Re Vanguard Energy Pte Ltd

[2015] SGHC 156

High Court — Companies Winding Up No 211 of 2014 (Summons No 801 of 2015)
Chua Lee Ming JC
5 March 2015; 7, 22 April 2015

Insolvency law — Winding up

9 June 2015

Chua Lee Ming JC:

1 This case concerns the validity of litigation funding arrangements in insolvency cases.

Background

2 Vanguard Energy Pte Ltd ("the Company") was placed under compulsory liquidation on 21 November 2014. Ms Ee Meng Yeng Angela, Mr Seshadri Rajagopalan and Mr Aaron Loh Cheng Lee were appointed as joint and several liquidators of the Company ("the Liquidators"). Prior to the liquidation order, the Company had filed three actions in the High Court:

(a) in Suit 1173 of 2014, the Company claimed against the defendant, Mr Kingsley Khoo Hoi Leng, for breach of an agreement to reimburse the Company 50% of the purchase price of three vessels;

alternatively the Company sought damages for misrepresentation in connection with the purchase of the vessels;

(b) in Suit 1174 of 2014, the Company claimed against Progress Petroleum Ltd for the balance owing to the Company arising from transactions for the sale and/or supply of bunkers and other fuel products; and

(c) in Suit 1195 of 2014, the Company sought to recover a loan extended to AF Ship Management Pte Ltd by the Company.

3 The Company has also identified certain other potential claims. As the Company has insufficient assets, the Liquidators were unwilling to proceed with the pending or potential claims (together, "the Claims") without any indemnity or funding from a third party.

4 The creditors were unwilling to provide such funding except for one Mr Santoso Kartono ("Mr Kartono"), who was also a shareholder of the Company. Mr Kartono and two other shareholders of the Company, Mr Seah Eng Toh Daniel ("Mr Seah") and Mr Soh Jiunn Jye Jeffrey ("Mr Soh"), agreed to provide the necessary funding. Mr Kartono and Mr Seah were also former directors of the Company while Mr Soh is still a director of the Company. After obtaining approval at a creditors' meeting on 23 January 2015, the Company and the Liquidators entered into a funding agreement ("the Funding Agreement") with Mr Kartono, Mr Seah, and Mr Soh on 13 February 2015.

5 The application in this case started as an application for approval of the terms of the Funding Agreement. During the course of the hearing, for reasons that will become clearer later, counsel for the Company sought leave to take

further instructions with a view to coming back before me with a revised agreement. I granted him leave to do so.

6 An affidavit was subsequently filed by one of the Liquidators, annexing a draft Assignment of Proceeds Agreement ("the Assignment Agreement"). Upon execution, it would supersede the Funding Agreement. The parties remain the same. The three shareholders, Mr Kartono, Mr Seah, and Mr Soh ("the Assignees"), will provide the funding under the Assignment Agreement.

The terms of the Assignment Agreement

7 Under the terms of the Assignment Agreement:

(a) The Company will provide upfront funding for 50% of the solicitor-and-client costs and any security for costs to be provided by the Company, subject to a cap of $300,000 ("the Co-Funding"). The Assignees will fund the remainder of these costs.

(b) The Assignees will fund party-and-party costs and other legal costs.

(c) After all the Claims have been settled, discontinued, or had final judgment entered by the court, any amounts received by the Company from the Claims ("the Recovery") are to be paid as follows:

(i) first, to the Company up to the amount of the Co-Funding;

(ii) second, to the Assignees up to the amount funded by them; and

(iii) third, any surplus will be paid to the Company.

(d) The Assignees will indemnify the Company against:

(i) any shortfall between the Recovery and the amount of Co-Funding;

(ii) any damages, compensation, costs, security, interest or disbursements which the Company agrees or is ordered to pay in relation to the Claims (apart from the Co-Funding).

(e) The Assignees will provide a banker's guarantee ("the Guarantee") payable on demand for $1,000,000. The Assignees will top up the amount of the Guarantee by an additional $300,000 for each action commenced in respect of a potential Claim.

(f) The Liquidators will have full control of legal proceedings except that the Assignees' agreement is required on the choice of solicitors and on any settlement or discontinuance of any Claim.

(g) All rights, title and interests of the Company and the Liquidators (present and future) over part of the Recovery equal to the funds provided by the Assignees ("the Assigned Property") will be sold to the Assignees by way of assignment.

8 The key terms of the Assignment Agreement mirror those of the Funding Agreement with one important difference. Under the Assignment Agreement, the Assigned Property is sold to the Assignees. The Assigned Property represents part of the proceeds that are expected to be recovered in the Claims. In contrast, under the Funding Agreement, there was simply a

promise by the Company to use part of the proceeds of the Claims to repay the three shareholders the amount funded by them.

Issues raised by the Assignment Agreement

9 The Liquidators view the Assignment Agreement to be in the best interests of the Company's creditors as it allows the Company to: (a) pursue the Claims with minimal risk to depletion of the Company's assets; and (b) benefit from any Recovery in excess of the cost of funding the Claims. Without the funding, the Company will not be able to pursue the Claims.

10 However, the Assignment Agreement raised the following legal issues:

(a) whether the assignment of the Assigned Property is a sale of property of the Company permitted under s 272(2)(*c*) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act");

(b) whether the doctrine of maintenance and champerty applies to a sale of property under s 272(2)(*c*) of the Act;

(c) whether the Assignment Agreement offends the doctrine of maintenance and champerty; and

(d) whether the payments to the Assignees under the Assignment Agreement contravene s 328(1) and/or s 328(3) of the Act, and if so, whether the payments can be approved under s 328(10) of the Act.

11 Section 272(2)(*c*) of the Act empowers liquidators to sell the immovable and movable property and things in action of the company. Section 328(1) sets out a statutory order of priorities in the payment of certain classes of preferred debts. Section 328(3) provides for equal ranking of debts within

each class. Section 328(10) empowers the court to distribute assets recovered with funding provided by creditors, in a manner that is more advantageous to those creditors.

My decision

12 I concluded that:

(a) s 272(2)(*c*) of the Act permits the sale of a cause of action as well as the proceeds from such actions. Therefore, the assignment of the Assigned Property is a sale of the Company's property which is permitted under s 272(2)(*c*) of the Act;

(b) s 272(2)(*c*) provides a statutory power of sale and the doctrine of maintenance and champerty has no application to the exercise of this power;

(c) in any event, the Assignment Agreement does not offend the doctrine of maintenance and champerty; and

(d) since the Assigned Property will be assigned to the Assignees, ss 328(1), (3) and (10) of the Act are therefore not relevant.

13 I now set out my reasons for the decision that I have reached.

Whether the assignment is within the scope of s 272(2)(*c*) of the Act

14 Section 272(2)(*c*) of the Act reads as follows:

> (2) The liquidator may —
>
> …
>
> (*c*) sell the immovable and movable property and things in action of the company by public auction,

> public tender or private contract with power to transfer the whole thereof to any person or company or to sell the same in parcels[.]

15 It is clear that s 272(2)(*c*) expressly permits the sale of a cause in action. Counsel for the Company submitted that the fruits of a cause of action that belongs to a company can also be sold under s 272(2)(*c*). Counsel informed me that there is no reported decision in Singapore on this point, and referred me to English and Australian cases.

16 The position in England is well established – the sale of either a cause of action or the fruits of an action falls within a liquidator's statutory power of sale. In *Grovewood Holdings Plc v James Capel & Co Ltd* [1995] 1 Ch 80 ("*Grovewood Holdings*"), Lightman J said at 87:

> … a transaction involving a transfer of a cause of action in return for financing an action and a share of recoveries has been treated uniformly by the courts since 1880 as a sale. … If a transfer of a cause of action in return for financing an action and a share of the recoveries is a "sale" … so must, I think, a transfer of a half beneficial interest in recoveries …

17 Lightman J's decision was followed in *Ruttle Plant Limited v Secretary of State for Environment Food and Rural Affairs No 2* [2008] EWHC 238 (TCC) ("*Ruttle Plant*"). Ramsey J said at [24]:

> … in the case of a liquidator, the fruits of the action form part of the assets of the company which the liquidator must realise and he may do so by using his power of sale of the property of the company under the Insolvency Act 1986.

18 The relevant provision in *Grovewood Holdings* and *Ruttle Plant* was para 6 of Sched 4 to the Insolvency Act 1986 (c 45) (UK) ("Insolvency Act 1986") which sets out the liquidator's power as follows:

> Power to sell any of the company's property by public auction or private contract with power to transfer the whole of it to any person or to sell the same in parcels.

Section 436 of the Insolvency Act 1986 defines "property" to include:

> … things in action … and every description of interest … whether present or future or vested or contingent, arising out of, or incidental to, property[.]

19 In Australia, a share of the fruits of an action is also regarded as property of the company which can be sold under s 477(2)(*c*) of the Corporations Act 2001 (Cth) ("the Australian Act"). Section 477(2)(*c*) of the Australian Act empowers a liquidator to:

> sell or otherwise dispose of, in any manner, all or any part of the property of the company[.]

Section 9 of the Australian Act defines "property" as:

> … any legal or equitable estate or interest (whether present or future and whether vested or contingent) … and includes a thing in action[.]

20 In *Re Movitor Pty Ltd (In Liquidation)* (1996) 64 FCR 380 ("*Movitor*"), the liquidator sought the court's declaration that he had power to enter into an agreement with an insurance company to finance actions against former directors of the company for insolvent trading. Drummond J held that the liquidator could do so in exercise of the statutory power to sell all or any part of the "property of the company". Drummond J said (at 393):

> Since a share in the fruits of an action belonging to an insolvent company is "property of the company" for purposes of s 477(2)(c) of the Corporations Law, that section authorises the liquidator to make an agreement to pay a percentage of such recoveries in return for assistance in running the action, because the section empowers the liquidator not only to sell, but to "otherwise dispose of, in any manner" any part of the property of the company.

21 It can be seen that the provisions in England and Australia are similar to s 272(2)(*c*) of the Act except that the term "property" is defined in the relevant statutes in both England and Australia, but is not defined in the Act. Counsel invited me to adopt the following definition of "property" set out in s 2(1) of the Bankruptcy Act (Cap 20, 2009 Rev Ed) ("Bankruptcy Act"):

> … money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of or incidental to, property[.]

22 Counsel relied on the Court of Appeal decision in *Alrich Development Pte Ltd v Rafiq Jumabhoy* [1995] 2 SLR(R) 340 in which the court held at [54] that the word "director" was used in the same sense in both the Residential Property Act (Cap 274, 1985 Rev Ed) ("the RPA") and the Companies Act (Cap 50, 1994 Rev Ed) ("the Old Companies Act") in that it dealt with persons in control of a company. The court then held that the word "director" in the RPA has the same meaning as that given to it in the Old Companies Act. Counsel submitted that the word "property" is used in the Bankruptcy Act and the Act in the same sense to describe the property of a bankrupt and an insolvent company respectively.

23 It is not clear whether the lack of a definition of "property" in s 272(2)(*c*) makes any difference to the application of the English and Australian cases. However, there was no need for me to decide this question as importing the extended meaning of "property" as defined in the Bankruptcy Act would remove any such doubt. I agreed with counsel's submission that the term "property" in s 272(2)(*c*) is used in the same sense as it is used in the Bankruptcy Act, and I therefore gave it the same meaning given to it in the Bankruptcy Act.

24 Having considered the language in s 272(2)(*c*) and the English and Australian cases, I had no hesitation in accepting counsel's submission that s 272(2)(*c*) permits the sale of the fruits of a cause of action that belongs to the company. In the present case, the Assigned Property represents part of the fruits of the Claims which are property of the Company. The assignment of the Assigned Property under the Assignment Agreement therefore falls within the scope of the power of sale in s 272(2)(*c*).

25 In contrast, I was of the view that s 272(2)(*c*) could not apply to the Funding Agreement as that agreement did not purport to sell either the Claims or the proceeds of the Claims. Under the Funding Agreement, there was just a promise by the Company to use part of the proceeds of the Claims to repay the three shareholders the amount funded by them.

Whether the doctrine of maintenance and champerty applies to the power of sale under s 272(2)(*c*) of the Act

26 It is clear from the English cases that liquidators' statutory powers place them in a privileged position, and that the traditional hostility of the law towards assignment of causes of action in return for a share of the proceeds, does not apply to assignments by liquidators: *Norglen Ltd (in liquidation) v Reeds Rains Prudential Ltd and others* [1999] 2 AC 1. However, Lightman J in *Grovewood Holdings* drew a distinction between the sale of a cause of action and the sale of the fruits of litigation. Lightman J accepted that the former is immune from the law of maintenance but took the view (at 87) that there was "no basis in principle or authority" for extending the immunity to the latter.

27 This distinction was doubted in *Re Oasis Merchandising Services Ltd* [1995] BCC 911 at 920–921 ("*Re Oasis*"). Walker J found "considerable

difficulty with this part of [Lightman J's] judgment" and expressed the view (without deciding) that the question was one of construing the statutory power of sale. If an assignment of fruits of litigation falls within the statutory power of sale, then it must be authorised by the statutory provision notwithstanding the rules as to maintenance and champerty. The Court of Appeal agreed with Walker J's observations: *In Re Oasis Merchandising Services Ltd* [1997] 2 WLR 764 at 772.

28 In *Movitor*, Drummond J declined (at 393) to draw the distinction drawn by Lightman J in *Grovewood Holdings*. Drummond J said at 391:

> In my opinion, the reason why the sale of a bare right of action by a trustee in bankruptcy or a liquidator does not involve maintenance and champerty is that, being a sale under statutory authority, to do that which Parliament has authorised, either expressly or by necessary implication, cannot involve the doing of anything that is unlawful. … [I]t is because the power of sale of the property of the insolvent is conferred by statute for this purpose that the transaction is immune from any rule of law otherwise applicable that would make the sale unlawful and open to challenge.
>
> Whether he sells a bare right of action or the fruits of the action, the only authority a liquidator has to make any such sale is this statutory power. … In my opinion, there is no reason why this statutory authority should not make lawful any other sale of the insolvent company's property by a liquidator, including the sale of a share in the proceeds of an action belonging to the company to a person with no interest in the litigation on terms that that person is to have control of the litigation, although that would involve champerty but for the transaction being made under that authority. This will be the position, provided only that the subject matter of the sale is "property of the company" within the statutory power.

29 I agree with the observations in *Re Oasis* and the decision in *Movitor*. Section 272(2)(*c*) provides a statutory power of sale. The only question is whether the sale falls within the scope of this statutory power. Section 272(2)(*c*) may be seen as a statutory exception to the doctrine of maintenance and champerty. As I have concluded that the assignment under the Assignment

Agreement falls within s 272(2)(*c*), it follows that the assignment is immune from the doctrine of maintenance and champerty.

30 I would add that for purposes of s 272(2)(*c*), it matters not whether the assignees make a profit or are merely recovering (as in this present case) the amount funded by them.

31 My decision on s 272(2)(*c*) of the Act is sufficient for the Liquidators and the Company to proceed with the Assignment Agreement. However, as counsel has made extensive submissions in respect of the doctrine of maintenance and champerty and s 328 of the Act, I shall deal with these issues as well. This will also help to explain the difficulties that the Funding Agreement faced and why the Company sought to replace that with the Assignment Agreement.

Whether the Assignment Agreement offends the doctrine of maintenance and champerty

32 Counsel for the Company referred to several cases and submitted that the Assignment Agreement does not offend the doctrine of maintenance and champerty as:

> (a) the Assignees have a genuine commercial interest in the litigation of the Claims, so as to fall within the common law exception to maintenance and champerty; and/or
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> (b) the Assignment Agreement does not offend the policy reasons behind maintenance and champerty.

Counsel further submitted that for purposes of [32(b)] above, one should also consider the public policy of allowing insolvent plaintiffs access to justice.

33 Maintenance may be defined as the giving of assistance or encouragement to one of the parties to litigation by a person who has neither an interest in the litigation nor any other motive recognised by the law as justifying his interference. Champerty is a particular kind of maintenance, namely, maintenance of an action in consideration of a promise to give a maintainer a share in the proceeds or subject matter of the action: *Lim Lie Hoa and another v Ong Jane Rebecca* [1997] 1 SLR(R) 775 ("*Lim Lie Hoa*") at [23]. The Court of Appeal in *Lim Lie Hoa* referred to the three leading cases that "redefined and stated" the law on champerty and maintenance, namely: *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 ("*Trendtex*"), *Brownton Ltd v Edward Moore Inbucon Ltd* [1985] 3 All ER 499 ("*Brownton Ltd*"), and *Giles v Thompson* [1994] 1 AC 142 ("*Giles*").

34 It has long been established that one can validly assign a cause of action that is incidental to a transfer of property. The House of Lords in *Trendtex* held that even if the assignee cannot show a property right to support his assignment, the assignment will not be struck down as savouring of maintenance if the assignee has a genuine commercial interest in taking the assignment and in enforcing it for his own benefit. In that case, Credit Suisse was a substantial creditor of Trendtex and had guaranteed Trendtex's legal costs in its action against the Central Bank of Nigeria ("CNB"). Trendtex assigned the cause of action to Credit Suisse. The House of Lords held that Credit Suisse had a genuine and substantial interest in the success of Trendtex's litigation against CNB. Nevertheless, the assignment was struck down as savouring of champerty because it contemplated the possibility that Credit Suisse might sell the cause of action to a third party who had no interest in the litigation. As Lord Wilberforce described it (at 694), the assignment involved "trafficking in litigation".

35 In *Trendtex*, Lord Roskill laid down the principle (at 703) that the court should look at the totality of the transaction in deciding whether there was a genuine commercial interest. This was applied by the Court of Appeal in *Brownton Ltd*. In that case, the first defendant ("EMR") was a firm of consultants who had advised the plaintiffs on the installation of a computer system that failed to work. The second defendant ("Cossor") was a firm of the manufacturers and suppliers of the system. The plaintiffs sued both EMR and Cossor. EMR paid a sum of money into court. The plaintiffs were prepared to accept the payment in settlement of the whole action but could not reach agreement with Cossor on costs. The plaintiffs then agreed with EMR that the plaintiffs would accept the payment into court and the plaintiffs would assign the cause of action against Cossor to EMR. The Court of Appeal held that, looking at the totality of the transaction, EMR had a genuine commercial interest in the litigation against Cossor as any sum recovered from Cossor would reduce the amount of EMR's loss.

36 *Giles* concerned a scheme under which car-hire companies financed actions by motorists involved in accidents. The actions were conducted by solicitors and counsel nominated or agreed to by the companies. Damages recovered for personal injury would go to the motorists and damages in the form of car rentals would be paid over to the car-hire companies which provided the motorists with replacement cars whilst their own cars were being repaired. The House of Lords held that the scheme was not champertous. Lord Mustill held (at 165) that there was:

> … no convincing reason for saying that, as between the parties to the hiring agreement, the whole transaction is so unbalanced, or so fraught with risk, that it ought to be stamped out.

37 The principle that an assignment of a cause of action is not champertous if it is ancillary to a transfer of property, or if there is a genuine interest in the assignment, was applied in Singapore in *Lim Lie Hoa*. In that case, the second appellant was in arrears of maintenance payments to his ex-wife, the respondent, and their children. He assigned half of his entitlement to the residuary estate of his father to the respondent, and through an irrevocable power of attorney, gave her powers to sue the representatives of the estate for his share in the residuary estate. The Court of Appeal agreed with the High Court's conclusion that the assignment was not champertous. The respondent clearly had a pre-existing interest in the second appellant's entitlement to the estate. The Court of Appeal further held that the assignment was not champertous because the right to sue was ancillary to the assignment of a property right or interest, *ie*, the half share of the second appellant's entitlement to the estate. *Lim Lie Hoa* also involved funding provided by a company called Gomar Leasing for litigation commenced by the respondent seeking, amongst others, enquiries and accounts to be taken of the estate. The court held that the funding agreement was not champertous as Gomar Leasing had an interest in financing the litigation in the hope that the respondent would recover funds from the estate to discharge a loan that she had taken from Gomar Leasing previously.

38 *Giles* is important in that it further developed the law in this area. Lord Mustill's judgment is instructive. He acknowledged (at 163) that "there have evolved crystallised policies in relation to solicitors' contingent fees and the assignment of bare rights of action for tortious wrongs", but preferred to "to approach the question more directly" in other cases. Noting that "the law on maintenance and champerty has not stood still" (at 164), Lord Mustill said (at 164):

> … I believe that the law on maintenance and champerty can best be kept in forward motion by looking to its origins as a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants. For this purpose the issue should not be broken down into steps. Rather, all the aspects of the transaction should be taken together for the purpose of considering the single question whether … there is wanton and officious intermeddling with the disputes of others in [circumstances] where the meddler has no interest whatever, and where the assistance he renders to one or the other party is without justification or excuse.
>
> … The question must be looked at first in terms of the harmfulness of this intervention. … Is there any realistic possibility that the administration of justice may suffer, in the way in which it undoubtedly suffered centuries ago? …

39 In *Regina (Factortame Ltd and others) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2003] QB 381 ("*Factortame*"), the Court of Appeal referred to *Giles* and said (at [44]) that it:

> …abundantly supports the proposition that, in any individual case, it is necessary to look at the agreement under attack in order to see whether it tends to conflict with existing public policy that is directed to protecting the due administration of justice with particular regard to the interests of the defendant.

For purposes of determining the relevant public policy considerations, the court held (at [36]) that:

> Where the law expressly restricts the circumstances in which agreements in support of litigation are lawful, this provides a powerful indication of the limits of public policy in analogous situations. Where this is not the case, then we believe one must today look at the facts of the particular case and consider whether those facts suggest that the agreement in question might tempt the allegedly champertous maintainer for his personal gain to inflame the damages, to suppress evidence, to suborn witnesses or otherwise to undermine the ends of justice.

40 In *Factortame*, the claimants were in a parlous financial state and a firm of chartered accountants ("GT"), to whom the claimants owed substantial fees, agreed to prepare and submit the claimants' claims for loss of damage in

return for 8% of the final settlement received. The court first concluded (at [76]) that the public policy in play was that which weighs against a person who is in a position to influence the outcome of litigation having an interest in that outcome. The court then found that the public policy was not affronted by the agreements because, among other things, (a) GT had not acted as expert witnesses but had retained independent experts; (b) GT had no role at all in the final battle before the House of Lords on the issue of liability; (c) any reasonable onlooker would not seriously have suspected that the 8% fee would tempt GT to deviate from performing their duties in an honest manner; and (d) the task of producing a suitable computer model was carried out as a joint operation involving both sides and in a transparent manner. Accordingly, since the agreements did not put at risk the purity of justice, the court found that the agreements were not champertous.

41 The public policy test adopted in *Giles* and *Factortame* is purposive in nature and is a broader test than the genuine commercial interest test. As *Factortame* shows, the existence of a genuine commercial interest is not always necessary. In fact, in *Factortame*, the court was of the view (at [77]–[78]) that GT's interest as a substantial creditor of the claimants did not help GT's case since that put GT in a position to influence the outcome of the litigation.

42 Another development in this area of the law is the consideration of countervailing policies, especially policies in favour of ensuring access to justice. In *Factortame*, the court took into consideration (at [91]) the fact that the claimants were faced with a real risk that lack of funds might result in their losing the fruits of their litigation, and that the agreements ensured that they continued to enjoy access to justice. In *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83, the New South Wales Court of Appeal said

(at [90]) that the "social utility of assisted litigation" has been reinforced by the trend of case law in recent years. In *Siegfried Adalbert Unruh v Hans-Joerg Seeberger* [2007] 2 HKLRD 414 ("*Unruh*"), the Hong Kong Court of Final Appeal held (at [103]) that:

> … countervailing public policies must be taken into account, especially policies in favour of ensuring access to justice and of recognizing, where appropriate, legitimate common interests of a social or commercial character in a piece of litigation. The traditional public policies against intermeddling in litigation must be weighed against such competing values and if the balance is in favour of the latter, the conduct complained of should not be regarded as contrary to public policy.

43 In summary, the above cases support the proposition that an assignment of a bare cause of action (or the fruits of such actions) will not be struck down if:

(a) it is incidental to a transfer of property; or

(b) the assignee has a legitimate interest in the outcome of the litigation; or

(c) there is no realistic possibility that the administration of justice may suffer as a result of the assignment. In this regard, the following should be considered:

(i) whether the assignment conflicts with existing public policy that is directed to protecting the purity of justice or the due administration of justice, and the interests of vulnerable litigants; and

(ii) the policy in favour of ensuring access to justice.

44 With respect to [43(b)], the cases have used different terms to describe the interest that would invoke the exception to the rule against maintenance and champerty. In *Trendtex*, Lord Wilberforce used the term "a genuine and substantial interest" whereas Lord Roskill referred to "a genuine commercial interest". Both terms were used in *Brownton* since it referred to *Trendtex* quite extensively. Lord Mustill spoke of "legitimate interest" in *Giles*. In *Martell and others v Consett Iron Co Ltd* [1955] 1 Ch 363, Dankwerts J referred to "a common interest". In *Lim Lie Hoa*, the Court of Appeal used the terms "a pre-existing interest" and "a genuine interest", and in *Unruh*, the Hong Kong Court of Final Appeal used the terms "legitimate common interest" and "common interest". I do not think much turns on the actual term used since the question in each case is the same, *ie*, whether the maintainer's interest in the litigation justifies his intervention.

45 Turning now to the facts of this case, first, it is not clear whether the question of champerty even arises. The Assignment Agreement does not involve any "division of the spoils" as Lord Mustill described it in *Giles* (at 161); the Assignees have no share in the Recovery beyond whatever amounts they have funded. However, it was not necessary to decide this question since the Assignees are assisting the Company to pursue the Claims and therefore the question of maintenance would arise in any event.

46 In my view, the relevant public policy in this case is that of protecting the purity of justice and the interests of vulnerable litigants. There is nothing in the Assignment Agreement that is objectionable from either perspective. The purity of justice is protected in that the Liquidators have full control of the legal proceedings and the Assignees' agreement is required only on the choice of solicitors and on any settlement or discontinuance of any Claim. The Assignees are not in any position to influence the outcome of the litigation on

the Claims. As for the Company's or creditors' interests, without the funding, the Company would not be able to pursue the Claims. The prospects of the Claims succeeding are not illusory, and success in the Claims would result in more assets for distribution to the Company's creditors. It is undeniable that litigation funding has an especially useful role to play in insolvency situations. As Lindsay J observed in *Eastglen Ltd (in liquidation) v Grafton* [1996] BCC 900 at 911:

> … It is a familiar experience of those concerned with liquidations that liquidators find themselves without liquid resources sufficient to launch, or to launch and sustain, proceedings which they regard as necessary or desirable for a due performance of their duties. There is a public interest in liquidators being able satisfactorily to carry out the duties which the statutory scheme … confers on them.

47 I also noted that the Assignees will recover only the amounts funded by them (if the Claims are successful), and this only after the Company's Co-Funding has been repaid first. This fact made the case for upholding the Assignment Agreement stronger, although I do not think it would be fatal even if the Assignees were to be entitled to a share in the Recovery exceeding the amount they funded. Realistically speaking, litigation funders would expect to be compensated for the risks they are taking. Considering all the circumstances, I could not find anything in this case that could be said to amount to wanton intermeddling or to involve trafficking in litigation. In my view, upholding the Assignment Agreement would not be contrary to public policy.

48 Separately, I was also of the view that the Assignment Agreement would not run foul of the doctrine of maintenance and champerty in any event, as the Assignees have a legitimate interest in the litigation of the Claims. The Assignees are shareholders of the Company. They are also either current or

former directors of the Company, and one of them is also a creditor of the Company. As shareholders, they will benefit from the spoils of successful litigation and thus have financial interests in the litigation. Clearly, they are not uninterested strangers. As the cases have shown, courts have taken a flexible approach in determining whether a legitimate interest exists.

49 Finally, I would add that, for the same reasons, the Funding Agreement would not have run foul of the doctrine of maintenance and champerty.

Whether the payments to the Assignees under the Assignment Agreement contravenes s 328(1) and/or s 328(3) of the Act and if so, whether the payments can be approved under s 328(10) of the Act

50 As mentioned previously, s 328(1) sets out a statutory order of priorities in the payment of certain classes of preferred debts, and s 328(3) provides for equal ranking of debts within each class. The payment waterfall under the Assignment Agreement (set out in [7(c)] above) requires the Company to pay the Assignees ahead of the preferred debts in s 328(1) and other unsecured creditors. However, this raises no issues as the Assignees are simply receiving what has already been sold to them. Section 328(1) is irrelevant in such a case.

51 The position was different in the case of the Funding Agreement. As the Funding Agreement did not involve any sale of the proceeds, the same payment waterfall would have contravened s 328(1) of the Act. Even though the payment could constitute "costs and expenses of the winding up" within the meaning of s 328(1)(*a*), that only allows the payment to be made ahead of the other preferred debts in s 328(1)(*b*) to (*g*). The payment would still contravene s 328(3) since it would be paid in priority to other costs and

expenses of the winding up in s 328(1)(*a*) whereas s 328(3) provides for equal ranking within each class.

52 Since the payment waterfall under the Assignment Agreement does not contravene ss 328(1) and/or (3), s 328(10) has no relevance to the Assignment Agreement. Section 328(10) of the Act states as follows:

> Where in any winding up assets have been recovered under an indemnity for costs of litigation given by certain creditors, or have been protected or preserved by the payment of moneys or the giving of indemnity by creditors, or where expenses in relation to which a creditor has indemnified a liquidator have been recovered, the Court may make such order as it thinks just with respect to the distribution of those assets and the amount of those expenses so recovered with a view to giving those creditors an advantage over others in consideration of the risks run by them in so doing.

It can be seen that s 328(10) creates another statutory exception to the doctrine of maintenance and champerty.

53 The position was different in the case of the Funding Agreement. The Funding Agreement would have contravened ss 328(1) and/or (3). The question would then have arisen whether the payment under the Funding Agreement could have been approved under s 328(10). I was of the view that the Company could not have relied on s 328(10) for the following reasons:

(a) The court may make an order giving a more advantageous distribution only to creditors who have provided the litigation funding or indemnity. Under the Funding Agreement, only one of the three shareholders providing the funding is a creditor.

(b) In any event, the language in s 328(10) is clear – the court has no power to make an order until after assets have been recovered, protected or preserved, or expenses have been recovered.

54 The interpretation in [53(b)] above is supported by an Australian case. Section 328(10) has its origins in s 292(10) of the Companies Act 1961 (No 6839 of 1961) (Aust) which is now s 564 of the Australian Act. The Supreme Court of Western Australia has held that there is no jurisdiction to make an order in advance of recovery, protection or preservation: R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis, 16th Ed, 2014) at para 27.470.3, citing *The Bell Group Ltd (in liq) v Westpac Banking Corporation* (1997) 16 ACLC 65. This interpretation of s 328(10) could reduce the usefulness of the provision since creditors might be reluctant to provide funding without first having comfort that the risks they are taking will result in a more advantageous distribution for them. The counter argument is that it may be premature to make an order in advance as there may not be sufficient information available at that stage to enable to court to decide what is just. In any event, the language in s 328(10) is clear in this regard and any changes will have to be effected by Parliament.

Legal privilege

55 The affidavit supporting this application disclosed the legal advice given by the Company's lawyers (Rodyk & Davidson LLP) on the merits of the Claims ("the Rodyk Opinion"). Counsel explained that this was done because the Liquidators have a duty to disclose the legal advice to show that they have discharged their duties in considering the Claims before entering into the Funding Agreement or the Assignment Agreement. Counsel referred to *Re ACN 076 673 875 Ltd* [2002] NSWSC 578, where the court held that one of the factors to be considered in the context of an application to approve a litigation funding agreement was the risks involved in pursuing the claim including the costs likely to be incurred in the proposed litigation.

56 Counsel made an oral application for a ruling that any waiver of legal privilege was limited to the specific purpose of this application only. Counsel relied on, amongst other authorities, *Berezovsky v Hine & Ors* [2011] EWCA Civ 1089 at [28] for the proposition that legal privilege may be waived for a limited purpose only.

57 Without fuller arguments, I would not be prepared to say that it is always necessary to disclose the legal advice in an application of this nature, although I will say that the disclosure in this case was useful. I was satisfied that the legal advice had been disclosed only for purposes of this application and that legal privilege had not otherwise been waived. Accordingly, I granted the Company's request and ruled that any waiver of litigation privilege of the Rodyk Opinion as disclosed in pp 25–52 of the 1st Affidavit of Aaron Loh Cheng Lee filed on 17 February 2015 is limited to the specific purpose of this application.

Chua Lee Ming
Judicial Commissioner

Balakrishnan Ashok Kumar and Tay Kang-Rui Darius (TSMP Law Corporation) for the applicant.