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# CERTAIN DRAFTING MYSTERIES CONCERNING THE NEW INSOLVENCY, RESTRUCTURING AND DISSOLUTION ACT

**KIU** YAN YU*

The *Insolvency, Restructuring and Dissolution Act 2018* caps the recent round of reforms to Singapore's insolvency regime, and represents the immense work that has been done to turn Singapore into an international centre for debt restructuring. Many aspects of the *Act* are new to Singapore and have elicited widespread discussion, such as the restrictions placed on *ipso facto* clauses. However, one area that has been overlooked is the drafting of provisions that were in place in one form or another under the old regime. The modification and transposition of these provisions to the omnibus act introduced new drafting oddities, rendering some of the provisions difficult to interpret. This paper aims to highlight some of these drafting issues, clarify the meaning of the relevant provisions, and provide some thoughts on how similar issues can be avoided in the future.

## I. INTRODUCTION

The *Insolvency, Restructuring and Dissolution Act 2018*,[1] representing the final phase of the current round of reforms to Singapore's debt restructuring and insolvency regime,[2] entered into force recently in Singapore.[3] The omnibus legislation consolidated the insolvency related provisions of the *Companies Act*[4] and *Bankruptcy Act*,[5] with the express purpose of aligning the two regimes to minimise uncertainty and enhance clarity.[6]

Unfortunately, it appears that certain *IRDA* provisions have fallen short of this goal, creating confusion and misleading readers. Three examples of such drafting issues will be discussed. The first, concerning the scope of the provision defining winding up commencement, reflects the situation where the plain wording of the

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* Research Assistant, EW Barker Centre for Law & Business, National University of Singapore. The author is grateful to Associate Professor Wee Meng Seng and the anonymous reviewer for bringing his attention to various salient points. All errors remain the author's own.

1 No 40 of 2018 [*IRDA*].

2 *Parliamentary Debates Singapore: Official Report*, vol 94 at p 57 (1 October 2018) [*IRDA Second Reading*].

3 Most of the *Act* entered into force on 30 July 2020: *Insolvency, Restructuring and Dissolution Act 2018 (Commencement) Notification 2020*, No S 569.

4 (Cap 50, 2006 Rev Ed Sing) [*CA*].

5 (Cap 20, 2009 Rev Ed Sing) [*BA*].

6 *IRDA Second Reading*, *supra* note 2 at p 57.

statute does not properly reflect its effect as intended by Parliament. The second, concerning the list of judicial management ("JM") expenses, exemplifies the more serious situation where it is nearly impossible to discern why the law was changed, and where the result of the change may be substantively problematic. The final example, concerning the treatment of unliquidated tort claims as provable liabilities, illustrates the problem that could arise when a change in the law is achieved by simply removing a provision from the statute.

The purpose of this paper is to address some of the difficulties that have arisen, and to highlight how particular drafting choices may have contributed to the problem, so that similar issues can be avoided in the future.

## II. Section 126(2): The Scope of the Definition for Winding up Commencement

*IRDA* section 126(2), which is substantially the same as its predecessor *CA* section 255(2), provides for when a winding up commences. It states: "In any other case [apart from a voluntary winding up], the winding up is deemed to have commenced at the time of the making of the application for the winding up."

As the definition applies "in any other case", one would expect this provision to be generally applicable throughout the statute as a matter of plain language, and this did not cause any difficulty under the *CA*. However, because *IRDA* section 218(2) reflects the first time that the concept of winding up commencement is directly applied to the cut-off time for proof of debts, the scope of section 126(2) and whether it covers section 218(2) became a novel issue.

### A. *The Cut-Off Timing for Proof Prior to the IRDA*

Prior to the *IRDA* entering into force, the cut-off timing for provability of claims in a court ordered insolvent liquidation was determined by *BA* section 87(1), because *CA* section 327(2) rendered bankruptcy law applicable to issues concerning proof. Consequently, the concept of winding up commencement was irrelevant to the cut-off timing prior to the *IRDA*. The result was that a claim was provable if the company was subject to it at the time of the winding up order, or if the company may become subject to it after the winding up order by reason of an obligation incurred before.[7] Thus, a contractual obligation to pay on a contingency created a provable claim even though the contingency had yet to occur at the time of the winding up order. The same is true of United Kingdom ("UK") law.[8]

This is the correct cut-off point for proof, because it gives effect to the principle of UK insolvency law that there is a notional collection and *pari passu* distribution

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7 Andrew Chan, ed, *Law and Practice of Corporate Insolvency* (Singapore: LexisNexis, 2014) at 382; Cheng Han Tan, ed, *Walter Woon on Company Law*, 3d ed (Singapore: Sweet & Maxwell, 2009) at para 17.195.

8 Edward Bailey & Hugo Groves, *Corporate Insolvency: Law and Practice*, 5th ed (London: LexisNexis, 2017) at para 26.3. See *The Insolvency (England and Wales) Rules 2016*, SI 2016/1024, r 14.1(3) [*IR 2016*].

of assets at the time of the winding up order.[9] This allows creditors to be treated equally by evaluating their claims at the same time, so that like is compared with like.

The cut-off time facilitates equal treatment in another way, by allowing virtually all liabilities of the company to be provable.[10] Classifying a claim as non-provable is generally unfair to the relevant creditor because non-provable claims are ranked below provable liabilities,[11] when all unsecured creditors are entitled to the same treatment.[12] By setting the cut-off time to be that of the winding up order, the only liabilities that will be non-provable by virtue of the cut-off time are liabilities caused by obligations incurred after the winding up order.[13] Since a liquidator is appointed and takes control of the company once the winding up order has been granted,[14] these non-provable liabilities are generally incurred by the liquidator as a necessary expense of the winding up,[15] which are payable in full in priority to all other unsecured claims.[16]

### B. *The Confusing Position Under the IRDA*

With the *IRDA*, proof of debts in liquidation is no longer addressed by bankruptcy provisions. Instead, *IRDA* section 218(2) directly provides that a claim is provable in insolvent liquidation or JM if the company was subject to that liability "at the commencement of the judicial management or winding up", or if the liability arises after by reason of an obligation incurred before. Thus, the cut-off time for proof of debts is now dependent on the commencement of winding up ("CoWU").

If *IRDA* section 126(2)'s definition applies to section 218(2), the cut-off time for proof would have changed to the time at which the winding up application was made, as opposed to the winding up order. This means that liabilities under obligations which the company incurred between the winding up application and the winding up order are not provable, which is contrary to the principles highlighted above.

There is no suggestion in the *IRDA*'s text that CoWU can have any other meaning. The only other definition is found in section 217, which is expressly limited to subsections 224 to 229, and similarly provides that CoWU means "the time of

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9 *In re T & N Ltd* [2006] 1 WLR 1728 at para 113 (HC) [*T & N Ltd*]; *Wight v Eckhardt Marine GmbH* [2004] 1 AC 147 at para 28, 29 (PC); Hamish Anderson, *The Framework of Corporate Insolvency Law* (Oxford: Oxford University Press, 2017) at paras 7.18–7.20, 21.17.

10 The principle that all liabilities should be provable in insolvency helps to achieve equal justice amongst creditors: *Re Nortel GmbH (in administration)* [2014] AC 209 at paras 92, 93 (SC) [*Nortel GmbH*].

11 *Re Lehman Brothers International (Europe) (in administration)* [2018] AC 465 at paras 17, 59–61 (SC) [*Lehman Brothers International*]; Kristin van Zwieten, ed, *Goode on Principles of Corporate Insolvency Law*, 5th ed (London: Sweet & Maxwell, 2018) at para 8-54.

12 UK, HC, "Report of the Review Committee on Insolvency Law and Practice", Cmnd 8558 in *Sessional Papers* (1982) 1 at para 225 [*Cork Report*].

13 Bailey & Groves, *supra* note 8 at 1278, 1279.

14 *CA*, *supra* note 4, s 263; now *IRDA*, *supra* note 1, s 134.

15 The exceptions are tort liabilities where the loss crystallised after the winding up order, and possibly specific statutory liabilities: *Lehman Brothers International*, *supra* note 11 at para 193. The position with respect to tort liabilities has changed under UK law, and it is unclear what the position is under the *IRDA*. See Part IV below.

16 *CA*, *supra* note 4, s 328(1)(a); *IRDA*, *supra* note 1, s 203(1)(a), (b). See Chan, *supra* note 7 at 383; Zwieten, *supra* note 11 at 335, 336.

the making of the winding up application" for court-ordered winding up without a prior JM.

This very issue was discussed during the second reading of the bill, where Member of Parliament Mr Christopher de Souza questioned whether it was: "intended for the law on provability of debts to change its reference point from the making of the winding up order to the making of the application for winding up".[17]

In response, the Senior Minister of State for Law Mr Edwin Tong disagreed that there was a change. He noted that:

> Clause 126 in Part 8 Division 2 applies to applicable provisions in that Division, such as clause 130, which requires the technical meaning provided under clause 126. The technical meaning in clause 126 does not apply to clause 218, which is in Part 9.[18]

He then explained that the meaning of CoWU in section 218(2) must therefore depend on its "plain and ordinary meaning", which is "the time when the winding up order is made" for court-ordered winding up.[19]

While Mr Edwin Tong's view would resolve the problem concerning the cut-off time, it would create a new issue. Limiting section 126 to Part 8 Division 2 would mean that CoWU bears its "ordinary meaning" in *IRDA* section 206 of Part 8 Division 4, a provision dealing with the rights of creditors for uncompleted executions and attachments. This would lead to an unexplained change in the law, since CoWU in its predecessor *CA* section 334 has always been understood as the time of the winding up application,[20] with UK law taking the same position.[21] The new position would be unprincipled as well, since *CA* section 334 was part of a group of provisions that invalidated post-application dispositions to ensure that unsecured creditors were treated equally, instead of allowing some to benefit from a race to the assets of the company.[22] This purpose would be nullified if *IRDA* section 206 does not affect executions and attachments completed after the application, which is what Mr Edwin Tong's statement implies.

### C. *Evaluating the True Scope of Section 126(2) and the Relevant Drafting*

The above discussion indicates that the scope of section 126(2) should be limited to the whole of Part 8, so that it applies to section 206 but not section 218(2). It is suggested that this would also be the view taken by the courts. The application of section 126(2) to section 218(2) leads to a manifestly absurd outcome which

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17 *IRDA Second Reading*, *supra* note 2 at p 67.

18 *IRDA Second Reading*, *supra* note 2 at p 70.

19 *Ibid*.

20 *Re Tiong Polestar Engineering Pte Ltd (formerly known as Polestar Engineering (S) Pte Ltd)* [2003] 4 SLR(R) 1 at paras 4-11 (HC); *Supermix Concrete Pte Ltd v Econ Corp Ltd (Public Utilities Board, garnishees)* [2004] 1 SLR(R) 250 at para 5 (HC).

21 Bailey & Groves, *supra* note 8 at para 22.29.

22 *The "Hull 308"* [1991] 2 SLR(R) 643 at para 14 (CA); *Transbilt Engineering Pte Ltd (in liquidation) v Finebuild Systems Pte Ltd* [2005] 3 SLR(R) 550 at para 2 (CA).

is contrary to insolvency law principles, and this justifies reference to extraneous materials such as the parliamentary debates.[23] Since Mr Edwin Tong's view that CoWU in section 218(2) means the time of the winding up order is "unequivocal" and "directed to the very point in question", it should be given great weight when determining the intended effect of the provision.[24] As a purposive interpretation must be preferred to a literal interpretation,[25] Mr Edwin Tong's view will likely be conclusive.

While Mr Edwin Tong's view also implies that section 126(2) does not apply to section 206, little weight can be given to this aspect of his statement, since his mind was not directed to section 206 at all.[26] The courts will therefore give more weight to the legislative history and ordinary meaning of section 206 in its context when determining its purpose.[27] For reasons already mentioned,[28] the end result is that CoWU in section 206 should mean the time of the application as provided under section 126(2).

Thus, the law in this area remains workable if the *IRDA* is correctly interpreted. However, this does not change the fact that the provisions are drafted in a misleading manner.

It does not make sense that CoWU is defined in the same manner under all definitional provisions in the *IRDA*, but means something different in section 218(2). CoWU's "ordinary meaning" was relied upon by Mr Edwin Tong, but it is unclear how CoWU can have an ordinary meaning when it has no meaning whatsoever outside the context of the insolvency regime. It is an inherently technical phrase whose meaning is tied to the statute in which it is found, and had always been understood with reference to *CA* section 255(2). The mere fact that *CA* section 255(2) and *IRDA* section 126(2) are phrased as deeming provisions does not imply that CoWU has an ordinary meaning distinct from the definitions provided.[29] Besides, if CoWU does have an "ordinary meaning", it is odd that the phrase must be defined and used in a non-ordinary way in multiple sections of the *IRDA*, as opposed to just using a different phrase altogether. Surely that is not conducive to clarity, readability, or ease of understanding.

The confusion is exacerbated by the use of the phrase "In any other case" under section 126. It is unreasonable to expect readers to read it as "In any other case within the same Part of the Act". There is no rule of statutory construction that definitions only apply to sections within the same Part. The converse is true, even where the definition provision's scope of application is explicitly limited. As the

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23 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at para 65 (CA) [*Ting Choon Meng*]. See also *Interpretation Act* (Cap 1, 2002 Rev Ed Sing), s 9A(2)(b)(ii); 9A(3)(d).

24 *Ting Choon Meng*, *ibid*, at para 70(a), citing *R v Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd* [2001] 2 AC 349 and *Melluish (Inspector of Taxes) v BMI (No 3) Ltd* [1995] 4 All ER 453. See also *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at para 52 (CA).

25 *Ting Choon Meng*, *ibid*, at para 71(a).

26 *Ting Choon Meng*, *supra* note 24.

27 For an example of a case focusing on the text and legislative history of a statutory provision to determine its purpose, see *Petroships Investment Pte Ltd v Wealthplus Pte Ltd* [2016] 2 SLR 1022 at paras 33-57 (CA). See also *Ting Choon Meng*, *supra* note 23 at para 71(f).

28 See the text to *supra* note 20, above.

29 *T & N Ltd*, *supra* note 9 at paras 133, 134.

Court of Appeal noted in *Singapore Shooting v Singapore Rifle Association*:

> We recognise that . . . 'charity proceedings' as so defined applies only to section 31. However, it is also a well-recognised rule of statutory interpretation that where an identical expression is used in a statute, it should presumptively have the same meaning. . .[30]

If section 126 is meant to be confined to Part 8, the drafters should have just said so, as was done for section 15A of the *Moneylenders Act* ("In this Part. . ").[31] While the above presumption would still apply, the reader is at least alerted to the possibility that the definition may be inapplicable.

Besides, even if one realises that the scope of *IRDA* section 126 must be restricted, it is not immediately obvious what the restrictions should be. This is best evinced by the fact that Mr Edwin Tong himself thought that section 126 ought to be limited to provisions within the same "Division" rather than "Part".

Given the above problems, a statutory provision should avoid utilising a term defined elsewhere in the statute, if that definition is not intended to apply to the provision in question.[32] There surely must be some other term in the English language which can serve as a suitable and less misleading alternative.[33] If not, the least that could be done is to delineate the scope of the definition provision more clearly in such situations.

## III. Section 114(1): The List of Judicial Management Expenses

The next example involves the more complex problem of identifying what claims connected to a JM should be prioritised and paid in full (the "JM expenses"). For instance, claims arising out of contracts entered into by the judicial manager have to be treated as JM expenses, or counterparties will never contract with a company in JM.[34]

The appropriate treatment of some other claims are less clear cut, such as those arising out of pre-JM contracts that offer continuing benefits e.g. a lease or a hire-purchase agreement.[35] To the extent that the judicial manager is utilising the benefits

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30 [2019] SGCA 83 at para 144.

31 (Cap 188, 2010 Rev Ed Sing).

32 This problem also exists in relation to the word "liability" under *IRDA* s 218(2), in that the definition under s 2(1) is inapplicable. This is a long-standing problem which also exists under the predecessor provisions and UK law: see *Nortel GmbH*, *supra* note 10 at paras 67-71. However, this wording is not as misleading since the issue is fairly obvious from the text: *IRDA* s 218(2)(a)(ii) would be rendered entirely otiose if the definition under s 2(1) is applied. The same cannot be said in relation to the CoWU problem: its absurdity is revealed by an understanding of insolvency law, and not a plain reading of the text.

33 For an example, see *IR 2016*, *supra* note 8, r 14.1.

34 *Centre Reinsurance International Co v Freakley* [2006] 1 WLR 2863 at para 8 (HL) [*Freakley*]; Ministry of Law, *Report of the Insolvency Law Review Committee: Final Report* (2013) at 99, para 45(1) [*ILRC Report*].

35 If the necessary requirements are met, such liabilities will be treated as expenses of liquidation under what is known as the *Lundy Granite*, or the liquidation expense principle: *Chee Kheong Mah Chaly v Liquidators of Baring Futures (Singapore) Pte Ltd* [2003] 2 SLR(R) 571 at paras 51-55 (CA). Its application in administration (the UK equivalent of JM) was discretionary, but became compulsory due

provided by these contracts, anything less than full payment is unfair to the counterparty and expropriatory in effect.[36] On the other hand, this unfairness has to be weighed against the nature of JM as a temporary rescue procedure, and the disruption to the rescue plan which will result if the judicial manager is compelled to treat such claims as JM expenses.[37] Special considerations may also arise in relation to specific classes of creditors, such as employees.

Under the *IRDA*, the list of JM expenses is primary determined through section 114(1).[38] The text of that section provides:

> The expenses of a judicial manager are payable in the following order of priority:
>
> (a) first, any debt arising from rescue financing obtained pursuant to an order under section 101(1)(b);
> (b) second, any sums payable in respect of any debts or liabilities of the company incurred during judicial management, including any debt arising from rescue financing obtained pursuant to an order under section 101(1)(a);
> (c) third, any other remuneration or expenses properly incurred by the judicial manager in performing the judicial manager's functions in the judicial management of the company.

Unfortunately, it is difficult to determine exactly how this provision operates, with every potential interpretation carrying its own problems.

### A. *The Intended Operation of Section 114(1)*

It is clearer for the purpose of exposition to start with the intended operation of section 114(1) as revealed by extrinsic materials.[39] The genesis of the provision can be traced back to recommendation 6.9 of the Insolvency Law Review Committee ("ILRC")'s final report, which provides that:

> Clear provisions should be made for the priority of debts incurred during the course of judicial management and that the debts incurred by the judicial manager

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to changes brought about by *The Enterprise Act 2002* (UK), c 40: see Zwieten, *supra* note 11 at paras 8-38, 11-112; Ian F Fletcher, *The Law of Insolvency*, 5th ed (London: Sweet & Maxwell, 2017) at paras 16-155–16-157; Gavin Lightman *et al*, *Lightman & Moss on The Law of Administrators and Receivers of Companies*, 6th ed (London: Sweet & Maxwell, 2017) at paras 4-027, 4-042. The UK position prior to those changes was stated to be applicable to JM in principle: *Re Swiber Holdings Ltd* [2018] 5 SLR 1358 at paras 88, 89 (HC) [*Swiber Holdings*].

36 *In re Atlantic Computer Systems Plc* [1992] Ch 505 at 530 (CA) [*Atlantic Computer Systems*]. This is because proprietary remedies which the counterparty would otherwise have cannot be exercised by virtue of the moratorium imposed during JM. See *IRDA*, *supra* note 1, s 96(4).

37 *Atlantic Computer Systems*, *ibid* at 528 (explaining why a flexible approach towards expenses was justified under the previous UK regime); see also Fletcher, *supra* note 35 at paras 16-156, 16-157.

38 The actual mechanism used to secure and allow payment of these JM expenses is dealt with under *IRDA*, *supra* note 1, ss 102(1)(b) and 104(3).

39 Legally, this should take place after the text of the provision has been fully analysed: *Ting Choon Meng*, *supra* note 23 at para 71(f).

> on behalf of the company should have priority over the fees of the judicial manager.[40]

In other words, the judicial manager should not pay himself if the liabilities which he has incurred on behalf of the company cannot be paid in full.[41]

Certain aspects of section 114(1)'s operation were also discussed during the second reading of the *IRDA* bill. Specifically, Mr Edwin Tong noted in a discussion on protecting the interests of employees that "employees' wages that are incurred in the course of judicial management would fall under clause 114(1)(b)" and will be given priority.[42] This means that Parliament intended for some claims under pre-JM contracts to fall within section 114(1)(b), since employment contracts are typically entered into before JM commences.

However, there is some uncertainty as to what Mr Edwin Tong envisaged when he referred to wages incurred "in the course of" JM. He treated the phrase as being equivalent to "during", which is used in *IRDA* section 114(1)(b), but the two phrases can have a different meaning in this context. In interpreting the UK provision on priorities of administration expenses,[43] Lord Neuberger noted that:

> Further, a liability may arise during an administration without falling within rule 2.67(1)(f), without being 'in the course of' the administration. In *Charles R Davidson & Co v M'Robb* [1918] AC 304, 321, Lord Dunedin explained that 'in the course of his employment' had a more limited meaning than 'during the period of his employment' and connoted 'something which is part of his service' namely 'work, or the natural incidents connected with the class of work'[44]

Under Lord Neuberger's view, it is arguable that wages are only incurred "in the course of" JM if the employment contract was adopted by the judicial manager. On the other hand, wages can be incurred "during" JM if the employment contract continued for a few days simply because the judicial manager had yet to complete his review of the company's business and to decide if retrenchment was desirable.

That said, it seems unlikely that the word "during" in section 114(1)(b) can be interpreted as "in the course of". That would entail altering a word in the statute by reference to what was said in passing, relying on specific cases which the speaker was unlikely to have in mind. In effect, one would be treating the words said in Parliament as the statutory wording; the tail would be wagging the dog.

With that, it is now appropriate to turn to the various possible constructions of section 114(1)'s text. There are two issues that have to be resolved: (1) the meaning of each subsection under section 114(1); and (2) whether the list of claims under section 114(1) is both definitive (claims falling outside of the list cannot be treated

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40 *ILRC Report*, *supra* note 34, Appendix 1 at 252. See also the discussion at 98, 99.

41 *Ibid* at 98, para 43.

42 *IRDA Second Reading*, *supra* note 2 at p 70.

43 UK administration being what JM was modelled upon: *ILRC Report*, *supra* note 34 at 53, para 11.

44 *Nortel GmbH*, *supra* note 10 at para 99.

as JM expenses) and mandatory (claims falling within the list must be treated as JM expenses).[45]

### B. *The Interpretation of Sections 114(1)(a) and (c)*

The meaning of subsections 114(1)(a) and (c) are reasonably clear. The text of subsection (a) is unambiguous, and its purpose is straightforward—to give priority to a specific type of rescue financing to incentivise its supply.

The meaning of section 114(1)(c), in particular what is covered by "other... expenses", becomes clear when its predecessor is considered. Both subsections (b) and (c) are based on *CA* section 227J(3), which created a charge that secured particular claims when a judicial manager vacated office.[46] Those claims are:

> (a) any sums payable in respect of any debts or liabilities incurred while he was a judicial manager under contracts entered into by him in the carrying out of his functions; and
> (b) any remuneration and expenses properly incurred by him

*CA* section 227J(3)(a) dealt with claims against the company by third parties, whereas (b) dealt with claims against the company by the judicial manager himself.[47] For instance, payments made by the judicial manager personally for the company would have fallen under subsection (b), because he is entitled to be reimbursed.[48]

It should be noted that the word "expenses" under *CA* section 227J(3) holds a different meaning from the same word under *IRDA* section 114. Due to the structure of section 227J(3), "expenses" under section 227J(3)(b) must necessarily exclude "debts or liabilities" covered by section 227J(3)(a). In contrast, the converse is true for "expenses of a judicial manager" under the *chapeau* of *IRDA* section 114(1): it must necessarily cover the "debts or liabilities" dealt with by section 114(1)(b).[49]

Placed in this historical context, it is likely that *IRDA* section 114(1)(c) is also intended to cover claims against the company by the judicial manager. The phrase "other expenses" under section 114(1)(c) would have a limited ambit under this construction, equivalent to "expenses" under *CA* section 227J(3)(b). The word "other" was only added to *IRDA* section 114(1)(c) because "expenses" under s 114 also includes the claims covered by subsections 114(1)(a) and (b).

One alternative construction is that the phrase "other expenses" refers to any other JM expenses that the courts may recognise, such that section 114(1)(c) performs a sweeping up function. If so, some liabilities incurred on behalf of the company by the judicial manager could end up being covered by section 114(1)(c). This result would however be inconsistent with ILRC's recommendation 6.9,[50] since those liabilities

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45 This language (whether the prescribed list is definitive/mandatory) was used in the discussion of administration expenses in Lightman *et al*, *supra* note 35 at para 4-038.

46 Thus, it is also the predecessor of *IRDA*, *supra* note 1, s 104(3).

47 *Swiber Holdings*, *supra* note 35 at para 84, approving *Freakley*, *supra* note 34 at para 9.

48 *Ibid*.

49 Interestingly, the meaning of the word "expenses" has changed under the UK equivalent of *CA* s 227J(3)(b) as well, for rather different legislative reasons: Lightman *et al*, *supra* note 35 at para 4-033.

50 See the text accompanying *supra* note 40, above.

would have the same priority as the judicial manager's remuneration. The alternative construction is therefore less attractive.

### C. *The Interpretation of Section 114(1)(b)*

The interpretation of section 114(1)(b) gives rise to significantly more difficult questions. It is likely to be a functional equivalent of *CA* section 227J(3)(a), in that they are the primary provisions dealing with what external creditor claims are to be prioritised and paid in full. However, a significant change in phraseology took place. Under *CA* section 227J(3)(a), the critical question was whether the relevant debts or liabilities were incurred "under contracts entered into" by the judicial manager. This requirement was removed from section 114(1)(b), such that when the debts or liabilities were incurred became the primary issue, creating interpretive difficulties.

#### 1. *Adopting the interpretation under section 19(5) of the UK Insolvency Act 1986*

One way of interpreting *IRDA* section 114(1)(b) is to refer to the *Insolvency Act 1986* (UK)[51] section 19(5) as originally enacted.[52] That sub-section provided that:

> "Any sums payable in respect of debts or liabilities incurred, while he was administrator, under contracts entered into or contracts of employment adopted by him. . . in the carrying out of his . . . functions shall be charged on and paid out [of the company's property in his custody or control]"

This sub-section is the predecessor of *CA* section 227J(3)(a), but the specific timing at which a liability was incurred was important to *IA* section 19(5), due to the additional clause on adopted contracts of employment.

Some guidance on this question was given in the House of Lords case of *Powdrill v Watson*.[53] The Court accepted that a liability is incurred when it becomes due, but the liability does not have to become immediately payable at that time. Thus, wages are a form of liability that is incurred daily,[54] but are typically only payable monthly—if an administrator was appointed halfway through the month, the wage liability that was incurred on the earlier part of the month would not be charged on the company's property. In contrast, a liability to pay wages in lieu of notice for termination is incurred at the time of termination.[55]

It is not always so easy to determine when a liability is incurred. A clause that the Court had to deal with provided that:

> (f) On termination of employment, other than for misconduct, your holiday entitlement will be paid on the basis of 1/12th of the annual entitlement for each full calendar month's service from the previous 1 April. . .[56]

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51 c 45 [*IA*].
52 Now *ibid*, Schedule B1, para 99.
53 [1995] 2 AC 394 (HL) [*Powdrill*].
54 The court referred to the UK equivalent of *Apportionment Act* (Cap 8, 1998 Rev Ed Sing), s 3.
55 *Powdrill*, *supra* note 53 at 446, 447.
56 *Ibid* at 435.

Two interpretations are tenable: the whole liability could be treated as having been incurred at the time of termination (as there might be no termination at all and therefore no liability), or that a liability was incurred at the end of "each full calendar month's service", subject to a contingency of the employment being terminated within that year (since working a full calendar month creates an entitlement to payment at termination). The latter interpretation was preferred by the Court, though the reasoning for this is not entirely clear.[57]

It also appears that liability for the whole term of a lease is incurred at the time of contract,[58] though none of the cases had to decide this point for the purpose of *IA* section 19(5).

Drawing from the few examples available, it may broadly be said that:

(i) If the existence of liability is dependent on performance, the liability is incurred at the time the performance is completed regardless of whether the liability also depends on a contingency—so liability for holiday entitlement is incurred under the above clause once a full calendar month's service is performed, even though that liability depends on the contingency of termination;

(ii) If the existence of liability is only dependent on a contingency, the liability is incurred at the time of the contingency—so liability for wages in lieu of notice is incurred on termination without notice;

(iii) If payment must be made once a period of time elapses, the liability to pay is incurred at the time of contract—leases and presumably term loans fall within this category.

This interpretation would however be substantively problematic if applied to *IRDA* section 114(1)(b), if section 114(1) is definitive and mandatory.[59] The section would be underinclusive, since liabilities under pre-JM contracts which provide continuing benefits, such as leases, would never be treated as JM expenses. They would be incurred at the time of contract, and not "during judicial management".

Section 114(1)(b) would also be over-inclusive, since some liabilities would be treated as JM expenses simply because they were incurred at the right time, even though the liability did not benefit the JM. For instance, liability under a contract of guarantee which imposes a conditional payment obligation is triggered by a contingency[60]—the default of the principal debtor.[61] This liability is therefore incurred at the time of the contingency. Consequently, the liability would be treated as a JM expense under section 114(1)(b) if the primary debtor defaulted during JM, even if the guarantee was granted long before the JM and had nothing to do with it.

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57 *Ibid* at 451.

58 Kester Lees, "Re Games Station Ltd: A Salvaged Salvage Principle" (2014) 3 Conveyancer & Property Lawyer 249 at 258, 259. See also *Jervis v Pillar Denton Ltd* [2015] Ch 87 at paras 88, 89 (CA); *In re Toshoku Finance UK plc* [2002] 1 WLR 671 at para 27 (HL) [*Toshoku Finance UK*]. But see the characterisation of future rents in *Christopher Moran Holdings Ltd v Bairstow* [2000] 2 AC 172 at 187 (HL).

59 Whether that is so is discussed at Part III-D, below.

60 What is described as "guarantees" can create different types of obligations: *Norwich and Peterborough Building Society v McGuinness* [2012] 2 All ER (Comm) 265 at para 7 (CA).

61 Wayne Courtney, John Phillips & James O'Donovan, *The Modern Contract of Guarantee*, 3d ed (London: Sweet & Maxwell, 2016) at para 10-146.

Some of these problematic effects may be ameliorated by the judicial manager's power to disclaim onerous property under the *IRDA*,[62] which allows full payment to be avoided through disclaimer of the contract before the relevant contingency occurs.[63] However, this may not always be a satisfactory solution. Time is needed for the judicial manager to familiarise himself with the contracts of the company, and he might not be able to issue the disclaimer in time.

2. *Adopting the interpretation under section 2(1) of the IRDA*

An alternative interpretation ignores the case law altogether, and instead focuses on the definition of "liability" under *IRDA* section 2(1), which is applicable "unless the context otherwise requires". That definition states:

> 'liability' means a liability to pay money or money's worth, regardless whether such liability is present or future, certain or contingent or of an amount that is fixed or liquidated or that is capable of being ascertained by fixed rules or as a matter of opinion, and includes any such liability arising —
> (a) under any written law;
> (b) under contract, tort or bailment;
> (c) as a result of a breach of trust by the person liable; or
> (d) out of an obligation to make restitution;

If this broad definition is adopted, all contractual liabilities will be incurred at the time of contract, since there would at least be a contingent future liability once the contract has been concluded. Thus, section 114(1)(b) can only apply to contracts entered into by the judicial manager, and would have the same meaning as *CA* section 227J(3)(a). The subsection would no longer be over inclusive.

This view is however unsustainable. First, it would be odd if the drafter intentionally deleted the phrase "under contracts entered into by him. . . " in section 114(1)(b), and yet the deleted phrase continues to reflect the effect which the sub-section has. Second, this interpretation is clearly inconsistent with Parliament's intention to classify some liabilities under pre-JM contracts as JM expenses under section 114(1)(b).[64]

## D. *Whether the List of Claims Under Section 114(1) Is Definitive and Mandatory*

The consequences of the first interpretation being over and under inclusive depend on the next issue: whether section 114(1) is definitive and mandatory.

1. *Definitive: Whether claims outside section 114(1) can be fully paid*

It is unlikely that section 114(1) is definitive, and claims falling outside the list can still be fully paid as a JM expense. The judicial manager has the power to make any

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62 *IRDA*, *supra* note 1, Part 9, Division 4. See also *ILRC Report*, *supra* note 34 at 183, 184, paras 50, 51.
63 The losses in consequence of the disclaimer are a provable debt: *IRDA*, *supra* note 1, s 230(5).
64 See the text accompanying *supra* note 42, above.

payment necessary or incidental to his functions,[65] and this power extends to making payments of pre-JM debts.[66] The court can compel the judicial manager to exercise this power on the application of a creditor, because the judicial manager is an officer of the court.[67] There is also suggestion, *obiter*, that the court's supervisory powers can have the effect that particular claims are covered by the section 104(3) charge, even if they fall outside the ambit of section 114.[68]

In any event, even if section 114(1) is definitive it is unlikely that significant unfairness will result. If a claim ought to be treated as a JM expense but falls outside section 114(1), any unfairness can be resolved by the court lifting the stay under *IRDA* section 96(4). For instance, if it would be unfair for a lease to continue without the judicial manager making full rental payment, the court can simply lift the stay under section 96(f) so that the landlord can re-enter, amongst other alternatives.

### 2. *Mandatory: Whether claims within section 114(1)'s subsections must be fully paid*

Focusing on section 114(1)'s text, whether the provision is mandatory depends on the effect given to the words "expenses of a judicial manager" in the *chapeau* of section 114(1). Those "expenses" can either refer to the list of claims in the subsections, or be given an independent meaning based on the common law. If it has an independent meaning, section 114(1) will not be mandatory: a claim is not a JM expense simply because it falls within one of the subsections, if it is not also one of the recognised "expenses".[69]

*IRDA* section 114(1) is most likely mandatory. If "expenses" in the *chapeau* is given an independent meaning, it follows that the list of claims in the subsections can be under inclusive relative to that list of "expenses", for example by failing to provide for rental claims falling within the *Lundy Granite* principle.[70] This leads to the problem that there may be some "expenses" whose priority is not provided for under section 114(1),[71] and there is no indication as to how they should be treated. This problem suggests that the drafters did not intend for "expenses" to have an independent meaning.

This view is also supported by Mr Edwin Tong's statement in Parliament; he concluded that wages will be prioritised because they fall within section 114(1)(b), without suggesting that some other test has to be met.[72]

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65 *IRDA*, *supra* note 1, First Schedule at para (n).

66 *Ibid*, s 99(6)(c).

67 *Ibid*, s 89(4); *Atlantic Computer Systems*, *supra* note 36 at 529, 530; Lightman *et al*, *supra* note 35 at para 4-039.

68 *Freakley*, *supra* note 34 at para 17, making reference to *IA*, *supra* note 51, s 19(5). Whether this is still true under the current UK legislation has been doubted: Lightman *et al*, *supra* note 35 at para 4-033. These considerations do not apply to the *IRDA* if the above interpretation of s 114(1)(c) is correct. That said, it is not immediately clear how directing the judicial manager to "to authorise or ratify" particular claims can change their nature such that they fall within s 114(1)(b) and by extension s 104(3).

69 A similar argument was made in relation to liquidation expenses in the UK, but the argument was rejected for historical reasons that are inapplicable here: *Toshoku Finance UK*, *supra* note 58 at paras 12-17.

70 See *supra* note 35 and the text accompanying *supra* note 59, above.

71 Assuming that the phrase "other . . . expenses" in s 114(1)(c) does not perform a sweeping up function, as argued at Part III-B, above.

72 See the text accompanying *supra* note 42, above.

### E. *Conclusion on the Issues Generated by Section 114(1)*

Following from the discussion above, a few points can be noted about section 114(1):

(1) The most likely interpretation of section 114(1) is that it is a mandatory provision, such that all claims falling within one of the subsections must be prioritised and paid. However, it is unlikely to be definitive, and other claims can also be fully paid.
(2) It is problematic that section 114(1) is mandatory, because section 114(1)(b) appears to be over-inclusive, causing certain liabilities that are incurred at the right time to be treated as JM expenses even though they have nothing to do with the JM.
(3) This over-inclusiveness is caused by the removal of the requirement that the contract must have been entered into by the judicial manager, which was imposed in the predecessor provisions *CA* section 227J(3) and *IA* section 19.
(4) There is no clear explanation for the rationale of this change. The only clue is the second reading of the bill, where it was highlighted that section 114(1)(b) protects the interests of employees by prioritising their wages. However, this cannot fully explain the change; section 114(1)(b)'s coverage of pre-JM contracts is not limited to employment contracts, unlike the adoption limb of *IA* section 19.
(5) The oddity of section 114(1)(b) is enhanced by the contrary position taken for receivership.[73] Under *IRDA* section 75,[74] the claims prioritised in a receivership are those (i) under a contract entered into by the receiver; and (ii) under an employment contract adopted by the receiver, if the employment claim is also a "qualifying liability". While JM and receivership utilise different mechanisms to prioritise claims,[75] similar considerations apply to the question of which claims should be prioritised, especially in relation to employment claims.[76] Why the drafters reached completely different conclusions on this point for the 2 procedures is therefore puzzling.

Beyond the problems concerning the interpretation of section 114 by itself, difficult issues on the interactions between section 114 and other *IRDA* provisions can also arise. For instance, payment in lieu of notice appears to be covered by section

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[73] This discussion is applicable to a receiver and manager appointed over substantially the whole of the company's property, and the terms "receiver" and "receivership" will be used in this sense.

[74] This provision is partly modelled on *IA*, *supra* note 51, s 44: *Insolvency, Restructuring and Dissolution Bill*, No 32 of 2018, Table of Derivations. This explains why its wording is more similar to *IA* s 19 then *IRDA*, *supra* note 1, s 114. See also *infra* note 76, below.

[75] Claims are prioritised in receivership by imposing personal liability on the receiver for them, with the receiver being entitled to an indemnity out of the property of the company: *IRDA*, *supra* note 1, s 75(2).

[76] Ian F Fletcher, "Adoption of contracts of employment by receivers and administrators: the Paramount case" [1995] J Bus L 596 at 598, pointing out that although the technical consequences for adoption of contracts under what was then *IA*, *supra* note 51, s 19 (administration) and s 44 (administrative receivership) were different, they had the same purpose of giving "enhanced protection to employees". Thus, both provisions were modified in a similar manner by the *Insolvency Act 1994* (UK) c 7, ss 1, 2, such that only a "qualifying liability" under an adopted employment contract is prioritised. The relevant provisions for administration are now *IA*, Schedule B1, paras 99(5), 99(6).

114(1)(b).[77] If this is intended as a matter of employee protection,[78] can the judicial manager bypass this protection by disclaiming the employment contract?[79] Another interesting question is how differences in prioritised claims under JM and receivership will be taken into account under *IRDA* section 91(6), when there is opposition to a JM application by a floating charge holder who could appoint a receiver. This differential treatment makes the floating charge holder worse off in a JM, since the prioritised claims which rank above the floating charge are more numerous in a JM.[80]

At least some of these difficulties could have been ameliorated if the drafters utilised the simple expedient of highlighting what they intended to achieve through the explanatory statement to the bill. The drafters were consciously deleting a particular element from *CA* section 227J(3)(a) when drafting *IRDA* section 114(1)(b), and must have had a specific reason for doing so. They should also have foreseen that, if any difficulties arose with respect to the provision's application, references will be made to its predecessor. Thus, it should have been reasonably apparent that the reason for the change ought to be stated somewhere. If that was done, much of the above analysis would probably be unnecessary. There would also have been more justification, as a matter of purposive interpretation, to reach the conclusion that was intended.

## IV. Sections 218 and 345(4): Proof of Unliquidated Tort Claims in Liquidation

*IRDA* sections 218 and 345 are highly similar provisions, dealing with debts provable in JM/winding up and bankruptcy respectively. However, one notable difference is that there is no equivalent of section 345(4) under section 218. That section reads:

> (4) For the purposes of subsection (1), in determining whether any liability in tort is provable in bankruptcy, the bankrupt is deemed to be subject to that liability by reason of an obligation incurred at the time when the cause of action for that tort accrued.

This represents a change in the law that applies to insolvent companies, as *IRDA* section 345(4) was identical to *BA* section 87(3A), which was made applicable to insolvent companies by *CA* section 327. The effect of this change is however difficult to deduce.

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77 Because this liability is incurred when the judicial manager terminates the employment contract.

78 Such a policy can be inferred from the prioritisation of this claim in receivership under *IRDA*, *supra* note 1, s 75(5)(c), in an intentional departure from the English position. For the reasoning behind the English position, see Paul Davies, "Employee Claims in Insolvency: Corporate Rescues and Preferential Claims" (1994) 23 Indus LJ 141. See also *Powdrill*, *supra* note 53 at 447 (commenting that it is not obvious why payments in lieu of notice should be given priority in the regime prior to the *Insolvency Act 1994*, *supra* note 76).

79 *Supra* note 62.

80 Because the provisions which give effect to s 114, ss 102(1)(b) and 104(3), provide for the entitlement to make payment and the creation of a charge "in priority to all other debts except those subject to a security to which section 100(2) or 101(1)(c) or (d) applies." A floating charge is covered under s 100(1), as pointed out by s 100(3).

### A. *The History and Purpose of Section 345(4)*

The history of the UK equivalent of *IRDA* section 345(4) was scrutinised in *In re T & N Ltd.*[81] Prior to the reforms which were consolidated in the *IA*, unliquidated tort claims were not provable during insolvent liquidation at all.[82] This was due to section 30 of the *Bankruptcy Act 1914*,[83] which was made applicable to insolvent companies by section 317 of the *Companies Act 1948*.[84] Pertinently, section 30(1) provided that: "Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust shall not be provable in bankruptcy. . . "

This was in substance identical to Singapore's position prior to the passage of the *Bankruptcy (Amendment) Act 2015*.[85] At that time, *BA* section 87(1) reproduced section 30 of the *Bankruptcy Act 1914*, and it also applied to companies.

The position under UK law changed with the introduction of the *IA*, and unliquidated tort claims were made provable. This was achieved through rules 13.12(2) – (4) of *The Insolvency Rules 1986*[86] as originally enacted.[87] Rule 13.12(2) was in substance identical to *IRDA* section 345(4), while (3) – (4) essentially reproduced the definition of "liability" under *IRDA* section 2(1).[88] The net effect of these provisions was that unliquidated tort claims were provable liabilities if they met the cut-off timing in rule 13.12(1),[89] and whether that was so must be answered by reference to rule 13.12(2). This meant that rule 13.12(2) had two effects:

> First, it has the general purpose of making clear that tort claims are provable provided that the cause of action has accrued by the liquidation date. Secondly, it clarifies the position as regards claims for losses which have not occurred at the liquidation date, and may never be incurred. An example would be personal injury cases where provisional damages have been awarded or are claimed, and where the claimant has a right to apply for a further award if, but only if, he develops new diseases or conditions. Another example would be the claim for further loss from a continuing nuisance. . .[90]

Conversely, tort claims were not provable if the cause of action accrued after the date of the winding up order in court ordered insolvent liquidations. Since damage is a necessary element of certain tortious causes of action, such as negligence,[91] certain

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81 *T & N Ltd*, *supra* note 9.
82 *Ibid* at paras 86, 87.
83 4 & 5 Geo 5, Ch 59.
84 c 38.
85 No 21 of 2015.
86 SI 1986/1925 [*IR 1986*].
87 The current equivalent is *IR 2016*, *supra* note 8, r 14.1(4)–(6), which is slightly different for reasons mentioned in *infra* note 93, below.
88 See Part III-C-2, above.
89 r 13.12(1) is in substance identical to *BA* s 87(1)/*IRDA* s 218(2), which were discussed under Part II, above.
90 *T & N Ltd*, *supra* note 9 at para 131.
91 *Ibid* at para 25.

tort claimants could not prove against a liquidating company if they had yet to suffer the relevant damage at the time of the winding up order.

That result was problematic on the facts of *In re T & N Ltd*, as that case involved claims concerning exposure to asbestos, where the damage could arise long after exposure.[92] This led to an amendment in the UK *Insolvency Rules*, such that "actionable damage" is not required if all other elements of the cause of action were present at the time of the winding up order.[93]

Singapore law allowed unliquidated tort claims to be proved in an insolvent liquidation much later. The impetus for the change was the ILRC report, which noted that UK law had moved on from disallowing proof of unliquidated tort claims, and recommended the same approach for Singapore.[94] However, the ILRC did not take a definite position regarding the amendments in UK law that resulted from *In re T & N Ltd*. On this point, the ILRC simply noted that:

> One possible exception [to the point that provability of debts should be the same for bankruptcy and liquidation] is that claims relating to latent tortious damage should not be provable in bankruptcy but should be provable in liquidation: see the amendment brought about by the *UK Insolvency (Amendment) Rules 2006*. . . [95]

The reforms to the *BA* did not touch on this "possible exception", but took on the suggestion that unliquidated tort claims should be provable. This led to *BA* section 87(3), which rendered unliquidated tort claims provable by modifying what was previously section 87(1). *BA* section 87(3) provided that: "Demands in the nature of unliquidated damages arising otherwise than by. . . tort. . . are not provable in bankruptcy."

*BA* section 87(3A) was also introduced, which in substance was identical to rule 13.12(2) of *IR 1986*.

Under the *IRDA, BA* section 87(3) continues to apply to companies through *IRDA* section 218(3). As mentioned however, it was decided that the complementary provision of *BA* section 87(3A) should no longer apply to insolvent liquidations, but continues to apply to bankruptcies through *IRDA* section 345(4).

The reason for this is unclear. The only possible explanation for this based on the discussion above is that the drafter wanted to implement the "possible exception" noted by the ILRC. However, the ILRC also explicitly noted how this change was implemented in the UK—via the amendment of *IR 1986* rule 13.12(2)—as opposed to deleting the provision altogether. If the purpose of this deletion was to follow UK law, the adoption of a completely different drafting technique would be inexplicable. It is therefore necessary to discuss what the effect of the deletion is.

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92 *Ibid* at para 100.

93 *IR 2016, supra* note 8, r 14.1(4)(b). Originally an amendment to the 1986 rules through *The Insolvency (Amendment) Rules 2006*, SI 2006/1272, r 4.

94 *ILRC Report*, *supra* note 34 at 17, paras 21, 22.

95 *Ibid* at 17, note 21. The rationale for this is set out in *infra* note 100, below.

### B. *The Effect of Disapplying Section 345(4) to Companies*

As noted above, section 345(4) has two effects, both of which were described as clarificatory.[96] If section 345(4) is a true clarificatory provision, disapplying it to companies would be completely inconsequential. However, that is unlikely to be the case. The very fact that section 345(4) exists and applies to bankruptcies indicate otherwise.

Thus, section 345(4) must have modified what would otherwise be the position ("the alternative position") in some way, and its disapplication to companies renders the alternative position applicable to them. Unfortunately, there are numerous potential candidates for what that alternative position is.

One possibility which can be dismissed is that under the alternative position, unliquidated tort claims cannot be proven at all. The main support for this view is that since section 345(4) was initially introduced in both the UK and Singapore as part of amendments which made unliquidated tort claims provable, its removal would imply that such claims are no longer provable. This is wrong however, because it would render otiose the parts of *IRDA* section 218(3) which expressly provides for proof of unliquidated tort claims. Parliament must be presumed not to have legislated in vain.[97]

One could take the view that the concept of incurring an obligation is simply inapplicable to torts,[98] in which case a tort liability is only provable if it falls within *IRDA* section 218(2)(a)(i). Contingent tort claims would not be provable then.[99]

The objection to the above is that the range of claims provable during insolvent liquidation should be equivalent to or broader than that of bankruptcy. This is because a claim which is unprovable in bankruptcy can be pursued after the individual has been discharged, whereas such a claim is effectively extinguished in an insolvent liquidation because the company will be dissolved.[100] The treatment of contingent tort claims as being non-provable in an insolvent liquidation, but provable in a bankruptcy by virtue of section 345(4), makes no sense.

Another view could be that, at least for the tort of negligence, an obligation is incurred when a duty of care arises. This submission was rejected in *In re T & N Ltd*, on the basis that the obligation in negligence is to compensate for loss, and such an obligation cannot be incurred until that loss has been suffered.[101] However, this was an outcome which was statutorily mandated in that case in any event, due to the equivalent of *IRDA* section 345(4). A Singapore court is free to take the view that, for the limited purpose of *IRDA* section 218(2)(a)(ii), the relevant "obligation" is the duty of care.

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96 See the text accompanying *supra* note 90, above.

97 *Tan Cheng Bock v Attorney-General*, *supra* note 24 at para 38.

98 Thus it was said in the context of a different statute that "'Any obligation incurred' may not be very apt language to describe a liability in tort. The very words 'liability in tort' could have been used and then there would have been no question": *Smith v Canadian Broadcasting Corp* [1953] 1 DLR 510 at 512. This was cited with approval in *T & N Ltd*, *supra* note 9 at para 131.

99 Such as those described in the text accompanying *supra* note 90, above.

100 *T & N Ltd*, *supra* note 9 at para 140; *Unite the Union v Nortel Networks UK Ltd (in administration)* [2010] 2 BCLC 674 at para 33 (HC); *ILRC Report*, *supra* note 34 at 17, *supra* note 21.

101 *T & N Ltd*, *supra* note 9 at para 142.

A weightier objection to the above view is that it seems overly inclusive, and captures many claims without a substantial basis. Anyone to whom a duty of care is owed would have a provable claim for a contingent future liability, even if there is no clear indication as to whether that duty will be breached. By itself this may not result in absurd consequences, since such a claim would probably have a negligible value when estimated under *IRDA* section 218(4). The claim may also be deemed non-provable by the Court under section 218(6) due to the impossibility of fairly estimating such claims. Nonetheless, it does not seem wise to allow such speculative claims to be made and cause a waste of time in the first place. Further, it is unclear how this approach can be extended to other torts.

The final possibility is the position that is positively provided by UK legislation, allowing tort claims to be provable even in the absence of "actionable damage" at the time of the winding up order.[102] No serious objections can be raised with respect to the substantive desirability of this possibility, especially since it has been adopted by other jurisdictions. Through a process of elimination then, this is perhaps the best view on the effect of disapplying *IRDA* section 345(4) to companies in insolvent liquidation.

### C. *The Surprising Drafting Technique Utilised*

The above analysis showed that Parliament intended to change the time at which a tortious obligation is incurred for the purpose of section 218(2). There is however no evidence of what Parliament intended the new law to be. On an analysis of the substantive desirability of different possible positions, the best view appears to be that the deletion had the effect which other jurisdictions achieved by adding a new provision.

If that is correct, the drafting technique adopted is truly surprising. The flaws of such a technique is self-evident: a change in the law through a deletion means that every other possibility not covered by the deleted provision could potentially reflect the new law. As mentioned, the confusion is enhanced by the fact that the ILRC expressly referred to the legislation adopted in the UK to achieve the same outcome. The reasoning behind the decision to change the law through a pure deletion is thus a mystery.

One point is clear: changes in the substantive law through a deletion without a corresponding substitution is rarely justified. At the very least, the intended effect of such a deletion should be recorded somewhere, such as the explanatory statement to the bill.

## V. Conclusion

The drafting of statutes is difficult, but it is critically important to get it right. Unlike the common law, courts cannot change the interpretation of statutes simply because the outcome is problematic; purposive interpretation cannot be a license to rewrite

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[102] *Supra* note 93. See also Ireland, *Civil Liability Act 1961* (Number 41 of 1961), s 61, which appears to provide substantially the same outcome in a different way. The Irish legislation was referred to in *T & N Ltd*, *supra* note 9 at para 92.

the law. Good drafting may be even more important in the context of the *IRDA*, which plays an important role in strengthening Singapore as an international centre for debt restructuring. The legislation is not intended to serve purely domestic purposes; it would also be referred to by other participants in the international market, and it is important that they are able to determine what Singapore's regime entails just by reading the legislation.

Unfortunately, the discussion above indicates that the *IRDA* might have fallen short of this goal in some respects. Hopefully, the above discussion elucidated some of the difficulties in the legislation, and also provided useful food for thought on how similar drafting problems can be avoided in the future.