IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 214

Companies Winding Up No 156 of 2018

Between

The Working Capitol (Robinson) Pte Ltd (in liquidation)

… Plaintiff

And

Capitol Concepts Pte Ltd

… Defendant

GROUNDS OF DECISION

[Companies] — [Winding up]

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v
Capitol Concepts Pte Ltd

[2018] SGHC 214

High Court — Companies Winding Up No 156 of 2018
Dedar Singh Gill JC
7 September 2018

4 October 2018

Dedar Singh Gill JC:

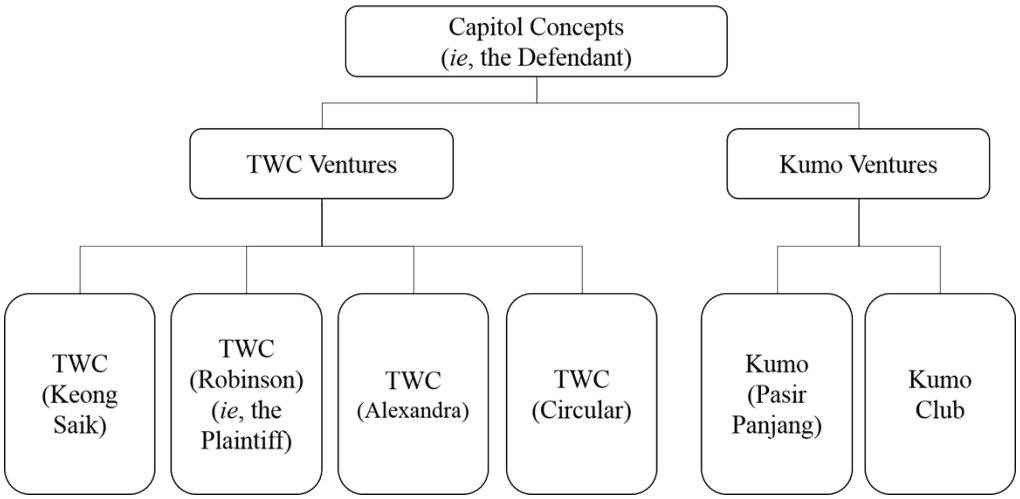
Introduction

1 This was an application by the plaintiff, The Working Capitol (Robinson) Pte Ltd (in liquidation) ("the Plaintiff") to wind up the defendant, Capitol Concepts Pte Ltd ("the Defendant"), on the basis that it was unable to pay its debts.

2 At the conclusion of the hearing on 7 September 2018, I granted the Plaintiff's application and ordered that the Defendant be wound up. The Defendant has since appealed. I now set out the full grounds of my decision.

Background facts

3 The Defendant is the parent company of a group of companies which includes the Plaintiff. Specifically, the Plaintiff is a wholly-owned subsidiary of TWC Ventures Pte Ltd ("TWC Ventures"), which is in turn a wholly-owned subsidiary of the Defendant. The full structure of the group of companies ("the Group") is as follows:



4 The Plaintiff (prior to its liquidation) and The Working Capitol (Keong Saik) Pte Ltd ("TWCKS") were the only entities in the Group that generated revenue. All other entities are dormant.

The loans from the Plaintiff to the Defendant

5 Between July 2017 and February 2018, the Plaintiff extended five loans to the Defendant, totalling $599,200:

S/N	Date	Loan amount ($)
1	25 July 2017	468,000
2	11 October 2017	100,000

3	12 December 2017	30,000
4	27 December 2017	100
5	13 February 2018	1,100
Total		**599,200**

6 Between October 2017 and December 2017, the Defendant repaid a total of $40,520.51:

S/N	**Date**	**Repayment amount ($)**
1	30 October 2017	40,000
2	19 December 2017	520.51
Total		**40,520.51**

7 On 2 March 2018, the Plaintiff was compulsorily wound up.

8 On 27 June 2018, the liquidator of the Plaintiff served a statutory demand for the sum of $558,679.49 (being $599,200 less $40,520.51) on the Defendant. Three weeks lapsed without the Defendant paying the sum owed, or securing or compounding the same to the reasonable satisfaction of the Plaintiff.

9 On 20 July 2018, the Plaintiff filed the present application for the Defendant to be wound up.

Parties' arguments

10 In support of its case that the Defendant should be wound up, the Plaintiff relied on two alternative grounds:[1]

[1] Plaintiff's Written Submissions, para 13.

(a) First, that the Defendant is deemed to be insolvent and unable to pay its debts, pursuant to s 254(2)(*a*) read with s 254(1)(*e*) of the Companies Act (Cap 50, 2006 Rev Ed) ("the CA").

(b) Second, that it is just and equitable that the Defendant be wound up, under s 254(1)(*i*) of the CA.

11 In resisting the application, the main plank of the Defendant's case was that there was a substantial and *bona fide* dispute as to the alleged debt of $558,679.49 owed to the Plaintiff. I will elaborate on this below at [17].

My decision

12 In my judgment, the Defendant failed to establish any substantial and *bona fide* dispute as to the sum of $558,679.49 owed to the Plaintiff. I also found that the Defendant failed to rebut the presumption of insolvency under s 254(2)(*a*) of the CA, and that there were no other reasons why this court should exercise its discretion not to grant the winding up order sought by the Plaintiff.

The applicable legal principles

13 I begin by setting out a brief summary of the applicable legal principles in respect of a winding up application, some of which are fairly trite propositions. A company may be wound up under an order of court on the application of a creditor of the company: s 253(1)(*b*) of the CA. The court may order the winding up if one of the grounds under s 254(1) of the CA is satisfied. For present purposes, we need only concern ourselves with the ground in s 254(1)(*e*), *ie*, that the company is unable to pay its debts.

14 Pursuant to s 254(2)(*a*) of the CA, a company shall be deemed unable to pay its debts if a creditor to whom the company is indebted in a sum exceeding

$10,000 then due has served a statutory demand on the company requiring it to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound it to the reasonable satisfaction of the creditor. I refer to this as the "presumption of insolvency". Where the presumption applies and the debt is undisputed, the creditor is ordinarily entitled to a winding up order (see *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268 ("*Metalform*") at [61]).

15 Where the debt is disputed, the court may dismiss the winding up application on the ground that the *locus standi* of the petitioner as a creditor is in question, and it is an abuse of process of the court for the applicant to try to enforce a disputed debt in this way (see *Metalform* at [62]). However, a company cannot stave off a winding up application merely by alleging that there is a substantial and *bona fide* dispute over the debt claimed by the applicant-creditor. It is the duty of the court to evaluate whatever evidence the company has raised and come to a conclusion on whether the alleged dispute exists. With regard to the applicable standard of proof, the debtor-company must raise triable issues: see *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") at [17] and [23]. Simply put, there must be a dispute which involves to a substantial extent disputed questions of fact which demand *viva voce* evidence, and the company must adduce evidence which supports its contention that there is a substantial dispute (see *Pacific Recreation* at [19], citing Andrew R Keay, *McPherson's Law of Company Liquidation* (Sweet & Maxwell, 2001) at para 3.67, p 122).

16 Although the statutory grounds for winding up may be technically established, the court retains the residual discretion to consider all the relevant factors, including the utility, propriety and effect of a winding up order as well as the overall fairness and justice of the case, before deciding whether to wind

up the company (see *Lai Shit Har v Lau Yu Man* [2008] 4 SLR(R) 348 at [33]). As observed by the Court of Appeal in *BNP Paribas v Jurong Shipyard Pte Ltd* [2009] 2 SLR(R) 949, where a petition to wind up a temporarily insolvent but commercially viable company is filed, many other economic and social interests may be affected, such as those of its employees, the non-petitioning creditors, as well as the company's suppliers, customers and shareholders. These are interests that the court may legitimately take into account in deciding whether or not to wind up the company (at [19]).

Whether there was a substantial and **bona fide** *dispute over the debt*

17 As mentioned, the Defendant disputed the debt of $558,679.49 owed to the Plaintiff. Specifically, the Defendant alleged that there was at least a triable issue that the debt had been set off pursuant to an implied contractual set off agreement within the Group and/or, in any event, a tripartite agreement between itself, the Plaintiff and TWC Ventures.[2] I will address each of these arguments in turn.

The implied contractual set off agreement within the Group

18 On the first argument, the Defendant emphasised that the Group was a family-run business whose entities shared a symbiotic relationship. Allegedly, the Group had a long extant practice of extending loans to its constituent entities in need of funds to meet their operating costs, creating a web of inter-company loans. Further, where appropriate and/or required, these entities would set off or write off mutual debts owed to each other. The Defendant argued that there was at least a triable issue as to whether the Group's practice of setting off and/or writing off inter-company loans could form the basis for an implied contractual set off agreement within the Group.[3]

2 Defendant's Written Submissions, paras 14–22.

19 At this juncture, I highlight that the *sole* piece of evidence the Defendant placed before this court in support of the existence of the Group's alleged practice was TWCKS's Statement of Financial Position for January to December 2017 ("TWCKS's 2017 Statement"). I reproduce below an excerpt from Mr Benjamin Gattie's affidavit dated 28 August 2018:[4]

> **SET-OFF OF INTERCOMPANY LOANS**
>
> 28. CC Group also has a practice of setting off and/or netting off intercompany debts.
>
> 29. To illustrate, I refer to TWCKS's Statement of Financial Position for the year 2017 ("TWCKS's 2017 Statement"), a copy of which is now produced and shown to me marked as TAB 4 of BG-1. TWCKS's 2017 Statement is a clear example of the set-offs of intercompany loans applied within CC Group:

S/N	Date	Description	Amount
1	March 2017	Write-off amount due from [TWC (Alexandra)]	S$535.00
2	December 2017	Write-off amount due from [TWC (Robinson)]	S$316,422.55
3	December 2017	Write-off loan to [Kumo (Pasir Panjang)]	S$75,000.00
4	December 2017	Write-off amount payable to [TWC (Robinson)]	S$2,464.92
5	December 2017	Write-off amount payable to [TWC (Circular)]	S$19.345.00

20 Proceeding on the basis that such a set off arrangement existed, the Defendant then sought to argue that various transactions between the Plaintiff and the Defendant could be set off against each other. The Defendant said that in 2017, it had extended various loans to the Plaintiff, as well as "made various payments of [the Plaintiff's] expenses on behalf of [the Plaintiff]". I reproduce below the list of transactions as set out in Mr Gattie's affidavit:[5]

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3 Defendant's Written Submissions, para 17.

4 Affidavit of Benjamin Gattie dated 28 August 2018, paras 28–29; pp 54–55.

S/N	Date	Description	Amount ($)
1	30 June 2017	Accrual for Brookfield Pass Through Costs Inv 80755	21,187.90
2	5 July 2017	Loan	282,000
3	18 September 2017	Recognition of Brookfield Inv 84553 (Cleaning Feb to Jun 2017)	103,257.03
4	22 September 2017	Deposit to Straits Law (Tarkus) paid by the Defendant on behalf	5,030
5	1 November 2011	Loan	40,000
6	19 December 2017	Loan	520.51
7	31 December 2017	Accrual for Brookfield Pass Through Costs Inv 101198	5,960.18
Total			**457,955.62**

As the loan of $282,000 (in S/N 2 above) had already been repaid, the Plaintiff only owed the Defendant $175,955.62 (*ie*, $457,955.62 less $282,000).

21 The Defendant then said that pursuant to the Group's practice, this sum of $175,955.62 could be set off against the loans of $599,200 that the Plaintiff had extended to the Defendant (see [5] above). Thus, any alleged indebtedness to the Plaintiff was only in the sum of $423,244.38, and not $558,679.49 as the

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[5] Affidavit of Benjamin Gattie dated 28 August 2018, para 22; pp 44–46.

Plaintiff alleged.[6]

22 As can be seen from the above, the Defendant's argument on the "implied contractual set off agreement" required it to first establish the necessary factual substratum – *ie*, that the Group had a practice of setting off inter-company loans. If established, this course of conduct or dealings between the parties and other relevant circumstances could form the basis for a contract to be implied, including a multi-party contract to set off (see, generally, *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 at [46]–[50]). I hasten to add, however, that the Defendant was not required to affirmatively prove the existence of such a practice on a balance of probabilities. At this stage, the standard of proof is one of triable issues. However, I did not consider that the Defendant had crossed even this low threshold. My reasons are as follows.

23 While I could accept that the various financial statements adduced in Mr Gattie's affidavit – specifically, the parties' General Ledgers and Statements of Financial Position – supported the Defendant's assertion that the Group had a practice of granting loans to each other, it did not necessarily follow that the Group had a practice of setting off these inter-company loans. That was a point which had to be proved separately.

24 In this regard, the sole piece of evidence cited by the Defendant, TWCKS's 2017 Statement (see [19] above), was not helpful. To begin with, the transactions set out in the table at para 29 of Mr Gattie's affidavit were in fact write offs (as labelled in the table itself), and not set offs (as described in the main body of para 29). Those are entirely distinct concepts, which the

6 Affidavit of Benjamin Gattie dated 28 August 2018, paras 25–27.

Defendant had erroneously conflated by using the terms interchangeably. I digress to note that it would not have been at all surprising if many of these inter-company loans had been written off, seeing as most of the entities in the Group were insolvent, or at least in financial difficulties at the relevant time. It was a completely different matter to say that those loans could or should be set off against each other pursuant to a practice within the Group.

25 In any event, it should be highlighted that all these transactions involved TWCKS and occurred between March and December 2017. Such evidence was of limited utility in proving that the Group as a whole had a practice of setting off inter-company loans, much less one which the Defendant claimed was "the practice long before any winding up application had been taken out against the [Defendant's] Group entities".[7] In this regard, "practice" connotes a consistent pattern of conduct. One would therefore have expected the Defendant to point to a range of transactions spanning different time periods and involving different parties. Instead, the Defendant cited a single piece of evidence involving just one party and over a fairly limited period of time. This was, in my judgment, clearly insufficient.

26 Furthermore, looking beyond what the Defendant had cited and scrutinising the available affidavit evidence as a whole, I saw no indication that inter-company loans had been set off against each other. The General Ledgers of both the Plaintiff and Defendant only referred to loans being received and repaid,[8] but not that they had been set off. Likewise, their Statements of Financial Positions only showed that the amounts due from other entities in the Group varied in value and at times had been reduced to zero, but there was no explanation provided for these variations.[9] There was no reason to assume that

7 Defendant's Written Submissions, para 15.

8 Affidavit of Benjamin Gattie dated 28 August 2018, pp 44–46 and 48–52.

these decreases were the result of set offs.

27 I digress to note that the lack of financial statements was a point of complaint raised by the Plaintiff in the present application. According to the Plaintiff, the Defendant had not filed its audited financial statements since 29 November 2016, in breach of s 201(1) of the CA.[10] The Defendant did not disclose for inspection, among other documents, the whole of its Statement of Financial Position and its management accounts.[11] The Defendant also did not respond to the Plaintiff's request of 3 September 2018 requesting for further documents to support the Defendant's claim of set off.[12] I need not make more of these points, save to comment that the absence of financial statements would explain why the affidavit evidence presently before the court was so scant.

28 Having rejected the sole piece of evidence cited by the Defendant in support of its contention that the Group had a practice of setting off inter-company loans, and having found no indication of such a practice on review of the rest of the affidavit evidence, what was left before the court was no more than a bare assertion. Thus, applying the principles in *Pacific Recreation* that it is for the defendant to produce evidence supporting its contention that there is a substantial dispute so that the court can evaluate the evidence for itself and conclude whether the alleged dispute exists (see [15] above), my conclusion – in the light of the complete lack of evidence – was that there was *no dispute* as to the debt on the ground of an implied contractual set off agreement within the Group.

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9 Affidavit of Benjamin Gattie dated 28 August 2018, pp 54–56.

10 Plaintiff's Written Submissions, paras 30–31.

11 Plaintiff's Written Submissions, paras 35–36.

12 Plaintiff's Written Submissions, para 54.

The tripartite agreement between the Plaintiff, the Defendant and TWC Ventures

29 The Defendant's second argument was that in any event, its debt to the Plaintiff had been set off pursuant to a tripartite agreement between the Plaintiff, the Defendant and TWC Ventures. The Defendant referred to the Plaintiff's General Ledger for the period from 1 January 2017 to 28 February 2018 and pointed out that the net position was that the Plaintiff owed TWC Ventures $1,565,888.[13] This sum was calculated by taking the ending balance of "Loan from TWC Ventures" less the ending balance of "Amt due fr TWC Ventures" (*ie*, $1,728,500 less $162,612).

30 The Defendant next referred to its Statement of Financial Position for January to December 2017, which recorded payments to TWC Ventures between May and August 2017 totalling $405,000.[14] According to the Defendant, although this sum was labelled a "loan", it was in truth a repayment made on the Plaintiff's behalf, in partial settlement of the latter's debt of $1,565,888 to TWC Ventures.[15] On this basis, the Defendant argued that there was a triable issue as to what the payment of $405,000 to TWC Ventures actually was, and that this issue could not be readily resolved on the affidavit evidence before this court, but would take "an exercise in the examination of the books and records of the entities involved, as well as the circumstances leading up to the loan."[16]

31 In my judgment, there was simply no factual basis to support the Defendant's argument that its payment of $405,000 to TWC Ventures in May

13 Affidavit of Benjamin Gattie dated 28 August 2018, para 35; pp 48 and 50–51.

14 Affidavit of Benjamin Gattie dated 28 August 2018, p 58.

15 Affidavit of Benjamin Gattie dated 28 August 2018, paras 35–37.

16 Defendant's Written Submissions, paras 18 and 21–22.

to August 2017 was repayment on the Plaintiff's behalf, pursuant to a tripartite agreement between itself, the Plaintiff and TWC Ventures. As the Plaintiff pointed out, on 1 June 2018, TWC Ventures had filed a proof of debt against the Plaintiff for the sum of $1,565,931.[17] This closely approximates $1,565,888, which was the amount recorded in the Plaintiff's General Ledger as owing to TWC Ventures (see [29] above). This clearly showed that TWC Ventures did not treat the Defendant's payment of $405,000 as a repayment on the Plaintiff's behalf. More importantly, this was entirely consistent with the Defendant's own records: in its Statement of Financial Position, the Defendant's payment of $405,000 to TWC Ventures was recorded under the item "Loan to TWC Ventures" instead of a repayment of the Plaintiff's debt, as one would expect if that were truly the case.

32 Further, as the Plaintiff pointed out, the sum of $405,000 was not recorded in the Plaintiff's books, nor was it recorded in TWC Ventures' books as a repayment of the monies owed to it from the Plaintiff.[18] In contrast, where there were repayments of loans between the Defendant and TWC Ventures, these were specifically recorded in the Defendant's General Ledger as "partial repayment of loan".[19] The absence of similar records for the Plaintiff and TWC Ventures strongly suggested that the Defendant's payment of $405,000 was simply what it was recorded as – a loan to TWC Ventures. Thus, having regard to the evidence before the court, I found that there was *no dispute* as to the debt on the ground of a tripartite agreement between the Plaintiff, the Defendant and TWC Ventures.

33 In the premises, I concluded that the Defendant failed to raise any triable

17 Affidavit of Don Ho Mun-Tuke dated 4 September 2018, p 21.

18 Affidavit of Don Ho Mun-Tuke dated 4 September 2018, paras 34–35.

19 Affidavit of Don Ho Mun-Tuke dated 4 September 2018, p 43.

issues. There was therefore no substantial and *bona fide* dispute as to the debt of $558,679.49 that it owed to the Plaintiff.

Whether the presumption of insolvency was rebutted

34 I turn now to consider whether the Defendant successfully rebutted the presumption of insolvency under s 254(2)(*a*) of the CA, which arose when the Defendant failed to pay, secure or compound the sum stated in the statutory demand served on it, within three weeks. In this regard, the Defendant's sole argument was that it was not "hopelessly insolvent" because its total assets still exceeded its total liabilities.[20] However, as the Plaintiff pointed out, as of December 2017, the Defendant's total assets only exceeded its total liabilities by a mere $122,026.65.[21] This was by no means a large sum: it was insufficient to pay off even the whole of the Defendant's debt to the Plaintiff.

35 Further, it is important to bear in mind that insolvency may be established as a fact in ways other than by a consideration of a company's total assets and liabilities. As noted by the High Court in *Chip Thye Enterprises Pte Ltd (in liquidation) v Phay Gi Mo and others* [2004] 1 SLR(R) 434 at [17], under s 254(2)(*c*) of the CA, the court may also look at the company's accumulated losses to see if they are in excess of its capital; the nature of assets of the company; current liabilities over current assets; prospects of fresh capital or financial support from shareholders and incoming payments from any source to discharge the debts, including credit resources. Applying these guidelines, it became quite apparent that the Defendant was insolvent. As of December 2017, its current liabilities exceeded its current assets by $1,433,816.52, and its cash

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20 Defendant's Written Submissions, para 26.

21 Affidavit of Don Ho Mun-Tuke dated 4 September 2018, p 20; Affidavit of Benjamin Gattie dated 28 August 2018, pp 58–59.

and cash equivalents fell far short of its total liabilities by $3,140,008.70.[22] Overall, the Defendant was unable to meet its liabilities from its most liquid assets, meaning that it could not pay its debts as they fell due.

36 In the premises, notwithstanding that its total assets exceeded its total liabilities, I held that the Defendant failed to rebut the presumption of insolvency, and thus the ground under s 254(1)(*e*) of the CA was established.

Whether the court should exercise its discretion to dismiss the winding up application

37 The final issue pertained to whether this court should exercise its discretion to dismiss the winding up application, even where grounds for winding up had been established. The Defendant argued that the court should not order a winding up because the entire Group would be put at risk of being pushed into a state of insolvency. In particular, a winding up order would put TWCKS, the only operationally active and revenue-generating entity in the Group, at risk. The Defendant argued that it just needed "breathing space" to extract itself from a "temporary cash crunch".[23]

38 I disagreed with the Defendant. TWCKS may have been operationally active, but it was quite clearly insolvent as well. As of December 2017, its total liabilities exceeded its total assets by approximately $2.6 million; its current liabilities exceeded its current assets by approximately $3.8 million; and its total liabilities exceeded its cash and cash equivalents by slightly over $10 million.[24] All other entities in the Group were dormant companies.[25] Unlike what the

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22 Affidavit of Don Ho Mun-Tuke dated 4 September 2018, p 20.

23 Defendant's Written Submissions, paras 27–28.

24 Affidavit of Don Ho Mun-Tuke dated 4 September 2018, p 17.

25 Affidavit of Benjamin Gattie dated 28 August 2018, para 16; Affidavit of Don Ho

Defendant asserted, it was clear to me that this was not a situation of temporary illiquidity that the Group, let alone the Defendant, could extricate itself from. There was thus no reason not to grant the winding up order sought by the Plaintiff.

Miscellaneous

39 For completeness, I should mention that the Plaintiff argued extensively in its written submissions that its loans to the Defendant constituted unfair preference transactions, and were liable to be clawed back by the liquidator.[26] I made no findings on this point as I did not consider it to be relevant to the present application to wind up the Defendant.

Conclusion

40 For the foregoing reasons, I therefore granted the prayers sought by the Plaintiff in the following terms:

(a) that a winding up order be made against the Defendant;

(b) that Mr Medora Xerxes Jamshid be appointed as liquidator of the Defendant; and

(c) that the costs of the winding up proceedings are to be taxed, if not agreed or fixed, and paid to the Plaintiff out of the assets of the Defendant.

Mun-Tuke dated 4 September 2018, paras 6 and 8.

[26] Plaintiff's Written Submissions, paras 58–76.

Dedar Singh Gill
Judicial Commissioner

Pancharatnam Jeya Putra and Shakti Krishnaveni Sadashiv (AsiaLegal LLC) for the plaintiff;
Qua Bi Qi and Yeo Lai Hock, Nichol (JLC Advisors LLP) for the defendant.