situation canvassed in Step (c)(ii).

94 On a related note, where the document in question was created as a result of the receiver discharging his duty to the chargee, or where the document belongs to the receiver himself, there is no corresponding obligation to hand it over. Conversely, as mentioned above at [93], the receiver *must* hand over documents owned by a chargor when the receivership comes to an end. The present appeal is not a post-receivership situation, and therefore this issue does not arise. However, we mention this because Step (c)(ii) of the Judge's proposed framework may be questionable, with respect, insofar as it suggests that the receiver can hold back production of the company's documents post-receivership as long as he can provide strong reasons for doing so.

95 For the reasons above, we agree with the Judge that the "need to know" test should be adopted over the "prejudice" test, subject to our qualifications above on the relevance of ownership and the Judge's proposed framework for determining when a receiver should be ordered to produce documents to a chargor ([40] above). We decline to follow *Re Geneva* insofar as it sought to dispense with the "need to know" test.

Analysis

96 As we have stated above at [92], the pivotal question is whether Victory has demonstrated a need to know the contents of the Report. Victory submits that it has a need to know because "a mortgagor in the position of Victory who has yet to been (*sic*) given full credit for the value of the Victory Shares ought to be entitled to the information in the Report."[68] We disagree that this is sufficient to satisfy the "need to know" test.

97 Fundamentally, Victory has not shown that there is a need to know the information that was to be provided in the Report for the purpose of the board discharging its residual functions. CCPL sent the Interim Statement to Victory detailing, albeit briefly, the transactions undertaken by the Receiver. Beyond that, the other information sought in the Report has not been established as being necessary to Victory's board. To the contrary, we note that cl 12.6 of the Share Pledge provides that the Receiver is entitled to conduct the sale of the Shares in any manner he thinks fit. It seems to us that this circumscribes the nature of the information that Victory may seek. Insofar as Victory seeks details about the manner in which the sale was arranged, that is a matter that fell within the purview of Mr Borrelli: see also, *Roberto Building Material* at [51].

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[68] AC at para 73.

98 Based on the Appellant's Case, the two parts to the Report are: (a) an account of the steps taken to sell the Victory Shares, and (b) the intended steps to collect the deferred consideration. Both do not satisfy the "need to know" test as stated above. As to the first, it is readily apparent that the sale of the Victory Shares was subject to the Minority SPA which has been provided to Victory. The sale itself was pursuant to drag-along rights imposed on Victory by Navis under the SHA. This being the case, it is difficult to see why Victory needs to have an account for the purpose of its board discharging its residual function, unless there is an intention to pursue the Receiver. That does not fall within the test in our view. Further, given that the apparent purpose for which the information is sought is to hold the Receiver to account for his actions or inactions, the request must be seen as prejudicial to the receivership, as the Receiver may have to disclose more confidential information in order to defend himself if legal proceedings are precipitated: see *Gomba (HC)* at 1308G. As to the deferred consideration, this amount is contingent on steps being taken by other members of the purchasers which is outside the control of the Receiver. As such, there is no need for Victory to know the information it seeks.

99 We therefore dismiss the appeal in relation to the production of the Report.

Whether the respondents should be ordered to deliver CCPL's bill of costs for assessment

100 Victory submits that it has standing to file an application under s 120(1) of the LPA because it was in substance the party liable to pay CCPL's bill to the "party chargeable" by CCPL (*ie*, Mr Borrelli) pursuant to the Share Pledge. Victory's central argument is that it is "ultimately responsible" for indemnifying Mr Borrelli's legal fees. The respondents, on the other hand, submit, as the Judge accepted, that Victory is "one step removed" from being a party with the

requisite standing to make an application under s 120(1) of the LPA. We set out the applicable law before providing the reasons for our decision.

Applicable law

Overview

101 Sections 120 and 122 of the LPA provides as follows:

> **Order for assessment of delivered bill of costs**
>
> **120.** —(1) An order for the assessment of a bill of costs delivered by any solicitor may be obtained on an application made by originating application or, where there is a pending action, by summons ***by the party chargeable*** therewith, or by ***any person liable to pay the bill either to the party chargeable or to the solicitor***, at any time within 12 months from the delivery of the bill, or, by the solicitor, after the expiry of one calendar month and within 12 months from the delivery of the bill.
>
> …
>
> **Time limit for assessment of bill of costs**
>
> **122.** After the expiry of 12 months from the delivery of a bill of costs, or ***after payment of the bill***, no order is to be made for assessment of a solicitor's bill of costs, except upon notice to the solicitor and under ***special circumstances*** to be proved to the satisfaction of the court.
>
> [emphasis added in bold italics]

102 Section 120 of the LPA refers to three groups of people that may apply for assessment: (a) the client, (b) the solicitor, or (c) "any person liable to pay the bill either to the party chargeable or to the solicitor": see *Riaz LLC v Sharil bin Abbas (through his deputy and litigation representative, Salbeah bte Paye)* [2013] 4 SLR 736 at [10].

103 If an applicant has standing under s 120 of the LPA, the inquiry shifts to s 122 of the LPA. Under this provision, the court first has to consider whether either of the two disqualifying events has taken place: (a) expiry of 12 months

from the delivery of a bill of costs, or (b) the payment of the bill of costs. Each disqualifying event serves a distinct purpose. The requirement that the client should apply for assessment within 12 months of the bill's delivery has much the same purpose as a limitation period – to prevent stale claims, to relieve a potential defendant of the uncertainty of a potential claim, and to remove the injustice of increasing difficulties of proof as time goes by. On the other hand, the requirement that the party chargeable must make the application for assessment before the payment of the bill of costs serves to discourage the applicant from approbating and reprobating and upholds the solicitor's interest in security of receipt for his fees: *Kosui Singapore Pte Ltd v Thangavelu* [2015] 5 SLR 722 ("*Kosui*") at [64]. It is only when either of these disqualifying events are triggered that a court will consider whether there are special circumstances such that an order for assessment should nevertheless be made: *Sports Connection Pte Ltd v Asia Law Corp and another* [2010] 4 SLR 590 at [23].

Meaning of "payment" in s 122 of the LPA

104 This case engages the question of when "payment" may be said to have been made for the purposes of s 122 of the LPA. In *Ho Cheng Lay v Low Yong Sen* [2009] 3 SLR(R) 206 ("*Ho Cheng Lay*"), the High Court found that there was no "payment" for the purposes of s 122 of the Legal Profession Act (Cap 161, 2001 Rev Ed) where a solicitor had paid himself out of sale proceeds that he was holding for his client, without informing the client: *Ho Cheng Lay* at [19] and [23].

105 The High Court in *H&C S Holdings Pte Ltd v Gabriel Law Corp* [2018] SGHC 168 ("*H&C S Holdings*") found likewise. In *H&C S Holdings*, the applicant client submitted, amongst other things, that the disqualifying "payments" did not occur because the client was not aware of the specific deductions at the time they were made. The client alleged that it was never asked

if it consented, and that it did not consent, to the law firm making deductions from its moneys held in the firm's client account: *H&C S Holdings* at [43]–[45]. The High Court held, at [46]:

> … Under the applicable legal professional rules (which will be examined later) the law firm must raise a bill of costs with the client prior to making a deduction. ***In short, the client's consent is needed if monies held in the client account are used***.
>
> [emphasis added in bold italics]

106 Victory's solicitors referred to the recent decision of the United Kingdom Supreme Court in *Menzies v Oakwood Solicitors Ltd* [2024] 1 WLR 4745 ("*Oakwood*") for a similar proposition.[69] In *Oakwood*, the appellant client had entered into a conditional fee agreement with the respondent solicitors when the latter were instructed to pursue a claim for damages for personal injury. The agreement stipulated that the sums owed to the respondent solicitors would be capped at a maximum of 25% of the compensation received, after deducting any fees and expenses recovered from the other side: *Oakwood* at [7]–[8]. The appellant entered into a settlement for his personal injury claim. The respondent solicitors received the settlement sum and retained the sums due to them under the conditional fee agreement: *Oakwood* at [9] and [16]. The appellant made an application pursuant to s 70 of the Solicitors Act 1974 (c 47) (UK) (the "UK Solicitors Act") which provides, in part, as follows:

> **Assessment on application of party chargeable or solicitor**
>
> (1) Where before the expiration of one month from the delivery of a solicitor's bill an application is made by the party chargeable with the bill, the High Court shall, without requiring any sum to be paid into court, order that the bill be assessed and that no action be commenced on the bill until the assessment is completed.

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69 Letter from Drew & Napier LLC dated 24 October 2024.

> (2) Where no such application is made before the expiration of the period mentioned in subsection (1), then, on an application being made by the solicitor or, subject to subsections (3) and (4), by the party chargeable with the bill, the court may on such terms, if any, as it thinks fit (not being terms as to the costs of the assessment), order—
>
> (a) that the bill be assessed; and
>
> (b) that no action be commenced on the bill, and that any action already commenced be stayed, until the assessment is completed.
>
> (3) Where an application under subsection (2) is made by the party chargeable with the bill—
>
> (a) after the expiration of 12 months from the delivery of the bill, or
>
> (b) after a judgment has been obtained for the recovery of the costs covered by the bill, or
>
> (c) after the bill has been paid, but before the expiration of 12 months from the payment of the bill.
>
> no order shall be made except in special circumstances and, if an order is made, it may contain such terms as regards the costs of the assessment as the court may think fit.
>
> (4) The power to order assessment conferred by subsection (2) shall not be exercisable on an application made by the party chargeable with the bill after the expiration of 12 months from the payment of the bill.
>
> …

107 The question before the court in *Oakwood* was what constituted "payment" under s 70(4) of the UK Solicitors Act. The court found, at [71], that "['payment'] requires an *agreement* to the *sum* taken or to be taken by way of payment of the bill of costs. Such an agreement may be inferred from the parties' conduct and in particular from the client's acceptance of the balance claimed in the delivered bill" [emphasis added]. On this basis, the court granted the appellant client's application for an assessment of the solicitor's bill of costs: *Oakwood* at [87].

108 The three cases outlined above (*Ho Cheng Lay*, *H&C S Holdings* and *Oakwood*) stand for the proposition that there is no "payment" for the purposes of s 122 of the LPA if the *client* did not know of, or consent to, the quantum of payments being made to the solicitor. However, we see no reason for this principle to be confined only to the knowledge and/or consent of the client.

109 In our view, the authorities suggest that the knowledge and/or consent of an applicant with standing under s 120 of the LPA vis-à-vis the quantum of payments is required for a "payment" to operate as a disqualifying event under s 122 of the LPA.

110 We consider the High Court's decision in *Kintyre Park Development Pte Ltd v Cooma Lau & Joh* [1990] 1 SLR(R) 739 ("*Kintyre*") to be instructive. In *Kintyre*, the applicant was one of the two owners of a property which was mortgaged to the respondent solicitor's client – the mortgagee. The mortgagee sought to wind up the applicant and recover outstanding sums under the mortgage. The parties settled the dispute: *Kintyre* at [1]–[2]. As part of the settlement, the applicant agreed to pay the mortgagee's legal costs and expenses by paying the respondent solicitors. Importantly, there was a reservation of right in the settlement which provided for the respondent's bill of costs to be taxed (*ie.* assessed, adopting present terminology) before the courts: *Kintyre* at [3]. When the applicant filed the application to tax the respondent's bill of costs, the respondent objected. Amongst other things, the respondent submitted that since the applicant had paid the bill, the bill could not be taxed except in the presence of special circumstances. Furthermore, the respondent contended that there were no special circumstances: *Kintyre* at [5]. We pause to note that the relevant provision in *Kintyre* was s 119 of the Legal Profession Act (Cap 161, 1985 Rev Ed), which is the predecessor provision and similarly worded as the current s

122 of the LPA. The court in *Kintyre* placed emphasis on the applicant's reservation to have the bill of costs taxed, and found as follows:

> 16 The respondent has accepted payment on these terms. Two points arise from this. ***The first is that a payment by a person without admission of the amount for which he is liable is not, in my view, a payment for the purpose of s 119(1) of Cap 161. The whole object of s 119(1) is to prevent the person chargeable or liable to pay the bill and who has paid it unconditionally from claiming that it is excessive unless he can show special circumstances***. The payment of the respondent's bill was not made with a view to settling it finally (as the exact amount could only be determined on taxation) but with a view [to] effecting prompt redemption of the petitioner's property. On this ground, the petitioner need not show any special circumstances.
>
> 17 If my decision on the first point is wrong, then the second point that arises is that the petitioner's express reservation to tax the bill is *per se* special circumstances …
>
> [emphasis added in bold italics]

111 The fact of payment by the applicant in *Kintyre* to the respondent solicitor was not sufficient to constitute a disqualifying event because the payment was not made with a view to finally settling the solicitor's bill. In principle, this must be correct. We see no reason why a party with standing under s 120 of the LPA would also have to show special circumstances pursuant to s 122 of the LPA if that party did not know of, or consent to, the payment of the bill of costs as drawn up or where the quantum of costs is not settled or agreed in the first place.

112 Furthermore, we agree with the concern raised by Farwell and Kennedy LJJ in *In re Hirst & Capes* [1908] 1 KB 982 ("*Hirst & Capes*"). In *Hirst & Capes*, the defendants in an action had entered into a settlement agreement whereby they agreed to pay, amongst other things, the solicitor-and-client costs of the plaintiff: *Hirst & Capes* at 982–983. The defendants' solicitors expressed a desire to tax the costs of the plaintiff's solicitors. The plaintiff paid her

solicitors, and the defendant applied to tax the plaintiff's solicitors' bill of costs. One point of contention raised by the plaintiff's solicitors was that the bill of costs had been paid by the plaintiff and the defendants had to show special circumstances under s 39 of the Solicitors Act 1843 (c 73) (UK) before taxation could be ordered: *Hirst & Capes* at 983–984.

113 Farwell and Kennedy LJJ considered that it would be absurd to say that, where a party has *prima facie* a right to taxation, and has expressed to the other party his intention to obtain taxation of the bill, he can be deprived of his right because the other party chooses to pay the bill. In particular, Farwell and Kennedy LJJ found, at 994–995 and 996 respectively, as follows:

> It would really, in my opinion be a very cruel kindness to the parties in such cases to compel them to have such questions settled by means of an action. …
>
> …
>
> If, in a case where a third party is liable to pay a bill of costs, the solicitor obtains payment of the bill without communication with the third party, knowing that he is intending to apply for taxation, although there may be nothing whatever dishonest in his action, I am disposed to think that under such circumstances it is really almost a mere matter of common fairness that the fact of the payment of the bill should not preclude the third party from obtaining taxation of the bill.

114 We agree. "Payment" under s 122 of the LPA requires the party with standing under s 120 of the LPA to have knowledge of and/or consent to the payment of the bill of costs. If there has been "payment" for the purposes of s 122 of the LPA, the court will then have to consider whether special circumstances exist.

Special circumstances under s 122 of the LPA

115 In order to show special circumstances, the fundamental question posed by s 122 of the LPA must be answered: why is it right to refer the solicitor's bill

for assessment even though the client has allowed one or both of the disqualifying events under s 122 of the LPA to be triggered? (see *Kosui* at [62]).

116 One of the ways in which a client can answer this fundamental question is by showing how the special circumstances explain and excuse his conduct in allowing the disqualifying event to set in: *Kosui* at [63]–[64]. The High Court in *Kosui*, at [61], set out a non-exhaustive list of circumstances that have been found to constitute special circumstances for the purposes of s 122 of the LPA:

(a) Prolonged negotiation over fees between solicitor and client after which the client applies for assessment.

(b) A disciplinary committee's finding that the solicitor has in fact overcharged.

(c) An impecunious client who requires time to secure a grant of legal aid in order to apply under s 120 of the LPA.

(d) A bill which fails to provide sufficient information, even when supplemented by what is subjectively known to the client, to enable the client to take an informed decision on whether or not to seek assessment.

(e) The fact that the solicitor, without his client's knowledge or consent, appropriated funds belonging in equity to the client in order to pay the bill.

(f) Duress, pressure or fraud by the solicitor.

117 Having set out the applicable law, we turn to consider Victory's appeal on this issue.

Analysis

Standing under s 120 of the LPA

118 We begin with the observation that cl 9 of the Deed of Appointment (under which Navis appointed Mr Borrelli as a receiver) provided that Navis had agreed to indemnify Mr Borrelli "against all liabilities, claims, costs, losses, fees and expenses including reasonable legal costs as incurred on a full indemnity basis". However, it was not Navis but Victory that was liable for Mr Borrelli's remuneration, pursuant to cl 11.3 of the Share Pledge.

119 We note at this juncture that on the eve of the hearing before us, Cavenagh Law had sought to file a supplementary affidavit to make a clarification as to the payments made by Navis and Mr Borrelli to CCPL. During the hearing on 25 October 2024, we directed that Cavenagh Law's letter dated 24 October 2024 would serve as a record of the clarification sought to be made, and there was thus no need for Cavenagh Law to file a supplementary affidavit.[70] In this letter, Cavenagh Law clarified that Navis had paid US$314,424.01 to CCPL for the invoices dated between 15 September 2021 to 27 April 2023, while Mr Borrelli had paid US$232,112.55 to CCPL out of the sale proceeds for the invoices dated 29 September 2023 and 26 October 2023.[71]

120 We do not consider this clarification to bring the respondents' case very far for two reasons. First, the clarification does not come with any evidence that Navis had in fact paid the specific invoices from 15 September 2021 to 27 April 2023 to CCPL directly. Second, even if we were to accept the clarification as being true, it does not impact our analysis. The available

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70 Minute Sheet for AD/CA 31/2024 dated 25 October 2024 at 2.

71 Letter from Cavenagh Law LLP dated 24 October 2024 at para 5.

evidence on record, namely the Interim Statement, shows that *Mr Borrelli* had deducted the full sum of US$546,536.56 as the legal fees payable to CCPL from the Sale Proceeds. The Interim Statement shows that *Mr Borrelli* applied part of the Sale Proceeds towards payment of his fees and expenses including CCPL's fees, pursuant to cl 9 of the Deed of Appointment read with cl 14 of the Share Pledge. The respondents have not shown how the clarification may be reconciled with the Interim Statement.

121 Pertinently, under cl 11.4 of the Share Pledge, Victory as the chargor is responsible for the liabilities incurred by the receiver. Notwithstanding that cl 11.3 of the Share Pledge appears to render Victory specifically liable only for the receiver's remuneration, with no explicit reference to other fees or disbursements, we consider cl 11.4 to be intentionally worded broadly so as to serve as a "catch-all" provision. By cl 11.4, Victory may be ultimately liable for any liabilities that the receiver reasonably incurs. This must extend to CCPL's fees.

122 In the circumstances, we accept that Victory has standing to seek assessment of CCPL's bill of costs pursuant to s 120 of the LPA.

Whether there was a "payment" for the purposes of s 122 of the LPA

123 We turn next to consider whether the fact that Mr Borrelli had paid CCPL's bill should operate as a disqualifying event under s 122 of the LPA. Victory's submissions below and in AD 31 seek to show the existence of special circumstances pursuant to s 122 of the LPA, which entitle it to succeed in its application for an order for CCPL's bill to be assessed.

124 We note that in its arguments before the Judge, Victory had also submitted that it had no control over CCPL's charging of fees to Mr Borrelli, as

part of its efforts to demonstrate special circumstances under s 122 of the LPA. On appeal, Victory emphasises instead that it had not known of or consented to such payment or accepted the quantum thereof at the material time.[72] We are drawn to conclude that Victory is neither approbating nor reprobating by seeking to challenge CCPL's bill, when it was not the party that had paid the bill and had neither known of nor consented to its payment. While by executing the Share Pledge, Victory might have agreed to the Sale Proceeds being utilised by the receiver to settle his expenses (amongst other things), that does not in our view equate to Victory consenting to the bill as drawn or to payment of the same: see, for example, *Kintyre* at [16] ([110] above). Crucially, Victory was not the party that paid the bill or consented to its payment, nor had it even known of the quantum and details of CCPL's fees. In such circumstances, we do not see how the mischief that either of the disqualifying events in s 122 of the LPA seeks to address (see *Kosui* at [64] as noted at [103] above) can be said to have been engaged. There is therefore no reason why Victory should be required to show any special circumstances.

125 Moreover, we reject the respondents' submission that Victory's proper recourse is against Navis as opposed to CCPL ([61] above). Before us, Cavenagh Law relied on three cases to support this submission, but we do not consider any of them to be particularly helpful.

126 The respondents first referred to *Tim Martin Interiors Ltd v Akin Gump LLP* [2012] 1 WLR 2946 ("*Tim Martin*"). In *Tim Martin*, a mortgagor company defaulted on loans obtained from a mortgagee bank. The bank instructed its solicitors to take steps to enforce the mortgages. During this process, the bank prepared a statement of indebtedness showing the overall liability, including the

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[72] AC at para 88.

legal fees payable to the bank's solicitors. The mortgagor's guarantors paid the full sum, and the mortgagor reimbursed the guarantors – in effect, therefore, the mortgagor had paid the bank the full sum demanded. The bank then approved its solicitors' final bill of costs and paid it in full: *Tim Martin* at [5]. Sometime later, the mortgagor company applied to have an assessment of legal costs under s 71 of the UK Solicitors Act, submitting that the bill was far in excess of what the bank could call upon the mortgagor to pay towards the legal costs and expenses under the mortgage agreement: *Tim Martin* at [8]–[9] and [12]. The question before the court was two-fold: whether a court conducting the assessment of a bill is permitted to, first, consider the separate basis of liability of the third party to the client, and, second, if the bill has been paid by a third party and later found to be excessive, to order repayment of the excess by the solicitor to the third party: *Tim Martin* at [14].

127 The English Court of Appeal held as follows:

> 29 *The present case concerns a mortgagor third party and mortgagee client. The rights and obligations as between them are regulated by the terms of the mortgages and by the general law as to mortgage*s. In particular, the mortgagee's right to add its costs and expenses is dealt with expressly in the mortgage, but even if it were not it would be governed by the well-developed rules of equity concerning mortgages.
>
> 30 If a dispute arises between mortgagor and mortgagee as to what is owed by the one to the other, then the classic remedy is a claim for an account of what is due under the mortgage. … *Such proceedings would not normally involve the mortgagee's solicitor as a party, but they could well involve a consideration of whether the solicitor's bill of costs rendered to the mortgagee was recoverable in full or only in part, and if in part as to what amount, by the mortgagee from the mortgagor.* …
>
> [emphasis added]

128 Going further, the court found that if a bill has been paid by the client, then on the face of it the issue as to payment or repayment ought to lie between the client and the third party, not between the solicitor and the third party: *Tim*

Martin at [66] and [93]–[94]. Notably, however, these principles were set out in the context of the mortgagor's claim that it should not have been liable to pay certain sums to the *bank*. The court found that the mortgagor's claim should not implicate the solicitor because the mortgagor did not show that some of the items of work were not properly chargeable by the solicitor to the client. There was thus no basis for the solicitor to be ordered to repay sums to the third party: *Tim Martin* at [67]. In essence, *Tim Martin* was a dispute between the mortgagor and the mortgagee bank on the extent of the mortgagor's liability pursuant to the mortgage agreement. The mortgagor did not claim that the solicitors should not have charged those sums to their client, *ie*, the mortgagee bank.

129 We agree with the English Court of Appeal that the purpose of an assessment of the bill of costs is to assess the reasonableness of the fees charged by the solicitors to their clients. If a third party takes issue with the sums payable to the client under an agreement between the third party and the client, and does not challenge the reasonableness of the fees charged by the solicitors to the client, then seeking assessment of the solicitors' costs would be inappropriate. However, that concern is not live in this dispute because, unlike *Tim Martin*, Victory in this case seeks an assessment of the fees charged by CCPL to its client, Mr Borrelli.

130 Similarly, in *Mirror Group Newspapers plc v Maxwell & others* [1998] BCC 324 ("*Mirror Group*") the receivers filed an application seeking directions and orders in relation to their remuneration and disbursements: *Mirror Group* at 326A. In relation to the legal fees payable by the receivers, the Chancery Court observed as follows (*Mirror Group* at 344):

> As I see it two questions arise in respect of each bill rendered to the receivers by [the solicitors]. First, what is the proper amount payable by the receivers, as clients of [the solicitors], in respect of the matters covered by the bill? Secondly, how much of the

> amount so payable is to be allowed as a payment out of the estate when the receivership accounts are taken?
>
> As to the first question it is, in the first instance, for the receivers as the paying party to decide whether or not they accept [the solicitors'] accounts in full. If they do accept and pay the accounts their conduct may subsequently be attacked if there are grounds for such an attack. It may be said that the charges are excessive and should have been reduced pursuant to negotiation or taxation. If such an attack is made and succeeds the extent to which the charges for which the receivers have become liable can be satisfied out of the estate will be adjusted accordingly. If the receivers are sufficiently confident about their decision to run the risk of such an attack being made there is nothing to prevent them taking such decision, but they will bear the consequences personally if an attack on their decision is made and succeeds.
>
> If the receivers are not willing to run this risk, there are a number of steps open to them as a means of avoiding or reducing it. At the very least they must subject the bills to critical scrutiny. If they simply pay them without such scrutiny they will obviously be vulnerable. They may be able to negotiate certain reductions, thus facilitating an argument that the negotiated, reductions are preferable to the possibility of obtaining greater reductions at greater cost. In an appropriate case (but not, I would expect, one where the issues are as complex and the amounts as large as in this case) they may be able to obtain a certificate from the Law Society as to the proper amount of their solicitors' bill. Finally they can require the bills to be taxed pursuant to s. 70 of the Solicitors Act 1974. A taxation will, of course, put beyond doubt the amount that the receivers are liable to pay their solicitors. This result is, however, achievable only at a significant cost in terms of the fees payable on taxation and, unless at least one fifth of the bill is taxed off, the costs of taxation. ***Moreover, even the taxation of the bill will not dispose of all the issues which may arise in connection with the second question I have mentioned. There may, for example, be a question whether the solicitors should have been retained to do particular work***.
>
> [emphasis added in bold italics]

131 Just as in *Tim Martin*, the court's observation in *Mirror Group* pertained to a situation where an estate might take issue with the amount claimed by a receiver as disbursements, without necessarily challenging the reasonableness of the fees charged by the solicitors to their clients (*ie*, the receivers).

132 Finally, the respondents' reliance on *In re Bignold* (1845) 9 Beav 269 ("*Bignold*") is also misplaced. In *Bignold*, the mortgagor defaulted on payment and the mortgagee sold the mortgaged property. The mortgagee's solicitor deducted his legal fees from the sale proceeds, and the balance was delivered to the mortgagor. The mortgagor sought taxation of the mortgagee's solicitor's bill of costs: *Bignold* at 269. The court ordered taxation because the mortgagee had not settled the bill with the solicitor: *Bignold* at 271. In so finding, the court held at 271:

> A mortgagor has a right to have a taxation of the mortgagee's solicitor's bill, because he is liable to pay it; but if the mortgagee thinks fit to settle with his solicitor and pay him, then, although the right of the mortgagee to charge the full amount against the mortgagor is left quite open, the mortgagor cannot, as of course, open that settlement and say, "The matter is still open, for the bill has never been settled as between me and the mortgagee's solicitor." The solicitor has a right to say, "I never acted as your solicitor; I have fairly settled all matters with my own client, and am not liable to account again to you."

133 Just as in the prior two cases, the court's finding in *Bignold* was relevant to a situation where a mortgagor challenged the quantum payable to the mortgagee for the mortgagee's legal fees for reasons other than the reasonableness of the solicitor-and-client costs. In any event, only very brief reasons were set out by the court in *Bignold*. No reasons were given to support the court's remark that payment by the client of his solicitor's bill will preclude a third party from seeking assessment of the bill.

134 We should also point out that while the respondents contended that *Bignold* had been endorsed by the court in *Oakwood,* as we have noted earlier, the court in *Oakwood* was concerned with a situation where the appellant client sought assessment of the respondent solicitors' bill after the solicitors retained the amount of their bill from the sums paid by the defendant to the appellant's personal injury claim. *Bignold* was cited by the court in the context of its

consideration of the appellant client's proposition that "for there to be payment by retention or deduction, there needed to be a 'settlement of account' – *ie*, an agreement to the sum to be taken by way of payment for the delivered bill" (at [58]-[59] of *Oakwood*). Specifically, in citing *Bignold,* the court in *Oakwood* was concerned with Lord Langdale's observation in *Bignold* that as between solicitor and client, the mere retainer by the solicitor, out of monies in hand, of the amount of his bill, did not amount to a payment, unless there had been a settlement of account. The reference to *Bignold* in *Oakwood* does not assist the respondents in their attempt to establish that payment by the client of his solicitor's bill will preclude a third party from seeking assessment of the bill.

135 In sum, our view of the three cases relied on by the respondents (*Tim Martin*, *Mirror Group* and *Bignold*) is that they make a similar point; namely that seeking an assessment of a solicitor's bill is inappropriate when a third party takes issue with the quantum payable to the client, but does not challenge the reasonableness of the solicitor-and-client costs. That concern does not arise here. Victory's case is not contingent on the costs it is liable to pay the *receiver* as an opposing party. Instead, Victory seeks an assessment of *CCPL's* solicitor-and-client costs, for which it may be ultimately liable. Victory therefore has standing to seek assessment pursuant to s 120 of the LPA.

136 For the reasons we have given, we reject the respondents' submission that Victory's proper recourse ought to lie in a claim against Navis. We find that there was no "payment" for the purposes of s 122 of the LPA. This is consistent with the approach adopted by the High Court in *Kintyre* (at [16]–[17]) which we find to be apposite.

137 Having regard to the above finding, we see no need to comment or to make any finding on Victory's allegations of overcharging, as the issue of

whether there are "special circumstances" under s 122 of the LPA no longer arises.

138 In addition, we do not agree with the respondents that CCPL's bill should not be delivered to Victory simply because its contents are privileged. There is no reason why a redacted version of the itemised bill removing privileged information cannot be provided. It is inappropriate to speculate at this juncture whether a redacted version is unlikely to prove useful, or to assume that an overwhelmingly large number of redactions will have to be made.

139 Victory has also sought to raise new arguments on appeal based on s 78 of the IRDA and the court's inherent jurisdiction. It is not strictly necessary to consider them for present purposes. We would only observe that while Mr Borrelli objects to Victory raising these arguments, we do not see strong grounds to preclude Victory doing so. Nevertheless, we do not think that the additional arguments are of assistance to Victory's case.

Conclusion

140 For the above reasons, we partially allow the appeal in AD 31. We order CCPL to deliver CCPL's bill for assessment by the court, and direct the respondents to serve CCPL's bill on Victory. The costs of the assessment are reserved to the court assessing the bill.

141 We further order the respondents to bear Victory's costs of the appeal to be fixed at $60,000 inclusive of disbursements. As Victory has only succeeded partially in AD 31, the costs order made by the Judge in OA 1214 is to remain. The usual consequential orders will apply.

Kannan Ramesh
Judge of the Appellate Division

See Kee Oon
Judge of the Appellate Division

Mavis Chionh Sze Chyi
Judge of the High Court

Jimmy Yim Wing Kuen SC, Hing Shan Shan Blossom, Chloe Shobhana Ajit, Nikhil Daniel Angappan and Adam Tan Ern-Ming (Drew & Napier LLC) for the appellant; and
Nish Kumar Shetty, Krishna Elan and Choo Ian Ming (Cavenagh Law LLP) for the respondents.
