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Corporate Governance in Winding Up — Statutory Derivative Actions and Professional Liquidators*

Introduction

Corporate governance is an issue which has been widely discussed in corporate law scholarship. However, the discussion has largely been focused on companies which are going concerns. Much less attention has been paid to corporate governance in liquidating companies, let alone the specific scenario of the members' voluntary winding up ("MVWU").

Two events in Singapore have however generated a good opportunity to examine the applicable corporate governance principles in this specific context. The first is a series of shareholder litigation concerning a joint venture entity in MVWU, Wealthplus Pte Ltd ("Wealthplus"), which were commenced by its minority shareholder, Petroships Investment Pte Ltd ("Petroships"). Of particular interest are the High Court¹ and Court of Appeal² decisions which rejected the application for leave to commence a statutory derivative action, and a subsequent High Court³ decision which rejected Petroships' attempt to replace the liquidators. The rather unusual facts of this series of cases ("the *Petroships* litigation") generated a significant amount of food for thought with respect to the potential governance issues that could arise in a MVWU.

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¹ *Petroships Investment Pte Ltd v Wealthplus Pte Ltd* [2015] SGHC 145 ("Petroships HCI")

² *Petroships Investment Pte Ltd v Wealthplus Pte Ltd* [2016] 2 SLR 1022 ("Petroships CA").

³ *Petroships Investment Pte Ltd v Wealthplus Pte Ltd (in members' voluntary liquidation)* [2018] 3 SLR 687 ("Petroships HC2").

The second is the recent passage of the Insolvency, Restructuring and Dissolution Act 2018 (“*IRDA 2018*”),⁴ which represents the last phase of Singapore’s current round of reforms in its insolvency and restructuring regime.⁵ At the moment, the *IRDA 2018* has yet to come into force,⁶ and the Companies Act (“*CA*”)⁷ is still the governing legislation in this regard. The *IRDA 2018* introduced a new regulatory regime which is intended to “professionalise and raise the quality and standards of insolvency practitioners.”⁸ However, despite debates on this point, the Act ultimately did not apply these requirements to liquidators of a MVWU.

The aim of this article is two-fold. First, it will demonstrate that from the perspective of corporate governance, the statutory derivative action ought not to apply to liquidating companies. The Singapore Court of Appeal’s decision is therefore to be welcomed, and liquidation-specific remedies should be relied on instead. While a MVWU may have characteristics which distinguish it from other forms of liquidation, these characteristics do not justify allowing the use of the statutory derivative action.

At the same time, the *Petroships* litigation amply demonstrates the importance of having competent liquidators who properly understand and discharge their duties, even in a MVWU. Consequently, liquidators should be professionals in all types of

⁴ No. 40 of 2018.

⁵ *The Parliamentary Debates Singapore: Official Report*, vol 94 at 4.39 pm (1 October 2018).

⁶ Under *IRDA 2018* s 1, the Act “comes into operation on a date that the Minister appoints by notification in the *Gazette*.” It is currently unclear what that date will be.

⁷ Cap 50, 2006 Rev Ed. For this reason, unless otherwise stated, all references to specific legislative provisions are references to the Singapore Companies Act. Where relevant, the equivalent *IRDA 2018* provision will be footnoted.

⁸ *The Parliamentary Debates Singapore: Official Report*, vol 94 at 4.39 pm (1 October 2018).

liquidation. It is therefore to be regretted that an exception is carved out for MVWU in this respect for both the current *CA* and the new *IRDA 2018*.

The *Petroships* Litigation: A Summary

Application for Leave to Commence a Statutory Derivative Action

Petroships was a minority shareholder with 10% of the shares in *Wealthplus*. The remaining shares were vested in related companies within the Koh Brothers Group (“the KB entities”).⁹ Disagreements arose between the parties, and *Petroships* commenced various suits which were struck out.¹⁰ *Petroships* then sought leave to bring a statutory derivative action under *CA* s 216A, in the name of *Wealthplus* and against the directors of *Wealthplus*, for breach of directors’ duties.¹¹

A week after the s 216A application was made, *Wealthplus* was placed in a MVWU against *Petroships*’ opposition.¹² Two liquidators (“initial liquidators”) were appointed. They stated that they would investigate *Petroships*’ complaints concerning the breach of directors’ duties if the shareholders provided consent.¹³ Unsurprisingly, the shareholders did not reach a consensus on this point.

The initial liquidators then applied to the Court for directions. But before the application could be heard, the KB entities requisitioned an extraordinary general meeting to consider a resolution to remove the initial liquidators.¹⁴ The initial

⁹ *Petroships CA* (n 2) [2]–[3].

¹⁰ *ibid* [8].

¹¹ *ibid* [12]–[13].

¹² *ibid* [14].

¹³ *ibid* [15].

¹⁴ *ibid*.

liquidators “accepted the inevitable” and chose to resign instead.¹⁵ The liquidators appointed in their place (“new liquidators”) declined to take over the application for directions, which was accordingly withdrawn. They also decided to take a “neutral stance” in the s 216A application.¹⁶

Suffice to say that this series of events at least created the appearance that Petroships’ complaints were being stifled through the use of the MVWU.¹⁷

However, when the s 216A application was heard in the High Court, Coomaraswamy J refused to grant Petroships leave because the requirements under s 216A—that the complainant was acting in good faith and that the action was *prima facie* in the interests of the company¹⁸—were not met.¹⁹

The Court of Appeal affirmed the High Court’s decision, but on the basis that s 216A was not available in liquidation at all, for the following reasons. First, s 216A requires the directors to be notified of the complainant’s intention to apply for leave, implying that the company was a going concern and therefore under the control of its directors as opposed to liquidators.²⁰ Second, nothing in the legislative history of s 216A or its Canadian predecessor suggested that s 216A was intended to be available in liquidation.²¹ Third, there were other modes of redress in the liquidation forum that rendered recourse to s 216A unnecessary.²² The Court was also fortified in its

¹⁵ *ibid.*

¹⁶ *ibid* [16].

¹⁷ *Petroships HCl* (n 1) [168].

¹⁸ *CA* s 216A(3)(b), (c).

¹⁹ *Petroships HCl* (n 1) [149], [167].

²⁰ *Petroships CA* (n 2) [35]–[36].

²¹ *ibid* [38]–[57].

²² *ibid* [63].

conclusion by precedents from other jurisdictions holding that derivative actions are not available when a company is in liquidation.²³

Applications to Replace the Liquidators

After its s 216A application failed, Petroships attempted to remove the new liquidators and replace them with its own nominees through 2 applications to the High Court.²⁴ The first was an application under *CA* s 254 read with s 253(2)(d),²⁵ to convert the MVWU into a liquidation ordered by the Court, with Petroships' nominees being appointed as replacement liquidators.²⁶ The second was an application under s 302²⁷ to replace Wealthplus' liquidators with Petroships' nominees, coupled with an order preventing Petroships' nominees from being removed without the Court's leave and an order empowering them to investigate into Petroships' complaints.²⁸

The basis of both applications was the existence of actual or perceived bias on the part of the new liquidators.²⁹ The Court dismissed most of the allegations that the liquidators acted improperly, with one exception. The Court accepted that the liquidators should not have refused to investigate into matters flagged out by Petroships unless all of the shareholders agreed to do so, or if Petroships bear the costs.³⁰ The liquidators should have made their own decisions on whether those matters warrant

²³ *ibid* [58]–[64].

²⁴ *Petroships HC2* (n 3) [2].

²⁵ *IRDA 2018* s 125 read with 124(2)(e).

²⁶ *Petroships HC2* (n 3) [3].

²⁷ *IRDA 2018* s 174.

²⁸ *Petroships HC2* (n 3) [4].

²⁹ *ibid* [2], [177], [253].

³⁰ *ibid* [205]–[207].

investigations.³¹ Further, the need to incur costs is not a legitimate reason for leaving the decision to investigate to the members themselves, since the company was in solvent liquidation and a surplus was available for the liquidators' use if investigations were warranted.³²

However, the liquidators' mistake was honestly made, and their concern over the costs of investigations was genuine. The liquidators' error therefore did not justify their removal.³³

Whether Statutory Derivative Actions Should Be Allowed in Liquidation

Corporate Governance and Derivative Actions

Whether the Singapore Court of Appeal is correct in disallowing statutory derivative actions during liquidation is a question concerning the proper interpretation of *CA* s 216A. That is not the concern of this article. Instead, a slightly different question is of interest: whether the statutory derivative action ought to be available as a matter of corporate governance. To answer this question, the function of the statutory derivative action must first be elucidated, before its utility to liquidation (if any) can be examined.

The rationale for derivative actions is uncontroversial. There is a need to control the exercise of powers by directors so that they do not enrich themselves to the detriment of the company and its shareholders, and this is partly achieved by the

³¹ *ibid* [208]–[209].

³² *ibid* [210]–[211].

³³ *ibid* [213]–[217].

imposition of director duties.³⁴ However, the existence of such duties is of little utility unless accompanying enforcement mechanisms exist.

With respect to enforcement by formal legal proceedings, it is trite that the proper plaintiff is the company itself,³⁵ as the breach of director duties is a wrong done to the company.³⁶ Consequently, the board of directors must approve the commencement of enforcement proceedings, as the decision to litigate in the company's name is a management decision vested in the board.³⁷

Unsurprisingly, strict adherence to this rule can create corporate governance difficulties. If a director breached his duties while acting in concert with other directors and the majority shareholders, the board would not act with respect to the breach. The minority shareholders will be aggrieved as a result: their interests are damaged by the breach of duties, but they cannot sue.

For that reason, the common law derivative action was recognised by the Courts as an exception to the rule: shareholders may be allowed to sue the wrongdoing directors on behalf of the company where they have breached their duties and are in control of the company.³⁸ Unfortunately, this common law solution has long been

³⁴ Paul L Davies and Sarah Worthington, *Gower Principles of Modern Company Law* (10th edn, Sweet & Maxwell 2016) para 16-1.

³⁵ This is often referred to as the rule in *Foss v Harbottle* (1843) 2 Hare 461.

³⁶ Under the English system of company law, director duties are generally owed to the company and not to shareholders: *Sharp v Blank* [2015] EWHC 3220 [9]; Davies and Worthington (n 34) paras 16-4–16-5; Cheng Han Tan (ed), *Walter Woon on Company Law* (3rd edn, Sweet & Maxwell 2009) para 8.128.

³⁷ Davies and Worthington (n 34) para 17-2.

³⁸ *Prudential Assurance v Newman Industries* [1982] Ch 204 (EWCA) 211; *Ting Sing Ning v Ting Chek Swee* [2008] 1 SLR(R) 197 (SGCA) [12]–[14].

criticised for being vague and formalistic.³⁹ This led to the creation of statutory derivative actions across various common law jurisdictions, allowing shareholders to take action with greater ease.⁴⁰

Corporate Governance Mechanisms in Liquidation

While there are clear justifications for derivative actions in going concerns, the same need not apply to companies in liquidation, as different corporate governance regimes apply in the two scenarios. There is thus a need to look at the alternative remedies which are available in liquidation, to determine if derivative actions are needed to fill any gaps.

A few preliminary points to note. First, it is the liquidators and not the directors who are the subject of corporate governance controls at this stage, as the power to run the company is transferred to liquidators on their appointment.⁴¹ Second, while this article is primarily concerned with the MVWU, in practical terms the remedies available for all types of liquidation are also available in a MVWU. This is because the Court's powers in a court-ordered liquidation can be applied to a voluntary liquidation on

³⁹ *Petroships CA* (n 2) [38], [43]. For an overview of the deficiencies of the common law derivative action, see Dan W Puchniak and Meng Seng Wee, 'Derivative Actions in Singapore: Mundanely Non-Asian, Intriguingly Non-American and at the Forefront of the Commonwealth' in Dan W Puchniak and others (eds), *The Derivative Action in Asia: A Comparative and Functional Approach* (Cambridge University Press 2012) 332–36; Law Commission, *Shareholder Remedies Consultation* (Law Com CP No 142, 1996) paras 14.1–14.4.

⁴⁰ Puchniak and Wee (n 39) 337. Indeed, the express purpose of *CA* s 216A was the provision of "more effective remedies for minority shareholders than existed at common law at present": *The Parliamentary Debates Singapore: Official Report*, vol 60 at cols 231 (14 September 1992).

⁴¹ *Petroships CA* (n 2) [36]; Tan (n 36) para 17.134.

application of the liquidator or any contributory or creditor,⁴² and a voluntary liquidation can be converted to a court-ordered liquidation.⁴³ The discussion will therefore include remedies that are not directly available in a MVWU.

Challenging a Liquidator's Decisions

Unlike the case with directors, aggrieved parties who are dissatisfied with a liquidator's decisions have many ways to challenge them. First, under *CA* s 272(3),⁴⁴ any creditor or contributory may apply to the Court to challenge "any exercise or proposed exercise" of any of the liquidator's powers granted under s 272. Second, under s 315,⁴⁵ "any person aggrieved by any act or decision of the liquidator" may apply to the Court, which may confirm, reverse or modify the decision complained of.

Sections 272(3) and 315 have substantially the same effect and generally the same law applies to each;⁴⁶ indeed it is not clear why s 272(3) is needed when it appears to be a complete subset of s 315. The Court will not normally interfere with commercial decisions unless they were made *mala fide* or that no reasonable liquidator would have arrived at the same decisions.⁴⁷ However, if the liquidator was performing his quasi-

⁴² *CA* s 310(1)(b) (*IRDA 2018* s 181(1)(b)).

⁴³ *CA* s 253(2)(d) (*IRDA 2018* s 124(2)(e)).

⁴⁴ *IRDA 2018* s 144(3). This applies to a court-ordered liquidation.

⁴⁵ *IRDA 2018* s 190. This applies to every mode of liquidation.

⁴⁶ Andrew Keay, *McPherson & Keay The Law of Company Liquidation* (4th edn, Sweet & Maxwell 2018) para 9-117, referring to the English equivalent: Insolvency Act 1986 ("*IA 1986*") s 167(3) and 168(5).

⁴⁷ Edward Bailey and Hugo Groves, *Corporate Insolvency: Law and Practice* (5th edn, LexisNexis 2017) para 15.31; Walter Woon (ed), *Woon's Corporation Law* (Desk Edition, LexisNexis 2019) 1129, para 4754.1.

judicial function (e.g. adjudicating on proof of debts), the test is simply whether the liquidator was legally wrong.⁴⁸

An additional avenue for challenging the liquidator's decisions in a voluntary liquidation is s 310(1)(a),⁴⁹ which provides that a liquidator, contributory or creditor may apply to the Court to "determine any question arising in the winding up of a company". The Court has the broad power to make any "order on the application as it thinks just" e.g. authorising distribution of the company's assets in a MVWU even when other creditors may subsequently emerge.⁵⁰

Finally, if the objection against the liquidator concerns the liquidator's failure to pursue a cause of action belonging to the company, one additional remedy is available: a contributory or creditor can apply to Court for leave to bring the action directly in the company's name.⁵¹ This application will be referred to as the "liquidation leave application". It leads to a similar outcome as a derivative action, in that control over the company's cause of action will be transferred to the applicant from the management. For liquidation leave applications, 3 issues are of importance when the Court decides whether to grant leave:⁵²

- (1) Whether the proposed action has a reasonable prospect of success;

⁴⁸ *MWA Capital Pte Ltd v Ivy Lee Realty Pte Ltd (in liquidation)* [2017] SGHC 216 [44]–[45], aff'd [2019] 1 SLR 191 (SGCA) for different reasons without comment on this point.

⁴⁹ *IRDA 2018* s 181(1)(a).

⁵⁰ *Tombs v Moulinex SA* [2004] 2 BCLC 397 (EWHC) [7]–[8] (referring to *IA 1986* s 112). For other examples see *Woon* (n 47) 1123–24, para 4501.

⁵¹ *Petroships HCI* (n 1) [162]; *Petroships CA* (n 2) [22] (referencing the High Court decision without disapproval); Keay, *McPherson & Keay The Law of Company Liquidation* (n 46) para 7-083.

⁵² *Carpenter v Pioneer Park Pty Ltd* (2008) 66 ACSR 564 (NSWSC) [34]; *Re Wan Ze Property Development (Aust) Pty Ltd* [2013] NSWSC 1977 [32].

- (2) The opinion of the liquidator on the action e.g. whether the liquidator would have commenced the action himself but for the lack of funds;
- (3) Whether other practical considerations support the grant of leave, particularly whether there is an adequate indemnity and even security from the applicant to the company.

Rendering the Liquidator Accountable

If a problematic decision of the liquidator has already been irreversibly carried out, or if the complaint against the liquidator goes beyond a specific decision, it would no longer be appropriate to rely on remedies that alter the liquidator's decisions. Instead, the liquidator must be held accountable, either through compensation orders and the like which can remedy the harm done, or removal.

There are a few ways to obtain orders for compensation, disgorgement and the like. Under s 313(2),⁵³ any creditor, contributory or the Official Receiver may complain to the Court when a liquidator does not, *inter alia*, "faithfully perform his duties", and the Court "shall inquire into the matter and take such action as it thinks fit." For instance, the Court can order a liquidator to pay the costs of the company's litigation when the liquidator breached the estate costs rule.⁵⁴

⁵³ *IRDA 2018* s 188(2). This applies to every mode of liquidation. *CA* s 265(1) (*IRDA 2018* s 137(1)) has very similar wording, but it only applies to court-ordered liquidation and the Court is replaced with the Official Receiver, who has to make applications to the Court anyway to render the liquidator liable.

⁵⁴ *Ho Wing On Christopher v ECRC Land Pte Ltd (in liquidation)* [2006] 4 SLR(R) 817 (SGCA) [53].

Another avenue for the grant of similar orders is s 341,⁵⁵ which allows the Court to examine into the conduct of any past or present liquidator for breach of duty on the application of the liquidator or any creditor or contributory. The Court may then compel the liquidator to make payment or to restore property to the company.

Finally, one more source of power for such orders is s 313(3),⁵⁶ which allows the Official Receiver or Registrar to report to the Court for the liquidator's "misfeasance, neglect or omission", and the Court can then cause the liquidator to make good any loss or make any other appropriate order.

Removal of the wrong-doing liquidator is also a possible remedy. A party with a legitimate interest in the liquidation—creditors generally, and contributories in a MVWU⁵⁷— that is dissatisfied with the liquidator's performance may apply to Court, and the Court is empowered to remove the liquidator "on cause shown".⁵⁸ The Court only needs to be satisfied that removal is for the general advantage of those interested in the assets of the company, and this may be the case even though the liquidator did not engage in any misconduct.⁵⁹

⁵⁵ *IRDA 2018* s 240. This applies to every mode of liquidation.

⁵⁶ *IRDA 2018* s 188(3). This applies to every mode of liquidation.

⁵⁷ Keay, *McPherson & Keay The Law of Company Liquidation* (n 46) para 8-091, referring to *IA 1986* s 108(2), 171 (voluntary liquidation) and 172 (liquidation ordered by the Court); see also Woon (n 47) 1116, para 4005–4050.

⁵⁸ *CA* s 268(1) (*IRDA 2018* s 139(1)) for liquidation ordered by the Court, and *CA* s 302 (*IRDA 2018* s 174) for voluntary liquidation.

⁵⁹ *Petroships HC2* (n 3) [117]–[124]; See also Bailey and Groves (n 47) paras 15.66–15.67.

Whether Derivative Actions Can Serve Any Purpose in Liquidation

Considerations Applicable to All Forms of Liquidation

While derivative actions fill a gap in the law when there is wrongdoing coupled with wrongdoer control in going concerns, the above discussion indicates that there are ample remedies in such a situation if the company is in liquidation.

That other remedies in liquidation obviate the need for derivative actions has already been noted in the 1935 case of *Ferguson v Wallbridge*,⁶⁰ which rejected the application of the common law derivative action to liquidating companies on the basis that “the real complainants, the minority shareholders, are no longer at the mercy of the majority”. Similarly, it has been repeatedly noted in the *Petroships* litigation that no injustice will arise as a result of the statutory derivative action being unavailable in liquidation.⁶¹

A contrary view is that since the liquidation leave application also allows aggrieved contributories and creditors to sue in the company’s name for a particular cause of action,⁶² it is arguably a type of derivative action in substance. On this view, the need for derivative actions in liquidation is already recognised by the law, though the application is not labelled as such. If so, it may well be that the statutory derivative action ought to be available in liquidation as well, to the extent that it can act as a better alternative to the liquidation leave application.

However, this contrary view fails to take into account important differences between liquidation leave applications and derivative actions. For instance, the

⁶⁰ [1935] 3 DLR 66 (UKPC) 83.

⁶¹ *Petroships HCI* (n 1) [162]; *Petroships CA* (n 2) [22], [63], [73]–[74].

⁶² The liquidation leave application is introduced above at the text to n 51.

liquidation leave application expressly recognises the liquidator's opinion as a key factor in the grant of leave.⁶³ Another difference is that the applicant indemnifies the company for the costs it might incur in the subsequent litigation if the liquidation leave application is successful;⁶⁴ in contrast, costs may be borne by the company in derivative actions.⁶⁵

This difference in the treatment of costs is important, and can be explained by the different corporate governance framework in place for going concerns and liquidating companies. Derivative actions represent cases which the company itself ought to have brought, but did not because of wrongdoer control.⁶⁶ Where derivative actions are allowed, typically no other adequate remedy is available;⁶⁷ unlike a liquidating company, the court cannot give directions to management nor remove them. Hence, there is a real risk that if the applicants granted leave are not awarded costs, the applicants would not prosecute the action and the wrongdoer gets away scot free.⁶⁸

⁶³ *ibid.*

⁶⁴ *ibid.* See also *Petroships HCl* (n 1) [166]; *Re Colorado Products Pty Ltd (in prov liq)* (2014) 97 ACSR 581 (NSWSC) [10] (highlighting that “an adequate indemnity to protect the assets of a company in liquidation... has frequently been emphasised in the cases”).

⁶⁵ For the statutory derivative action under *CA* s 216A, it has been noted that “it is typically the company who bears the cost of the litigation”: *Petroships HCl* (n 1) [166]. An order for the company to pay costs is expressly provided under *CA* s 216A(5)(c), though the Court has a discretion in whether to grant such an order. The company may also bear the costs under the common law: *Wallersteiner v Moir (No 2)* [1975] QB 373; *Tonstate Group Ltd v Wojakovski* [2019] 2 BCLC 574 (EWHC) [7]–[15].

⁶⁶ *Wood v Links Golf Tasmania Pty Ltd* [2010] FCA 570 [9].

⁶⁷ This is a requirement under both *CA* s 216A and the common law: *Pang Yong Hock v PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 (SGCA) [22]; *Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] 4 SLR 1 (SGHC) [61].

⁶⁸ Andrew Keay, ‘Assessing and rethinking the statutory scheme for derivative actions under the Companies Act 2006’ (2016) 16(1) JCLS 39, 58.

While this does not mean that there must be prior indemnification of the applicants' costs in all cases, it is necessarily a relevant factor.

In contrast, this concern does not apply in liquidation since a wrongful refusal by the liquidator to commence litigation can always be remedied by challenging that refusal, or removing the liquidator through court applications. The effect of these remedies is that control over any subsequent litigation remains in the hands of the liquidator, with the company paying the costs of the subsequent litigation. For control to remain with the liquidator is desirable in most cases,⁶⁹ as liquidators are normally professionals⁷⁰ with a better understanding of the company and the liquidation process. Further, they have the duty to act even-handedly with respect to all whose interests are involved,⁷¹ unlike the aggrieved party who may be overzealous in the pursuit of its own cause.

Liquidation leave applications are therefore only justified in the limited scenario where the liquidators wish to proceed with the action but have insufficient funds to do

⁶⁹ Keay, *McPherson & Keay The Law of Company Liquidation* (n 46) para 9-072, pointing out that allowing a contributory to conduct litigation has “the disadvantage of removing the litigation from the hands of the liquidator”. See also *Hedley v Albany Power Centre Ltd (in liq)* [2005] 2 NZLR 196 (NZHC) [55], noting that statutory derivative actions should not be allowed in liquidations because it could undermine efficient gathering and distribution of the company's assets by the liquidator. Remedies which “directly engages the liquidator” are to be preferred, such as a court direction to the liquidators to sue.

⁷⁰ Though not necessarily so for the MVWU in Singapore. See the discussion below from the text to n 85 onwards.

⁷¹ Bailey and Groves (n 47) para 15.2; Keay, *McPherson & Keay The Law of Company Liquidation* (n 46) para 8-049; Tan (n 36) para 17.142.

so,⁷² in which case control over the action is transferred to the applicant creditor/contributory in return for funding.⁷³ Given this rationale, it is no surprise that the applicant normally foots the costs of the subsequent litigation.

For the above reasons, equating the liquidation leave application to the derivative action is wrong, and the existence of the liquidation leave application does not justify allowing statutory derivative actions as well. Indeed, allowing statutory derivative actions in liquidation could upset the proper balance between minority protection and the general principle that liquidators should make all management decisions, as the minority may end up managing the company's litigation while using company funds. The interests of other stakeholders in the liquidation process could thereby be jeopardised.

One response is that there is sufficient flexibility built into statutory derivative action provisions like *CA* s 216A for the Court to adapt to the fact that the company is being liquidated. For instance, *CA* s 216A(5) is phrased as an open-ended discretion for the Court to grant any order "in the interests of justice". But if the discretion is properly exercised, the outcome will be the same regardless of whether s 216A or the liquidation leave application was relied upon. On the other hand, the discretion could be improperly exercised, due to influence from s 216A case law that dealt with going concerns. There is little reason to tempt fate in the circumstances.

⁷² This has been noted to be the usual reason for the seeking of leave: *Fargro Ltd v Godfroy* [1986] 1 WLR 1134 (EWHC) 1136–1137. See also *Partnership Pacific Ltd v Aliprandi* (1990) 4 ACSR 51 (NSWSC) 54.

⁷³ It may be arguable that litigation funding is a better solution for this issue, but that is a point which is beyond the scope of this article.

Special Considerations Applicable to Members' Voluntary Winding Up

Nevertheless, it has been argued by some that the MVWU should be treated differently in relation to the availability of statutory derivative actions, due to the control which the members have in the timing of the liquidation, the appointment and removal of the liquidators, and the lack of incentives for the liquidators to pursue wrongdoing directors.⁷⁴ Certainly, some of these factors have led to the appearance that the minority's derivative action was being stifled in the *Petroships* litigation. However, it is difficult to see why these differences should result in the statutory derivative action being available in a MVWU.

In relation to the control over the timing of the liquidation, it is true that the majority members can trigger a MVWU at any time through the passage of a special resolution.⁷⁵ But the only possible consequence that this has on the minority member's position is that time and costs might have been expended on preparing for a derivative action, which must now be aborted in favour of other remedies. Even so, the minority member could utilise the same materials to convince the liquidator that the action ought to be pursued, and if the liquidator disagrees, the materials would also be relevant for any related applications to the Court. For the most part, the time and costs expended would not be wasted.

Besides, the risk that the majority would use liquidation to thwart a derivative action should not be overstated. In general, companies are incorporated because the parties wish to run a business, and not because they wish to defraud the minority. To liquidate is in many cases to forgo that business.

⁷⁴ Samantha S Tang and Alan K Koh, 'How to Avoid a Derivative Action: A Cautionary Tale from Singapore' [2016] LMCLQ 346, 349–50.

⁷⁵ *CA s 290(1)(b) (IRDA 2018 s 160(1)(b))*. See also Tan (n 36) para 17.109.

As for the power to select and remove liquidators, it is again true that the members in a MVWU have significant discretion in this respect. They select the liquidators for the initial appointment,⁷⁶ and can replace the liquidators at any time.⁷⁷ However, if the appointed liquidators acted improperly, the minority could apply to remove them.

If the majority tried to remove the liquidators to thwart investigations, the liquidators or creditors can apply for an order that the liquidators shall not be removed under s 294(3).⁷⁸ While a minority member has no standing under this section, it is unlikely that the liquidators will reject an offer to fund such an application, and any rejection can probably be challenged under s 315. In any event, the same outcome can be achieved by the minority member applying under s 310(1).⁷⁹

As for the allegation that liquidators have fewer incentives to act against errant directors in a MVWU, that is only true in a limited and irrelevant sense. Regardless of the type of liquidation, the liquidator's duty is to realise the assets of the company to maximise the returns to residual claimants.⁸⁰ Members are just as interested in maximising their returns in a solvent liquidation as creditors are in an insolvent liquidation. Consequently, every liquidator has the same incentive to pursue profitable causes of action against errant directors to bolster the assets of the company.

⁷⁶ CA s 294(1) (*IRDA 2018* s 164(1)).

⁷⁷ CA s 294(3), (4) (*IRDA 2018* s 164(3), (5)).

⁷⁸ *IRDA 2018* s 164(4).

⁷⁹ *Petroships HC1* (n 1) [164]; Keay, McPherson & Keay *The Law of Company Liquidation* (n 46) para 7-067 (referring to *IA 1986* s 112).

⁸⁰ *Petroships HC2* (n 3) [138]; Davies and Worthington (n 34) para 33-17; Keay, McPherson & Keay *The Law of Company Liquidation* (n 46) para 9-072.

The only significant difference in this regard is that, since the liquidator's duty to investigate is more limited in a solvent liquidation,⁸¹ he is less likely to independently unearth evidence which may indicate wrongdoing in a MVWU. But if a matter is brought to a liquidator's attention in a solvent liquidation, he has a duty to determine if he should investigate further.⁸² Since any member hoping to bring a derivative action must already have *prima facie* evidence of wrongdoing,⁸³ this difference between solvent and insolvent liquidation has no impact on whether the derivative action should be allowed. Either the member already has some evidence, in which case he can just pass the evidence to the liquidator, who will investigate further if that is warranted; or the member does not have any evidence, in which case the availability of derivative actions in liquidation is of no utility to him.

Even in the case of a MVWU then, there is no reason for the statutory derivative action to be made available, as evident from the remedies which *Petroships* had recourse to after its statutory derivative action failed.⁸⁴

Members' Voluntary Winding Up and Professional Liquidators

Moving beyond derivative actions, the *Petroships* litigation has also illustrated how disagreements between warring factions of shareholders can create difficult issues in a MVWU. It is therefore worthwhile to examine if excluding MVWU liquidators from professional licensing requirements is justified, as is the case under the *CA* and the new

⁸¹ *Petroships HC2* (n 3) [136]–[140].

⁸² *ibid* [215].

⁸³ This requirement applies to both common law and statutory derivative actions in Singapore: Margaret Chew, *Minority Shareholders' Rights and Remedies* (3rd edn, LexisNexis 2017) para 3.014; 6.057.

⁸⁴ See the text to n 24 onwards.

IRDA 2018 in Singapore.

The Regime in Singapore

Currently, an individual must be an “approved liquidator”⁸⁵ under the *CA* to act as a liquidator in most cases. While there is no formal requirement under the *CA* that only professionals can become an “approved liquidator”, the nature of the criteria utilised—experience and capacity as determined by the Registrar of Public Accountants, with a simplified evidentiary path for public accountants—renders it relatively unlikely that non-accountants can become an “approved liquidator”.⁸⁶

When the *IRDA 2018* enters into force, only a “licensed insolvency practitioner”⁸⁷ can act as a liquidator. Only solicitors and accountants can hold an insolvency practitioner’s licence, unless other qualifications are subsequently recognised by the Minister’s order.⁸⁸

However, none of these requirements apply to a MVWU: MVWU liquidators do not have to be an “approved liquidator” currently,⁸⁹ and even the company’s directors

⁸⁵ *CA* s 11(1)(a).

⁸⁶ The qualification of an “approved liquidator” is regulated by *CA* s 9. As the power under *CA* s 9(1) has not been exercised (Woon (n 47) 45, para 553), approval must be sought under s 9(2). The criteria for approval is set out in Registrar of Public Accountants, “Practice Direction No. 5 of 2005” (*Accounting & Corporate Regulatory Authority*, 30 May 2005) <www.acra.gov.sg/docs/default-source/default-document-library/how-to-guides/requirements-to-be-an-approved-liquidator/practicedirectionno5of2005.pdf> accessed 31 January 2020.

⁸⁷ *IRDA 2018* s 48(1)(a).

⁸⁸ *IRDA 2018* s 50.

⁸⁹ *CA* s 11(1)(a) read with 11(2)(a). The same is true for a creditors’ voluntary liquidation, but only if a resolution to that effect has been passed by a majority of creditors in number and value: *CA* s 11(2)(b).

can be appointed to the office.⁹⁰ Similarly, the new licensing regime under the *IRDA 2018* does not apply to such liquidators.⁹¹

The General Case for Requiring Professional Liquidators

There should be no dispute that honest, fair and competent liquidators are critical for the proper administration of liquidating companies generally, even though there are many legal controls on the liquidators' behaviour. Formal legal proceedings can only serve as a flawed last resort, for significant time and costs will inevitably have to be incurred in the litigation. In any event, the Court will not interfere with the decisions of liquidators unless they were made *mala fide* or were decisions which no reasonable liquidator would reach,⁹² thereby leaving a great level of discretion to the individual liquidator. How such discretion is exercised could have a significant impact on the outcomes of the liquidation process.

For that reason, liquidators should generally be licensed professionals. Imposing such a requirement will contribute towards the maintenance of standards within the pool of potential liquidators, since they are subject to the accreditation, supervision and control of professional bodies. Creditors or members affected by misbehaving liquidators will therefore have avenues to make complaints, leading to sanctions which

⁹⁰ Tan (n 36) para 17.139. Cf Davies and Worthington (n 34) para 33–1, noting that under English law, “For reasons which might be obvious, especially given the competing interests which may need to be balanced, this process is not undertaken by the company’s own directors, but by independent appointees who are qualified insolvency practitioners and who act professionally as company liquidators”.

⁹¹ *IRDA 2018* s 47(2)(b).

⁹² *Petroships HC2* (n 3) [169].

may prevent the same liquidator from acting in the future. This significantly reduces the likelihood of a poorly administered liquidation.

Indeed, the importance of having professional officeholders in insolvency proceedings has been recognised since the 1982 Cork Committee Report, which noted that professional qualification is necessary to ensure the competence and integrity of liquidators.⁹³ While the report focused on the insolvency system, the Insolvency Act 1986 requires appointment of professional liquidators for all forms of liquidation, solvent or insolvent.⁹⁴

Evaluating the Carve-Out for Members' Voluntary Winding Up

Singapore law does recognise the importance of professional liquidators generally, but considers that the same justifications do not apply to a MVWU. The reasons for this view can be seen in the discussion surrounding the decision to exclude MVWU liquidators from professional licensing requirements in the new *IRDA 2018*. The Insolvency Law Review Committee appointed by the Ministry of Law was “divided” on this very issue, with those in favour of imposing such requirements arguing that there is an equal need to maintain standards and ensure confidence in MVWU.⁹⁵ Those against

⁹³ Department of Trade, *Insolvency Law and Practice: Report of the Review Committee* (Cmd 8558, 1982) paras 732, 756 (“Cork Report”).

⁹⁴ *IA 1986* s 390(2) read with s 390A. Note that *IA 1986* s 388, which defines the meaning of “act as insolvency practitioner”, is very similar to Singapore’s *IRDA 2018* s 47, but without the carve out for a MVWU liquidator. See also Ian F Fletcher, *The Law of Insolvency* (5th edn, Sweet & Maxwell 2017) para 2-012ff for some of the newer changes to the regulation of insolvency practitioners in the UK.

⁹⁵ Ministry of Law, *Report of the Insolvency Law Review Committee: Final Report* (2013) 217–218, para 18.

imposing such requirements argued that:⁹⁶

- (1) Since the company is solvent, the members should be entitled to decide on who should carry out the liquidation, for cost reasons or otherwise;
- (2) In a MVWU, most of the necessary work in terms of realising assets and discharging liabilities may have been done before the formal liquidation process is initiated.

The Committee ultimately concluded that further views should be taken before a decision is made.

During the public consultation, the Ministry of Law received feedback that either supported imposing the same qualification and licensing requirements regardless of the type of liquidation, or a slightly relaxed set of requirements for MVWU.⁹⁷ The Ministry disagreed, taking the position that, since the company is solvent:⁹⁸

- (3) Professional knowledge is less of an issue, since matters such as insolvency set-off will not arise;
- (4) There is no impact on creditors;

⁹⁶ *ibid.*

⁹⁷ Ministry of Law, 'Annex A – Summary of Feedback from the Public Consultation on The Insolvency Law Review Committee Report and MINLAW's Response' at 31–33, Rec No. 10.2–10.3 <app.mlaw.gov.sg/files/news/public-consultations/2013/10/MinLaw%20Response%20to%20Feedback%20on%20ILRC%20Report.pdf> accessed 31 January 2020.

⁹⁸ *ibid.*

- (5) Whatever requirements that are imposed with respect to a MVWU can be discharged by an unqualified liquidator if he obtains advice, and he also assumes the risks of non-compliance.

None of these points are convincing, and professional licensing requirements should also apply to MVWU liquidators.

Argument (1), which gives precedence to the right of members to decide on how to conduct the liquidation, ignores the point that the majority members may well act unfairly towards the minority. The instalment of a professional liquidator can mitigate this risk. Besides, the exact same argument can be made in relation to an insolvent liquidation, swapping members with creditors. But while creditors' views are given great weight in an insolvent liquidation,⁹⁹ they cannot appoint a liquidator who does not meet the relevant professional and licensing requirements. This is at least partly because there is a public interest aspect to liquidation, especially in relation to the liquidator's investigatory functions,¹⁰⁰ such that the views of members and creditors cannot be conclusive. While the public interest aspect of solvent liquidation may be somewhat more limited, to say that it is non-existent and that the majority members should have free rein goes too far.¹⁰¹

⁹⁹ Keay, *McPherson & Keay The Law of Company Liquidation* (n 46) paras 8-003, 9-110. See also *CA s 273(2) (IRDA 2018 s 145(2))*, providing that the liquidator may, and must under certain circumstances, summon meetings of the creditors or contributories for the purpose of ascertaining their wishes.

¹⁰⁰ *Petroships HC2* (n 3) [138]; *Hall v Poolman* (2009) 71 ACSR 139 (NSWCA) [128]–[129]; *Cork Report* (n 93) paras 235–240.

¹⁰¹ Thus, it has been said that at least some duties of investigation are imposed on liquidators of a MVWU because there is public interest in ensuring that the management of a company acts in accordance with the standards of commercial morality: *Petroships HC2* (n 3) [138].

Argument (2) refers to the possibility that most of the work might already be done, but that does not extinguish the need to ensure that the work was done well. By requiring the appointment of a professional liquidator, the liquidator can perform a crucial checking function at the end of the process.

With respect to argument (3), it is probably fair to view insolvent liquidations as being more complicated than MVWU generally. However, the latter is not necessarily straightforward either. Even professional liquidators can make mistakes while administering a MVWU, as the *Petroships* litigation demonstrates.¹⁰² There, both the initial and new liquidators failed to comply with their duty to exercise independent judgment on whether to investigate into matters which have been brought to their attention.¹⁰³ The initial liquidators sought directions from the Court simply because the majority and minority shareholders differed on whether investigations were warranted, and had not formed their own views on the point.¹⁰⁴ Similarly, the new liquidators would only agree to investigate if all shareholders approved the investigations, or if the minority seeking those investigations agreed to foot the costs.¹⁰⁵ In effect, the liquidators abdicated their responsibilities, leaving the Court and the shareholders to make decisions on their behalf. The liquidators' duty of realising the assets of the company was also compromised as a result,¹⁰⁶ as they chose not to independently

¹⁰² Both the initial and the new liquidators were from accounting firms: *Petroships HC1* (n 1) [52], [58].

¹⁰³ *Petroships HC2* (n 3) [209], [215].

¹⁰⁴ *ibid* [186]. This is not a valid use of the procedure for seeking directions: *Aavanti Offshore Pte Ltd (in creditors' voluntary liquidation) v Bab Al Khail General Trading* [2020] SGHC 50 [83]; *Bailey and Groves* (n 47) para 15.31.

¹⁰⁵ See the text to n 30, above.

¹⁰⁶ *Bailey and Groves* (n 47) para 15.27.

evaluate a potentially valuable cause of action. The risk of non-professional liquidators making significant errors over the course of administering a MVWU therefore cannot be discounted.

In any event, specialist knowledge is not the only reason for preferring professional liquidators; independence and integrity are also relevant. Indeed, it is arguable that independent liquidators are especially important in a MVWU, as the majority members appoint and remove the liquidator and can therefore bring great pressure to bear on him.¹⁰⁷ In contrast, the liquidator cannot be removed without a court order in other forms of liquidation in Singapore.¹⁰⁸ This problem is illustrated by *Fustar Chemicals Ltd (Hong Kong) v Liquidator of Fustar Chemicals Pte Ltd*,¹⁰⁹ where the Singapore Court of Appeal noted that the MVWU liquidator in that case appeared to have rejected a creditor's proof of debt wrongfully because of a desire to benefit the appointer.¹¹⁰ Obviously, the rectitude of professionals is not guaranteed either, but the ethical duties and the system of regulation which they are bound to would at least reduce the likelihood of objectionable behaviour.

The premise of argument (4) is doubtful; the solvency of the company is not guaranteed even in a MVWU. To proceed with a MVWU, the majority of the directors must make a declaration of solvency, stating that in their opinion the company can

¹⁰⁷ See above, n 76, 77.

¹⁰⁸ Cf *IA 1986* s 171(2)(b) and 172(2), which allows the liquidator to be removed by a decision of the creditors in creditors' voluntary liquidation and court-ordered liquidation.

¹⁰⁹ [2009] 4 SLR(R) 458 (SGCA).

¹¹⁰ *ibid* [22]–[23]; [33].

repay its debts in full within 12 months of the liquidation.¹¹¹ However, the directors may turn out to be wrong, and if the liquidator discovers that at any time he must call a creditors' meeting.¹¹²

Thus, creditors' interests may be affected even in a MVWU, and the legislation safeguards against this by having the liquidator assess the solvency of the company. Appointing a professional liquidator strengthens this safeguard, as they are more likely to be uninfluenced by the directors who made the declaration of solvency. Further, the effectiveness of this safeguard depends on how long the liquidator takes before he discovers that the company is insolvent, and a professional liquidator is likely to be more efficient in this regard.

In any event, even if the interests of creditors are completely unaffected, the interests of members will definitely be engaged in a MVWU. It is difficult to see why the interests of creditors are necessarily more worthy of protection than that of members.

Argument (5) also misses the point. It is hard to imagine any job that cannot be performed by an industrious individual with access to good professional advice; the same applies to liquidators in other forms of liquidation. The real issue is whether a professional liquidator is likely to add value. Since all forms of liquidation serve as the last chance for the company's affairs to be scrutinised, and that its proper administration could significantly impact rights and interests relating to the company, the answer

¹¹¹ *CA s 293(1) (IRDA 2018 s 163(1))*. It is a criminal offence for the directors to make this declaration without having reasonable grounds for their opinion: *CA s 293(4) (IRDA 2018 s 163(4))*.

¹¹² *CA s 295 (IRDA 2018 s 165)*.

should be in the affirmative. The MVWU is not so simple and straightforward to be distinguished in this regard.

As for the point that whoever acts as a liquidator in a MVWU also assumes the risks of non-compliance, it has already been noted that legal remedies are a poor substitute for good administration.¹¹³

Finally, a theme that runs through the arguments is that since a MVWU is simpler, appointment of a professional liquidator represents unnecessary costs. However, it is unlikely that the costs of a professional liquidator will be exorbitant in the case of a straightforward liquidation, as his remuneration is subject to the Court's review as well as professional duties relating to overcharging.¹¹⁴ If the liquidation turned out to raise complex issues however, the professional liquidator can prove his worth. Costs savings should therefore not be a significant consideration on this issue.

Conclusion

The MVWU occupies a rather awkward space in the liquidation regime. Like a going concern, the company is normally still solvent, and majority rule by members continues to apply to a great extent. At the same time, like an insolvent company being liquidated, control over the company is transferred from the directors to the liquidators,¹¹⁵ who are subject to extensive controls of the Court. The statutory provisions for MVWU are also found in the insolvency legislation of both the United Kingdom and Singapore.¹¹⁶ The legal framework governing a company in MVWU is therefore somewhere between the

¹¹³ See the text to n 92, above.

¹¹⁴ *CA s 303 (IRDA 2018 s 175)* for voluntary winding up.

¹¹⁵ Unless the liquidator or the company in general meeting with the consent of the liquidator decides otherwise: *CA s 294(2) (IRDA 2018 s 164(2))*.

¹¹⁶ *IA 1986*, Chapter III; *IRDA 2018* Part 8, Division 3.

two scenarios, and unsurprisingly exactly where that position should be is up for debate.

In general, corporate governance mechanisms during a MVWU should mimic that of insolvent liquidation to a greater extent than that of solvent going concerns. As the law has decided that there should be a transfer of power from directors to liquidators in a solvent liquidation, it would make little sense for the governance mechanisms to remain as that which applies to directors. Significantly different philosophies underlie legal controls over directors and those applicable to liquidators, since Courts should be slow to interfere in the limitless ways in which a business can be run, whereas the same reticence need not apply so strongly when the issue is simply how a company should be dissolved pursuant to a statutory scheme.

Consequently, derivative actions—a product of the limited legal controls placed on directors who have the support of the majority shareholders—have no place in a MVWU conducted by liquidators. On the other hand, since the conduct of a fair and efficient MVWU depends on the liquidators, the MVWU should not be exempted from the requirement that professional liquidators must be appointed. On this view, Singapore law has moved in the correct direction for the former issue, but is wrong in relation to the latter.