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

[2026] SGHC 93

Originating Application (Bankruptcy) No 2370 of 2025
(Summons No 218 of 2026)

Between

(1) True Yoga Pte Ltd
(2) True Fitness (STC) Pte Ltd
(3) True Fitness Pte Ltd

… *Claimants*

And

Patrick John Wee Ewe Seng

… *Defendant*

EX TEMPORE JUDGMENT

[Insolvency Law — Bankruptcy — Section 352(6) Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) — When court has power to make order]
[Insolvency Law — Bankruptcy — Section 352(6) Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) — When asset has been protected or preserved]

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True Yoga Pte Ltd and others
v
Wee Ewe Seng Patrick John

[2026] SGHC 93

General Division of the High Court — Originating Application (Bankruptcy) No 2370 of 2025 (Summons No 218 of 2026)
Kristy Tan J
30 April 2026

30 April 2026

Kristy Tan J (delivering the judgment of the court *ex tempore*):

Introduction

1 In HC/SUM 218/2026 ("SUM 218"), the claimant-creditors ("Claimants") of the defendant-bankrupt ("Defendant") applied, pursuant to s 352(6) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA"), for the court's approval of the advantages given to the Claimants over other creditors of the Defendant under a funding agreement dated 9 January 2026 ("Funding Agreement") between the Claimants and the private trustees of the Defendant's bankruptcy estate ("PTIBs").

2 However, as I find, the Claimants' application has been made *prior* to their provision of funding to the PTIBs and *prior* to any asset of the Defendant having been recovered, protected or preserved by virtue of such funding. In other words, what the Claimants seek is the court's *prospective* approval of the

advantages given to them under the Funding Agreement. As I also find, the court does not have power under s 352(6) of the IRDA to grant such prospective approval. Nor may the court do so through the exercise of its inherent power. SUM 218 thus fails at the threshold.

Relevant background

3 The Claimants are judgment creditors of the Defendant.[1] They commenced bankruptcy proceedings against him and obtained a bankruptcy order on 6 October 2025.[2] Under the bankruptcy order, Mr Tan Kim Han and Mr Luke Anthony Furler of Quantuma International were appointed the joint and several PTIBs.[3]

4 On 3 December 2025, the PTIBs provided to the potential creditors of the Defendant, including the Claimants, a Preliminary Report setting out an update on the progress of the administration of the bankruptcy estate ("Preliminary Report").[4] In the Preliminary Report, the PTIBs stated that the assets in the bankruptcy estate totalled $14,595, and that they estimated requiring $99,000–150,000 to proceed further with administering the bankruptcy estate and an additional $41,230–77,430 for legal and other costs.[5] The PTIBs also made a request for funding, stating, *inter alia*:[6]

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1 Affidavit of Zhang Ruoliao filed on behalf of the Claimants on 14 January 2026 ("Claimants' Affidavit") at para 4.

2 Claimants' Affidavit at p 17.

3 Claimants' Affidavit at p 17.

4 Claimants' Affidavit at para 6.

5 Claimants' Affidavit at para 7 and pp 36 and 43–44.

6 Claimants' Affidavit at pp 42 and 44.

> 5.1.3 Building on the preliminary review, the immediate objective of the next phase of investigations, subject to funding, would be to complete an evidence-led assessment that enables a clear decision on recovery action and, if appropriate, a proportionate pathway to resolution.
>
> …
>
> 6.1.2 Please note that if no funding is available the PTIBs will not be able to progress the proposed actions. *The PTIBs cannot guarantee* that any funding provided will be repaid or *that any realisations will be made as a result of the funding being provided*. …
>
> [emphasis added]

5 On 9 January 2026, the Claimants and the PTIBs entered into the Funding Agreement, which contained the following salient terms:[7]

(a) Clause 2.1 provided that the court's approval of the terms of the Funding Agreement was a *condition precedent* to the Funding Agreement itself:

> **2. Condition Precedent**
>
> 2.1 It shall be a condition precedent to this Agreement for the [Claimants] to obtain an order from the Singapore Court approving the terms of this Agreement, specifically the advantage to be given to the [Claimants] pursuant to Clause 6 below.

(b) Clause 3.1 provided that the initial amount of funds provided by the Claimants would be $70,000 ("Initial Funds").

(c) Clause 3.2 provided for the PTIBs to give the Claimants a "right of first offer" to provide additional funds if an additional funding request was made.

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[7] Claimants' Affidavit at pp 9–15.

(d) Clause 3.3 provided for interest of 5.33% per annum on the Initial Funds and any additional funds provided by the Claimants ("Additional Funds").

(e) Clauses 3.2 and 3.4 provided that additional funding from other funders "shall not be conferred with higher or equivalent priority of repayment to the [Claimants'] Initial Funds".

(f) Clause 4.1 provided for the Claimants' Initial Funds and Additional Funds to be applied by the PTIBs to meet the following costs and expenses:

> 4.1.1 the reasonable costs and expenses of the PTIBs to investigate the affairs of the [Defendant] (the "**Preliminary Work**"). The Preliminary Work includes the review of any potential Claims [*ie*, claims the Defendant and/or the PTIBs have or may have] and where necessary, appointment of and advice from the Lawyers [*ie*, solicitors engaged by the PTIBs] on the viability of the Claims;
>
> 4.1.2 to obtain recognition of the bankruptcy order in the Hong Kong and/or BVI courts;
>
> 4.1.3 the reasonable costs and expenses of the PTIBs and/or their Lawyers to initiate and pursue the Claims and the Proceedings [*ie*, any legal proceedings that the PTIBs consider necessary to bring, prosecute and resolve the Claims];
>
> 4.1.4 any security for costs that the [Defendant] is ordered to provide with respect to the Claims and the Proceedings;
>
> 4.1.5 any adverse costs order made against the [Defendant] with respect to the Claims and the Proceedings; and
>
> 4.1.6 any remuneration or other costs, disbursements and expenses whatsoever incurred by the PTIBs or the Lawyers in connection with the preparation, negotiation, finalisation and execution of this Agreement.

(g) Clause 4.2 provided that the Claimants' Initial Funds and Additional Funds could not be used for any claims and legal proceedings against the Claimants and specified parties related to the Claimants.

(h) Clause 6.1 provided for the order of priorities in the distribution of any assets recovered by virtue of the Initial Funds and Additional Funds provided by the Claimants ("Total Funds"):

> **6. Order of Distribution**
>
> 6.1 Any assets recovered from the Claims and Proceedings funded by the Total Funds ("**Recovered Assets**") would be applied and distributed, when the PTIBs in their discretion decide is the appropriate time to do so, in the following order of priority:
>
> 6.1.1 the [Claimants'] Total Funds;
>
> 6.1.2 the PTIBs' costs, expenses and remuneration in connection with the bankruptcy;
>
> 6.1.3 the Agreed Interest payable for the Total Funds;
>
> 6.1.4 the creditors in accordance with the distribution scheme set out in the IRDA.

6 On 14 January 2026, the Claimants filed SUM 218 seeking an order that the advantages given to them in the Funding Agreement be approved. The claimants' application in SUM 218 was made pursuant to s 352(6) of the IRDA.

7 The PTIBs did not file any affidavit or written submissions in SUM 218.

8 The defendant's ex-wife, Ms Cho Min Jung ("Non-Party"), who claimed to be a creditor of the Defendant by virtue of being owed maintenance

payments,[8] opposed SUM 218 on the grounds that certain terms in the Funding Agreement were objectionable. Her objections were roundly countered by the Claimants.

9 However, in the initial round of written submissions, neither the Claimants nor the Non-Party addressed the issue of whether the court had power under s 352(6) of the IRDA to grant the order sought in SUM 218. In my view, this was a fundamental preliminary issue. I directed the Claimants to address this anterior issue in a further round of written submissions and extended the invitation to the Non-Party to do so too if she wished. I will address the Claimants' submissions in this regard at the relevant junctures below. The Non-Party made no germane submissions on this issue.

Issues to be determined

10 The issues to be determined are:

(a) Issue 1: Under s 352(6) of the IRDA, *prior* to a creditor giving any indemnity or making any payment of moneys and *prior* to the recovery, protection or preservation of any asset of the bankrupt by virtue of such indemnity or payment of moneys, does the court have power to *prospectively* approve giving that creditor an advantage over other creditors in the distribution of such asset?

(b) Issue 2: If the answer to Issue 1 is in the negative, is the order sought in SUM 218 one for such prospective approval, which the court does not have power under s 352(6) of the IRDA to grant?

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[8] Affidavit of Cho Min Jung filed on 26 March 2026 at para 1.

(c) Issue 3: If the answer to Issue 2 is in the affirmative, can the court nevertheless make the order sought in SUM 218 pursuant to its inherent power (as the Claimants belatedly contended)?

(d) Issue 4: It is only if I find, one way or the other, that the court has power to make the order sought in SUM 218, that the question arises *whether* it would be just to grant the order.

Decision on Issue 1

11 I answer Issue 1 (see [10(a)] above) in the negative.

12 Section 352(6) of the IRDA provides:

> Where any creditor *has given* any indemnity or *made* any payment of moneys *by virtue of which* any asset of the bankrupt *has been* recovered, protected or preserved, the Court may make such order as it thinks just with respect to the distribution of such asset with a view to giving that creditor an advantage over other creditors in consideration of the risks run by the creditor in so doing. [emphasis added]

13 In my view, it is plain from the language of s 352(6) of the IRDA that it is only *after*:

(a) a creditor has given any indemnity or made any payment of moneys; and

(b) any asset of the bankrupt has been recovered, protected or preserved as a result of the indemnity given or payment of moneys made by that creditor,

that such creditor may apply for, and the court may make, an order giving him an advantage over other creditors in the distribution of such asset. Prior to the

occurrence of the events described in [(a)] and [(b)], the court does not have power under s 352(6) of the IRDA to make a prospective order.

14 The Claimants in fact accepted that this was the correct interpretation of s 352(6) of the IRDA, stating expressly in their further written submissions that:[9]

> 4. There are two preconditions which must be satisfied before the Court's power to "make such order as it thinks just" is triggered under [s 352(6) of the IRDA].
>
> 5. ***First***, the creditor must have "*given any indemnity or made any payment [of] moneys*".
>
> …
>
> 8. ***Second***, by virtue of the indemnity and/or moneys provided, "*any asset of the bankrupt has been recovered, protected or preserved*". …
>
> [emphasis in original]

15 A similar observation on s 352(6) of the IRDA was made by Audrey Lim J in *Yiong Kok Kong (as the private trustee in bankruptcy of the bankrupt estate of Goh Ming Hue Julius, a bankrupt) v Liu Chien Min* [2023] 4 SLR 1089 ("*Yiong Kok Kong*") (at [29]–[31]):

> 29 … it is important to note at what stage an application under s 352(6) IRDA should be made.
>
> 30 Section 352(6) of IRDA reads as follows: …
>
> 31 It is clear from s 352(6) of IRDA that the Court cannot make an order with respect to the distribution of an asset of the bankrupt *before* the asset has been recovered, protected or preserved. This interpretation of s 352(6) of IRDA is consistent with the interpretation given in *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597 (at [53]) pertaining to s 328(10) of the Companies Act (Cap 50, 2006 Rev Ed) (now s 204 of IRDA),

[9] Claimants' Further Submissions dated 28 April 2026 ("CFS") at paras 4, 5 and 8.

> which deals essentially with the similar issue of funding by creditors in the case of a company winding up.
>
> [emphasis in original]

16 In *Yiong Kok Kong*, the trustee in bankruptcy of a bankrupt had sought an order that he be empowered to pay out the net proceeds from the sale of the bankrupt's property to three creditors in priority to other creditors of the bankrupt, pursuant to s 352(6) of the IRDA. While the trustee in bankruptcy subsequently withdrew his prayer for this order, Lim J considered it important to address the stage at which an application under s 352(6) should be made (as set out at [15] above). The Claimants sought to downplay Lim J's observations.[10] For example, they argued that *Yiong Kok Kong* did not concern an advantage to be given under a funding agreement.[11] That may be so, but s 352(6) operates in the same manner whether the advantage in question arises pursuant to a funding agreement or otherwise. In any event, the Claimants' attempt to put distance between their application and *Yiong Kok Kong* is odd given that their own interpretation of s 352(6) (see [14] above) coheres with Lim J's observations.

17 It is also apposite to consider s 328(10) of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act") (now repealed) and the decision of *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597 ("*Vanguard Energy*"), to which Lim J referred.

18 Prior to its repeal, s 328(10) of the Companies Act provided:

> Where in any winding up assets have been recovered under an indemnity for costs of litigation given by certain creditors, or

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10 CFS at para 22.

11 CFS at para 22(a).

> 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.

19 In *Vanguard Energy*, Chua Lee Ming JC (as he then was) held that it was clear from the language of s 328(10) of the Companies Act that the court had no power to make an order under that provision until after assets had been recovered, protected or preserved, or expenses had been recovered (at [53(b)] and [54]). Chua JC observed that while 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", any changes to the position under s 328(10) would have to be effected by Parliament given the clear language of the provision as it stood (at [54]).

20 Section 328(10) of the Companies Act was worded similarly to s 352(6) of the IRDA, and it is unsurprising that Lim J in *Yiong Kok Kong* (at [31]) considered *Vanguard Energy* as support for the interpretation that s 352(6) of the IRDA did not allow the court to make an order thereunder before any asset of the bankrupt was recovered, protected or preserved (see [15] above).

21 In the event, s 328(10) of the Companies Act was subsequently repealed, and s 204 of the IRDA enacted in its place, by the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018).

22 Section 204 of the IRDA provides:

> 204.—(1) Where in any winding up —

> (*a*) assets have been recovered under an indemnity for costs of litigation given by certain creditors;
>
> (*b*) assets have been protected or preserved by the payment of moneys or the giving of an indemnity by certain creditors; or
>
> (*c*) 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 those creditors in giving those indemnities or paying those moneys.
>
> (2) Any creditor may apply to the Court for an order under subsection (3) ***prior to*** —
>
> (*a*) giving an indemnity for costs of litigation for recovering any assets;
>
> (*b*) paying any moneys or giving an indemnity to protect or preserve any assets; or
>
> (*c*) indemnifying a liquidator in relation to the liquidator's expenses.
>
> (3) On an application by a creditor under subsection (2), the Court may, for the purpose of giving the creditor an advantage over others in consideration of the risks to be run by that creditor in giving the indemnity or payment for the purposes mentioned in that subsection, grant an order with respect to the distribution of —
>
> (*a*) the assets mentioned in subsection (2)(*a*) that may be successfully recovered;
>
> (*b*) the assets mentioned in subsection (2)(*b*) that may be successfully protected or preserved; or
>
> (*c*) the amount of expenses mentioned in subsection (2)(*c*) that may be successfully recovered.
>
> [emphasis added in bold italics]

23 In *Song Jianbo v Sunmax Global Capital Fund 1 Pte Ltd* [2023] 4 SLR 1575 ("*Song Jianbo*"), Goh Yihan JC (as he then was) pointed out that the main difference between s 204 of the IRDA and s 328(10) of the Companies

Act lay in how s 204(2) read with s 204(3) of the IRDA empowered the court to make the relevant order *prospectively*, *before* the relevant creditor provided the relevant funding and *before* any recovery, protection or preservation of assets or expenses as the case may be (at [12] and [18]):

> 12 … the main difference between s 204 of the IRDA and s 328(10) of the Companies Act is that the latter only provided for *retrospective* orders, in the sense that the court may make a relevant order only *after* the relevant assets had been recovered, protected or preserved, or after the relevant expenses had been recovered. By contrast, s 204(2) of the IRDA now allows the court to make, in addition to retrospective orders, *prospective* orders prior to the giving of an indemnity by a creditor. This means that a court can make a relevant order *before* the relevant assets have been recovered, protected or preserved, or before the relevant expenses have been recovered. …
>
> …
>
> 18 … Importantly, an order made under s 204(3) of the IRDA is a prospective order in that it can be sought before the relevant assets have been recovered, protected or preserved, or before the relevant expenses have been recovered. The power to make a retrospective order under s 328(10) of the Companies Act is still preserved by s 204(1) of the IRDA.
>
> [emphasis in original]

24 In my view, the fact that the legislative provision dealing with the similar issue of funding by creditors in the winding up of a company was amended to allow the court to make the relevant order prospectively, reinforces that in the absence of similar legislative amendments in the bankruptcy regime, s 352(6) of the IRDA does not allow the court to make prospective orders.[12]

25 Indeed, s 204(2) of the IRDA was enacted because Parliament accepted the recommendation in the *Report of the Insolvency Law Review Committee: Final Report* (2013) ("*Final Report*") that "[s]ection 328(10) of the Companies

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12 *Cf*, CFS at paras 18 and 20.

Act should be amended to allow creditors to apply to the court for [the relevant] order of court ***in advance*** *of providing any funding or indemnity*" [emphasis added in italics and bold italics] (*Final Report*, Recommendation 5.5; *Song Jianbo* at [17]). This recommendation was made to address the concern that, as s 328(10) of the Companies Act only allowed the court to make a retrospective order, the funding creditors had no certainty at the time of providing the funds or indemnity (a) that the court would later make an order giving them an advantage over other creditors in consideration of the risks run by them, and (b) of the terms of such an order (*Final Report* at p 74, para 31; *Song Jianbo* at [17]).

26 In contrast to the legislative amendments concerning funding by creditors in the winding up regime, no similar legislative amendments have been made in the bankruptcy regime. Section 352(6) of the IRDA remains practically identical to its predecessor provision, s 90(8) of the Bankruptcy Act (Cap 20, 2009 Rev Ed). The absence of change in this regard, in the context where s 204 of the IRDA by contrast changed the previous position under s 328(10) of the Companies Act, further reinforces that s 352(6) of the IRDA can only be read as allowing the court to make retrospective (and not prospective) orders.

27 To be clear, I see force in the view that prospective orders, which give funding creditors greater assurance and certainty as compared to retrospective orders, would further encourage creditors to fund trustees in bankruptcy and thereby potentially enhance the assets of the bankrupt's estate for distribution, to the benefit of creditors generally. I also see force in the view that the policy considerations pertaining to funding by creditors should apply similarly in the

winding up and bankruptcy regimes.[13] However, I am constrained to observe that any changes to align the position under s 352(6) of the IRDA with the approach under s 204 of the IRDA would have to be effected by Parliament.

Decision on Issue 2

28 I answer Issue 2 (see [10(b)] above) in the affirmative.

29 The Claimants argued that they had satisfied what they termed the first precondition under s 352(6) of the IRDA that the relevant creditor must have "given any indemnity or made any payment [of] moneys" because: (a) "[u]nder the Funding Agreement, the Claimants have agreed to provide funding of $70,000 to the PTIBs in the first instance"; and (b) "[t]he Additional Funds and/or Total Funds … to be provided subsequently to the PTIBs also constitute an indemnity as to the amount of additional funding requested by the PTIBs".[14]

30 I disagree with the Claimants' analysis at [29] above. First, pursuant to cl 2.1 of the Funding Agreement (see [5(a)] above), the Funding Agreement does not take effect unless the court has approved its terms. This explains why SUM 218 was taken out quickly on 14 January 2026 on the back of the execution of the Funding Agreement on 9 January 2026: court approval was required for the Funding Agreement to become effective. This means that at this time, the Claimants are *not* contractually obliged to provide the Initial Funds (or any other funding). Indeed, as the Claimants' counsel frankly confirmed at today's hearing, the Claimants have *not* in fact provided any funding to the PTIBs to-date because the condition precedent in the Funding Agreement

13 See also CFS at para 21.

14 CFS at paras 5–7.

requires prior approval of its terms. Second, the Funding Agreement does not in any event oblige the Claimants to provide Additional Funds. Clause 3.2 (see [5(c)] above) specifically stipulates: "The PTIBs agree to give the [Claimants] a right of first offer, and the [Claimants] shall have the right *but not the obligation* to accept the terms of such an additional funding request within ten (10) Business Days from the date of receipt of the request" [emphasis added]. As cl 3.2 makes plain, and contrary to the Claimants' suggestion, there is presently no "indemnity as to the amount of additional funding requested by the PTIBs" (see [29] above). In short, it cannot be gainsaid that the Claimants had *not* at the time they filed SUM 218 and have *not* hitherto "given any indemnity or made any payment of moneys" to the PTIBs, as is required under s 352(6) of the IRDA before the court may make an order under that provision.

31 Next, the Claimants argued that the Defendant's bankruptcy estate included choses in action, specifically, claims, which were assets of the bankruptcy estate. These were "at risk of being lost through inaction". The Claimants' provision of funding to the PTIBs "ke[pt] the claims alive", and thus "protected" and/or "preserved" these assets within the meaning of s 352(6) of the IRDA by preventing them from being lost through neglect, limitation or failure to take necessary procedural steps.[15]

32 To my knowledge, there is absence of local authority construing what it means under ss 352(6) and/or 204 of the IRDA (or their predecessor provisions) for assets to be "protected or preserved".

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15 CFS at paras 8–12.

33 However, and confining myself to the specific ambit of the Claimants' submission at [31] above, there are Australian decisions which have addressed whether the right to pursue a claim by action may constitute property, and when such right would be found to have been protected or preserved, within the meaning of s 564 of the Corporations Act 2001 (Cth) ("Australian Corporations Act"). As s 564 of the Australian Corporations Act is *in pari materia* with s 328(10) of the Companies Act (*Vanguard Energy* at [54]; *Song Jianbo* at [15]), it is helpful to consider these Australian decisions.

34 Section 564 of the Australian Corporations Act provides for the court to make orders giving an advantage to funding creditors retrospectively:

> Where in any winding up:
>
> (a) property has been recovered under an indemnity for costs of litigation given by certain creditors, or has been protected or preserved by the payment of money or the giving of indemnity by creditors; or
>
> (b) expenses in relation to which a creditor has indemnified a liquidator have been recovered;
>
> the Court may make such orders, as it deems just with respect to the distribution of that property and the amount of those expenses so recovered with a view to giving those creditors an advantage over others in consideration of the risk assumed by them.

35 In *Lombe, Re Babcock & Brown Limited* [2012] FCA 107 ("*Lombe*"), the liquidator of a company applied to the court for orders under s 564 of the Australian Corporations Act to give an advantage to certain creditors of the company who had contributed funds to the liquidator. Those funds had enabled the liquidator to conduct public examinations that led to the acquisition of information that in turn enabled claims to be mounted against former directors and auditors of the company, and those claims (which were settled pursuant to

a mediation) had resulted in a substantial recovery of funds by the liquidator (at [2] and [28]). A question that arose for determination was whether it could be said that property had been protected or preserved within the meaning of s 564 (at [38]). The court first reasoned that the fund that was recovered as a result of the mediation might be thought of as the proceeds of a chose in action consisting of the claim against the former directors and auditors, and a chose in action was clearly property (at [40]). The court held that it could be said both that (a) property had been recovered, in the sense that the chose in action was realised through the satisfaction of the claim, and (b) property had been protected and preserved, because "[h]ad no claim been made, the [claim] would, in the fullness of time, have been extinguished by the operation of limitation legislation" (at [41]). The court found that the property would not have been recovered, protected or preserved if the liquidator had not been funded by the relevant creditors' contributions (at [42]).

36 The reasoning of the court in *Lombe* (at [40]–[42]) was adopted by the court in *Re Shepherds Producers Co-Operative Ltd* [2012] NSWSC 390, which held that property consisting of a chose in action, being the right of the company to bring a claim, was protected and preserved by the funding provided by funding creditors, where it would otherwise have been extinguished by the expiry of the limitation period in due course (at [9]).

37 In *Deputy Commissioner of Taxation v Currockbilly Pty Ltd* [2002] NSWSC 1061 ("*Currockbilly*"), certain creditors of the company had indemnified the liquidator in respect of his costs incurred in the public examinations of the directors of the company, which led to the liquidator obtaining sufficient information to enable him to recommend proceeding with litigation (at [9] and [18]). The litigation was not in fact commenced and the

claims that the liquidator wished to bring were settled prior to the step of commencing proceedings (at [18]). The liquidator applied to the court for orders under s 564 of the Australian Corporations Act to give the creditors who had provided the indemnity an advantage in respect of the amount recovered as a result of settlement of the threatened legal proceedings (at [3] and [18]). The court accepted that a chose in action was "property" under s 564 of the Australian Corporations Act (at [21]–[22] and [31]), and held that whether the cause of action was protected or preserved should be assessed "in a practical sense" (at [34]–[37]):

> 34 I turn to the question of whether the cause of action was protected or preserved.
>
> 35 Clearly a cause of action accrues when material facts occur so that the right to sue upon a cause of action is a claim to curial redress or remedy based upon events that have happened. Such cause of action may be lost in a practical sense by the loss of the means of proving it in court. It is a common experience that many claims may, in practical terms, be lost if documents are not available or are missing, witnesses die or memories fade. Logically the uncovering of facts so that a cause of action becomes apparent could be said to be preservation of the cause of action as it may then be realised by action.
>
> 36 The liquidator submitted that the very funding of the public examinations by the indemnifying creditors together with the related production orders was a crucial factor which enabled him to gather in sufficient evidence, to prepare an insolvency report, make detailed demands on the directors and achieve the pressure needed to persuade the directors and Lurose Pty Ltd to agree to the settlement. The facts that exist in this case certainly support the submission by the liquidator. Documents were only made available through the examination process and the evidence that was obtained in the examination process enabled detailed proposed claims to be articulated, documented and put to the proposed defendants. Franklyn J who did not allow recovery of costs of examinations [in *Re Kyra Nominees Pty Ltd* (1987) 11 ACLR 767 at 773] did not seem to have

> the detailed evidence, which I have in this case, to establish a causal connection between the examination and the result achieved.
>
> 37 To the extent that these matters occurred, in a practical sense it can be said that what was achieved by the examination process was a protection or preservation of the chose in action. Giving a meaning to protect and preserve in a practical sense is consistent with the object of the section to which I have referred above.

38 The court also expressed the view that, until there was property available for distribution, whether as a result of judgment on or a settlement of the claim that was protected or preserved, an application under s 564 of the Australian Corporations Act would be premature (*Currockbilly* at [33]):

> 33 The preferable construction in my view is that until it can be established that the cause of action has been protected or preserved and that there is property available, whether as a result of judgement or a settlement, such that there can be a distribution, an application under the section is premature. The court cannot determine what is just with respect to the distribution until the property available for distribution has been determined. The matters in subsection (a) predate the task of the court when it has to consider what is just in respect of property that is to be distributed. There is no difficulty caused by including what is an asserted cause of action as an item of property that may be protected or preserved because the court has to make a factual finding to that effect. Cases where an asserted cause of action has no foundation at all are unlikely to result in a finding that the cause of action has been protected or preserved.

39 At today's hearing, the Claimant's counsel cited *Re Kyra Nominees Pty Ltd* (1987) 11 ACLR 767 ("*Kyra Nominees*"). That case involved an application by the liquidator under s 292(10) of the former Companies Act 1961 (WA) ("Australian Companies Act"), which was in terms similar to s 564 of the Australian Corporations Act save that the term "assets" was used in place of "property" (at 769). The liquidator sought an order with respect to the

distribution of moneys recovered in two actions brought by the liquidator. The court held that "[t]he asset of the company in each case as it then existed was a chose in action, being the right to recover moneys" and that the payment of moneys by the funding creditors had "protected and preserved the company's right to pursue by action its claims for the moneys in fact recovered in those respective actions" (at 772–773).

40 In my view, it is also significant that the court emphasised that its power was limited to making an order with respect of the "distribution of those assets" as stated in s 292(10) of the Australian Companies Act (*Kyra Nominees* at 773). The right to pursue a claim by action obviously cannot be distributed *in specie*. The court thus held that, where such assets were concerned, the expression "distribution of those assets" necessarily extended to the distribution of the realisation of the assets (*Kyra Nominees* at 773):

> However, the power of the court to make an order under the sub-section is limited to making "such order as it deems just with respect to *the distribution of those assets* … with a view to giving *those creditors* … an advantage …". (emphasis added) In my opinion although at the date the moneys were paid the assets in question were no more than choses in action which were protected or preserved by the funds enabling the actions to be prosecuted, the expression in the section "distribution of those assets" necessarily extends to the distribution of the realisation of the assets. To hold to the contrary would mean that only moneys or other assets capable of being distributed in specie amongst all the creditors who made the requisite payment could be the subject of an order under the section. In my view this is not in accord with the intent of the Act and would produce an absurd and quite inequitable result. I find that the proceeds of the actions are in fact assets to which the sub-section refers.

41 In my view, having regard to what has been expressed in the Australian decisions examined above, the relevant principles which apply in the context of s 352(6) of the IRDA are as follows:

(a) A right of the bankrupt that can be enforced by action is a chose in action, and correspondingly, an asset of the bankrupt within the meaning of s 352(6).

(b) Whether or not the right to pursue a claim by action has been "protected" or "preserved" within the meaning of s 352(6) should be assessed *practically*. For example, the right may be found to have been protected or preserved where steps have been taken which advance the claim, preventing its extinguishment by the expiry of the applicable limitation period.

(c) An applicant under s 352(6) must also show a causal connection between (i) the established protection or preservation of the right and (ii) the indemnity given or payment of moneys made by the funding creditor.

(d) Further, as s 352(6) provides for an order to be made "with respect to *the distribution of such asset*" [emphasis added] as has been protected or preserved, where the asset comprises a right to pursue a claim by action (which cannot be distributed *in specie*), it is only logical and sensible to construe the provision as requiring some realisation or monetisation of such asset so that the court may order distribution of the proceeds therefrom. A practical illustration of the point can be seen in cl 6.1 of the Funding Agreement. Notwithstanding the Claimants' argument that their funding "protected" and/or "preserved" potential claims of the Defendant, cl 6.1 provided for the distribution of "assets *recovered* from the Claims" [emphasis added] (see [5(h)] above); the Funding Agreement provided for no concept of distribution where

"Claims" had merely been "protected" and/or "preserved" with no proceeds recovered or realised therefrom.

(e) Finally, as s 352(6) only allows the court to make retrospective orders, the matters at [(b)]–[(d)] above would have to be established before the court may make the relevant order.

42 I do not think the legal position assists the Claimants in their submission at [31] above. First and fundamentally, the Claimants have not in fact provided any funding to the PTIBs (see [30] above). Second, it follows that the PTIBs have not used the Initial Funds (which have not been received) towards advancing the supposed claims of the Defendant. It is thus impossible to assess whether any claims have been protected or preserved, much less realised. Indeed, the PTIBs themselves stated in the Preliminary Report that they could not guarantee that any realisations would be made as a result of the provision of funding (see [4] above). The requisite causal connection to the Claimants' funding also cannot be assessed.

43 I therefore conclude that the Claimants have not met what they themselves term the "two preconditions" for an order under s 352(6) of the IRDA (see [14] above). They are in fact seeking an order for prospective approval, and (as discussed at [11]–[27] above) the court does not have power under s 352(6) to make such an order.

Decision on Issue 3

44 I answer Issue 3 (see [10(c)] above) in the negative.

45 The Claimants submitted that if the court found that s 352(6) of the IRDA covered only retrospective orders, their application could nevertheless still be granted pursuant to the court's inherent power.[16] I am unable to agree.

46 In *Chan Yun Cheong (trustee of the will of the testator) v Chan Chi Cheong (trustee of the will of the testator)* [2021] 2 SLR 67 ("*Chan Yun Cheong*"), the Court of Appeal held that in order for the court to exercise its inherent power, two conditions must be met: (a) there must be no statutory exclusion of the inherent power; and (b) there must be exceptional circumstances where there is need for the court to use its inherent power in order for justice to be done or injustice to be averted (at [37]). In that case, the Court of Appeal found that it could not exercise its inherent power to compel a co-trustee to consent to a trustee's retirement. One reason was that doing so would be contrary to the proper statutory interpretation of s 40 of the Trustees Act (Cap 337, 2005 Rev Ed), which required the consent of the co-trustees to the proposed retirement of a trustee (for an effective discharge of the latter) but left the co-trustees' decision wholly within their discretion (at [36] and [38]). In a similar vein, the Court of Appeal in *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)* [2022] 1 SLR 771 ("*AnAn*") explained that the court is entitled to rely on its inherent power in situations or areas in which no statutory provision applies (at [94]).

47 In the present case, I have found that s 352(6) of the IRDA empowers the court to make the relevant order retrospectively and not prospectively. In my view, it would be perverse for me to then exercise the court's inherent power to make an order contrary to what the precise statutory provision governing the

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16 CFS at paras 24–27.

situation at hand (*viz*, s 352(6)) permits. Put another way, the evident import of s 352(6), even though not expressly stated, is that the court is *not* permitted to make the relevant order prospectively. The court cannot get around this through the exercise of its inherent power.

48 For completeness, I do not accept the Claimants' attempt to analogise the circumstances in *AnAn* to those in the present case. In *AnAn*, the specific situation of whether the court could order a petitioning creditor to bear the liquidator's remuneration was not addressed in any legislation, and the Court of Appeal concluded that it had inherent power to make such an order (at [92] and [94]). In contrast, here, s 352(6) of the IRDA precisely addresses when the court may make an order approving the grant of an advantage to a funding creditor over other creditors in the distribution of an asset. The present circumstances are more akin to the situation in *Chan Yun Cheong* where the Court of Appeal found that it could not exercise its inherent power to make an order contrary to the statutory provision that governed the situation in question (see [46] above). For the reasons explained in [47] above, the court cannot exercise its inherent power to grant the order sought by the Claimants.

Decision on Issue 4

49 Issue 4 (see [10(d)] above) does not arise. As SUM 218 has been disposed of further to my determination of the preliminary Issues 1, 2 and 3, it is unnecessary and inapposite to address the Claimants and Non-Party's dispute over the substance of the Funding Agreement. To avoid doubt, the merits of those arguments have not in any way been determined.

Conclusion

50 The application in SUM 218 is premature and cannot be entertained at this time. I therefore dismiss SUM 218 but on the express understanding that such dismissal is without prejudice to the Claimants bringing another similar application at the appropriate time (see also [49] above).

51 Turning to the issue of costs of SUM 218, it is plain that the Claimants have not succeeded in the application. In my view, however, neither can the Non-Party be considered successful in SUM 218. I thus order the Claimants and Non-Party to bear their own costs of SUM 218.

- Sgd -
Kristy Tan
Judge of the High Court

Victor Leong and Lim Jun Heng (Audent Chambers LLC) (instructed), Han Guangyuan, Keith and Ammani Mathivanan (Oon & Bazul LLC) for the claimants;
The private trustee in bankruptcy of the defendant's bankruptcy estate (Tan Kim Han) in person;
Ong Ying Ping (Ong Ying Ping Esq) for the non-party (Cho Min Jung).