IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 71

Companies Winding Up No 34 of 2020

Between

BW Umuroa Pte Ltd

… *Plaintiff*

And

Tamarind Resources Pte Ltd

… *Defendant*

JUDGMENT

[Companies] — [Winding up]
[Arbitration] — [Agreement]

BW Umuroa Pte Ltd
v
Tamarind Resources Pte Ltd

[2020] SGHC 71

High Court — Companies Winding Up No 34 of 2020
Choo Han Teck J
28 February, 6 March 2020

6 April 2020 Judgment reserved.

Choo Han Teck J:

1 This is the plaintiff's application to wind up the defendant on the basis of an unsatisfied statutory demand arising from two unpaid invoices. The plaintiff is a Singapore-incorporated company which is part of a group of companies known as the "BW Group". The group owns and charters shipping vessels to oil and gas extraction companies. The defendant is a Singapore-incorporated company engaged in the business of oil and gas extraction, and is part of a group of companies known as the "Tamarind Group".

2 On 16 September 2019, the defendant chartered a Floating and Production Storage and Offloading vessel ("Vessel") from the plaintiff under a charter contract ("Bareboat Charter"). On the same day, a company related to the plaintiff named BW Offshore Singapore Pte Ltd ("BWO Singapore") entered into a separate Operations and Maintenance Agreement ("O&M

Agreement") with a New Zealand based company related to the defendant named Tamarind Taranaki Ltd ("TTL") for the maintenance of the Vessel. Neither BWO Singapore nor TTL are parties to the present application, but their involvement will be explained in the narrative below. According to the plaintiff, the Bareboat Charter and O&M Agreement together were intended to replace an even earlier charter contract ("Original FPSO Charter Contract") for the Vessel between BWO Singapore and TTL dated 18 November 2005.

3 On 30 September 2019, the plaintiff issued an invoice to the defendant under the Bareboat Charter for US$819,375 in respect of the hire of the Vessel for the period from 16 to 30 September 2019. On 31 October 2019, the plaintiff issued another invoice for US$1,683,761 in respect of the hire for the month of October 2019. These two sums comprise the alleged unpaid debt ("Alleged Unpaid Debt") of US$2,503,136 which forms the basis of the plaintiff's present winding up application. According to the plaintiff, the Bareboat Charter and O&M Agreement were both subsequently terminated sometime between October and November 2019.

4 On 27 December 2019, the plaintiff, through its solicitors, served a statutory demand for the Alleged Unpaid Debt on the defendant. The defendant did not apply to set aside the same, allegedly due to some miscommunication on its end. Subsequent correspondence between the counsel for both sides failed to yield any resolution, and nothing was done to satisfy the statutory demand.

5 On 29 January 2020, the plaintiff filed the present winding up application. On 31 January 2020, the defendant issued a notice of arbitration against the plaintiff pursuant to an arbitration clause in the Bareboat Charter, apparently to obtain declarations that the plaintiff was not entitled to the Alleged

Unpaid Debt and was in breach of the Bareboat Charter. The defendant concurrently applied before an emergency arbitrator for an injunction to restrain the plaintiff from filing a winding up application. This application was dismissed pursuant to an interim order issued by the emergency arbitrator dated 13 February 2020.

6 In the present winding up application, counsel for the defendant, Mr Arvin Lee, submitted, *inter alia,* that the application should be stayed, if not dismissed, on the following grounds:

(a) First, the Alleged Unpaid Debt is disputed, and the dispute should be referred to arbitration as agreed by the parties under the Bareboat Charter. Further, where such an arbitration agreement exists, the law on the standard of proof, which the defendant must meet to show that there is a dispute over the debt which should be referred to arbitration, is in a state of flux.

(b) Second, the defendant has substantial cross-claims against the plaintiff, which should also be referred to arbitration as agreed by the parties under the Bareboat Charter.

(c) Third, the defendant is solvent.

7 The plaintiff, represented by Mr Sim Kwan Kiat, disputed all the above grounds. Mr Sim submitted that the defendant should be wound up on the ground set out in s 254(1)(e) read with s 254(2)(a) of the Companies Act (Cap 50, 2006 Rev Ed) – namely, that the defendant is presumed insolvent and unable to pay its debts on the basis of an unsatisfied statutory demand. Alternatively, Mr Sim submitted that the defendant be given a maximum of

seven days to make full payment of the Alleged Unpaid Debt, or to secure or compound the same to the satisfaction of the plaintiff.

8 Whether the winding up application should be stayed or dismissed is the main issue before me, and is an issue that must obviously be determined by Singapore law, regardless of whether the arbitration court might be applying another law for the substantive dispute over the debt and cross-claim, if any. In other words, Singapore law governs whether the defendant has rebutted any presumption that it is unable to pay its debts, or met the requisite standard of proof in showing that there is a "dispute" over the debt or that it has a "cross-claim", so as to justify a stay or dismissal of the present application.

9 On the other hand, the "dispute" and "cross-claims" which form the defendant's case arise from one of the three agreements referred to in [2] above (in particular, the Bareboat Charter). All three agreements contain a clause stating that English law governs the agreement. No submissions were made before me as to why these clauses would not be operative. That being the case, the defendant has to show that it has raised a "dispute" over the debt or a "cross-claim" under the relevant agreement, which has a sufficient basis in English law to meet the requisite standard of proof under Singapore law for staying or dismissing a winding up application. There is a fine but appreciable difference between the law applicable to the agreements which form the basis of the defendant's dispute and cross-claims, and the law applicable to the granting, staying or dismissal of a winding up application.

10 The defendant incorrectly claimed that there is a "dispute" over the debt as well as "cross-claims" under the relevant agreements in Singapore law. In respect of the "dispute" over the debt, Mr Lee acknowledged that the Bareboat

Charter is in fact governed by English law. He went on, however, to submit that "English law [would still] reach the same result as to whether the debt is 'disputed' " for the purpose of granting a stay on winding up proceedings. Mr Lee fails to appreciate the distinction mentioned in [9] above. For his part, Mr Sim also appeared to assume that Singapore law applies to the agreements when arguing that the defendant had not raised a proper "dispute" or "cross-claim" under those agreements.

11 Although any "dispute" or "cross-claim" arising from the agreements is to be governed by English law, no argument under English law was advanced to substantiate any such "dispute" or "cross-claim". As I mentioned, the main question is whether to stay or dismiss the winding up application, which must clearly be determined by Singapore law, and on which question I find that even the lower standard of proof (as discussed later below) has not been met.

12 Even if I accept that Singapore law applies to the relevant agreements, the defendant has not shown that either ground has sufficient basis in Singapore law to meet the standard of proof (also under Singapore law) to obtain a stay or dismissal.

13 Mr Lee's first argument is that Singapore law on the standard of proof applicable to raising a dispute over the debt in question is uncertain. It is well-established that to obtain a stay or dismissal of a winding up application, a debtor company may show that there is a substantial and *bona fide* dispute over the debt. Generally, to determine that such a dispute exists, the court must be satisfied that the debtor company has made out a "triable issue".

14 Where there is an arbitration agreement between the parties (as there is in the present case), the High Court in *VTB Bank (Public Joint Stock Co) v Anan Group (Singapore) Pte Ltd* [2018] SGHC 250 has held that the standard of proof remains the same, notwithstanding the presence of the arbitration agreement. On the other hand, in *BDG v BDH* [2016] 5 SLR 977 and *BWF v BWG* [2019] SGHC 81, the Court there held that to obtain a stay or dismissal of the winding up application, the debtor company need only meet a lower standard – namely, that there is a "*bona fide prima facie*" case that a dispute exists, and it falls within the scope of the arbitration agreement. If this standard is met, then the dispute should be referred to arbitration as agreed by the parties. According to Mr Lee, the latter two High Court decisions are currently on conjoined appeals to the Court of Appeal regarding this very issue on the applicable standard of proof. Mr Lee submitted that if this court does not grant at least a stay on the present application, this court takes the risk that it may reach a verdict *per incuriam*. Mr Sim has, however, stated that the plaintiff is prepared to proceed on the basis that the lower standard of proof is applicable, and it takes the position that the defendant cannot even satisfy that. I do not think that the risk of deciding *per incuriam* is a reason for not deciding this matter, and will proceed on the assumption that the lower standard of proof applies, there being no prejudice to the defendant.

15 In my view, the defendant has not even managed to raise a *bona fide prima facie* dispute over the Alleged Unpaid Debt. The defendant has repeatedly and vigorously emphasised that it is disputing the Alleged Unpaid Debt, and that the dispute should be referred to arbitration. To this end, Mr Lee argued that although an officer of the defendant had approved the two unpaid invoices in an email dated 13 December 2019, the same officer retracted the said email

on the very same day. According to Mr Lee, it could thus not be said that the defendant had unequivocally admitted to the Alleged Unpaid Debt. Mr Lee further referred to two provisions in the Bareboat Charter. The first was Article 12.4, which provides that if the defendant wished to dispute any amount reflected in an invoice, it had to do so within 14 days of receipt, failing which the invoice would be deemed accepted. The second was Article 12.1(d), which purports to exclude any right of set-off in respect of payments owed by the defendant to the plaintiff. Mr Lee contended that (under Singapore law) those provisions do not prevent the defendant from disputing the relevant invoices now or raising a "set-off" defence, and their true construction ought only to be decided through arbitration.

16 Putting aside my earlier point that the Bareboat Charter should be governed by English law, even if I fully accept all of Mr Lee's contentions above, none of them had stated the basis on which the defendant is now disputing the Alleged Unpaid Debt. Despite the fact that having to show a *bona fide prima facie* dispute is a low standard of proof to meet, I do not think that the defendant has done even that. As Mr Sim rightly pointed out, a bare allegation that a dispute exists is insufficient. I do not find the defendant's submissions before the emergency arbitrator to be of any assistance either, as they similarly do not tell me what the defendant's basis for its dispute is.

17 Turning to Mr Lee's second argument, he submitted that the defendant has genuine and serious cross-claims based on substantial grounds against the plaintiff, which exceeds the Alleged Unpaid Debt and should be referred to arbitration. Mr Lee accepted that in respect of a cross-claim, the applicable standard of proof requires the defendant to show that "there is a likelihood that

[the winding up application] may fail or that it is unlikely that a winding-up order would be made" (see *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268 (*"Metalform"*) at [77]). In *Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) v Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theem Park Investments Ltd)* [2011] 4 SLR 997, Quentin Loh J made the observation (with which I concur) that this is no different from the "triable issue" standard.

18 Although Mr Sim did not specifically submit on the applicable standard of proof for a cross-claim, it was unnecessary for him to do so because Mr Lee's acceptance of the higher "triable issues" standard was already to the plaintiff's advantage. In my view, however, it is altogether very strange for both parties to proceed on the basis that the higher "triable issue" standard applies to the alleged cross-claim, but the lower standard (*ie,* that there is a *bona fide prima facie* case) applies to a disputed debt. As far as the applicable standard of proof is concerned, it is not obvious to me why any distinction should be drawn between a cross-claim and a disputed debt insofar as both are grounds for calling into question the *locus standi* of a creditor to present a winding up application against a debtor company (see *Metalform* at [68]).

19 In any event, I do not think that the defendant has met either standard of proof in respect of its alleged cross-claims against the plaintiff. The cross-claims are based on the defendant's allegations that:

(a) the plaintiff and/or BWO Singapore had mismanaged machinery on the Vessel; and

(b) the plaintiff had made unauthorised changes to the pipework on the Vessel in order to divert oil.

20 Based on Mr Lee's submissions (presumably based on Singapore law), it is clear that these alleged cross-claims are all contractual in nature, and not grounded in tort or some other basis independent of contract. Mr Lee referred, *inter alia,* to two provisions in the Bareboat Charter between the plaintiff and defendant. Article 8.9 states that the defendant bears the obligations relating to the maintenance of the Vessel. Article 8.10 goes on to say that the defendant shall enter into an agreement with BWO Singapore, under which the latter would assume the former's maintenance obligations in Article 8.9. I repeat, for the avoidance of doubt, that it was eventually TTL (and not the defendant) which entered into the O&M Agreement with BWO Singapore in respect of maintenance of the Vessel.

21 The defendant alleged that because the plaintiff and/or BWO Singapore had mismanaged machinery on the Vessel, BWO Singapore had thereby breached its obligations regarding maintenance under the Original FPSO Charter Contract (which was the only contract in force at the time). According to Mr Lee, BWO Singapore's breaches are "continuing breaches and carry over to the [subsequently executed] Bareboat Charter" pursuant to Article 8.9 read with 8.10. He submitted that the liability of BWO Singapore for the said breaches of the Original FPSO Charter Contract and the subsequent Bareboat Charter can be attributed to the plaintiff, given the "inter-connected relationship" between the plaintiff, defendant, BWO Singapore and TTL. Mr Lee accepted that the basis for such attribution is "less clear than desired", but he argued that the matter should still be referred to arbitration.

22 Again, putting aside the fact that the relevant agreements should be governed by English law, there are immense difficulties with the defendant's alleged cross-claims under Singapore law. As Mr Sim correctly pointed out, the maintenance obligations which were allegedly breached are those of BWO Singapore under the Original FPSO Charter Contract. The only parties to that agreement were BWO Singapore and TTL, and not the plaintiff and defendant themselves. It is unclear what Mr Lee means when he says that BWO Singapore's continuing breaches are "carried over" to the Bareboat Charter. The Bareboat Charter was entered into between the plaintiff and defendant only, and does not bind BWO Singapore. Even if there was a failure to maintain the Vessel which is governed by the Bareboat Charter, it is clear that as between the plaintiff and defendant, it would be the latter who owes the relevant maintenance obligation under Article 8.9. Insofar as such a failure (if any) is governed by the O&M Agreement instead, again, it is BWO Singapore and TTL who are the parties to that agreement, and not the plaintiff and defendant. Mr Lee's argument that BWO Singapore's continuing breaches "carry over" to the Bareboat Charter is an attempt to cross an unbridgeable chasm.

23 It is therefore entirely unclear how the plaintiff itself owes any obligation to maintain the Vessel, or how the defendant has *locus standi* to sue it for any breach of the same, under the Original FPSO Charter Contract, the Bareboat Charter or the O&M Agreement. As for the basis on which BWO Singapore's liability under the first and last of these agreements can be attributed to the plaintiff, Mr Lee's concession that it is "less clear than desired" is an understatement – the defendant failed to establish any *prima facie* basis at all, much less raise a triable issue. Indeed, the defendant's lack of particularisation in this respect suggests that its cross-claims are not genuine or

made *bona fides*. That being the case, it is unnecessary for me to also decide whether there is a *bona fide prima facie* case that the defendant's alleged cross-claims fall within the arbitration clause in the Bareboat Charter.

24 In light of the foregoing, it is presumed from the unsatisfied statutory demand (served on the defendant on 27 December 2019) that the defendant is unable to pay its debts. In this respect, Mr Lee's third and final argument was that the defendant is in fact solvent. According to Mr Lee, the defendant's management accounts show that it is "balance sheet" solvent, in that its total assets exceed its total liabilities. Mr Sim argued that the defendant fails to show that it is also "cash flow" solvent, and that in any event, it is not "balance sheet" solvent because many of the defendant's assets do not have the value which the defendant ascribed to it, and other major liabilities have also not been taken into account.

25 In my view, there is no real reason to engage in a detailed inquiry into the defendant's financial standing. The present winding up application is based on an unsatisfied statutory demand for the Alleged Unpaid Debt. I find that the defendant has not successfully raised the defence that there is a dispute over the debt or that it has cross-claims against the plaintiff which should be referred to arbitration. I agree with Mr Sim's submission that if the defendant is genuinely solvent as it claims, it should have satisfied the statutory demand. It is no defence to a valid statutory demand for the defendant to say that it is solvent, but that it refuses to pay, compound or secure the debt. Since I rejected the other grounds put up by the defendant, I was thus prepared to grant the application with a stay of execution for two weeks for the defendant to pay, secure or compound the debt. However, the plaintiff's counsel informed the court on

2 April 2020 that it had received a letter on 28 March 2020 from the newly-appointed receivers and managers of the defendant, indicating that the defendant had been placed in receivership. This makes it clear that the defendant is not solvent.

26 In the circumstances, I grant the first, second and third prayers of the plaintiff's application in the following terms:

(a) That a winding up order be made against the defendant;

(b) That Joshua James Taylor and Yit Chee Wah be appointed the joint and several liquidators of the defendant;

(c) That the costs of the proceedings be taxed, if not agreed or fixed, and be paid to the plaintiff out of the assets of the defendant; and

(d) Liberty to apply.

Choo Han Teck
Judge

Sim Kwan Kiat and Ho Zi Wei (Rajah & Tann Singapore LLP) for the plaintiff;
Lee Wei Yuen Arvin (Wee Swee Teow LLP) for the defendant.