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

[2023] SGHC 315

Companies Winding Up No 138 of 2023

In the matter of Section 125(1)(*e*) of the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018)

And

In the matter of Viva Capital (SG) Pte Ltd

Between

61 Robinson Pte Ltd

… *Claimant*

And

Viva Capital (SG) Pte Ltd

… *Defendant*

EX TEMPORE JUDGMENT

[Insolvency Law — Winding up — Unable to pay debts]

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v
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Goh Yihan J:

1 This is the claimant's application for a winding up order against the defendant on the ground that the defendant is unable to pay its debts pursuant to s 125(1)(*e*) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA"). After considering the parties' submissions, I allow the application for the reasons below.

Background facts

2 The claimant is the registered owner of the property located at 61 Robinson Road, Singapore 068893 ("61RR"). The defendant is part of the Viva Land Group, which is a group of companies ("Viva Group") that is primarily in the business of regional real estate.

3 In September and October 2022, the Viva Group leased several units in 61RR. In this connection, four letters of offer and/or lease agreements were entered into between Robson (CP) Investment Pte Ltd ("Robson") and the defendant. These were as follows:

(a) a letter of offer dated 1 September 2022 for the lease of unit #18-01 of 61RR (the "Office Unit") between Robson as landlord and the defendant as tenant, and a lease agreement dated 13 September 2022 in respect of the Office Unit (the "Lease Agreement") for a period of three years initially commencing 15 September 2022 at a monthly rate of $77,883.12;

(b) a letter of offer dated 1 October 2022 for the lease of units #01-01 and #01-02 of 61RR (the "Café Unit") between Robson as landlord and Viva Saigon Food Pte Ltd as tenant;

(c) a letter of offer dated 1 October 2022 for the lease of units #05-01 to #05-04 of 61RR (the "Gallery Unit") between Robson as landlord and Viva iSales Pte Ltd as tenant.

For convenience, I shall term all of these documents collectively as the "Lease Documents".

4 The current dispute concerns the Office Unit, which is the subject of the Lease Agreement. As Robson's rights under the Lease Agreement were eventually assigned to the claimant on 16 November 2022, I shall, for convenience, refer to the "claimant" and the "defendant" when referring to the parties of the Lease Agreement. Similar with the rest of the Lease Documents, the Lease Agreement contained, among other terms, a number of key characteristics.

(a) First, there was a no-oral modification clause, which provided that its terms shall comprise the whole of the agreement between the parties, unless varied or supplemented to by any subsequent written agreement signed between parties ("NOM Clause").

(b) Second, the Lease Agreement did not contain any provision that would have allowed the defendant to terminate the agreement prior to the expiry of the agreed three-year fixed term.

(c) Third, the Lease Agreement provided that in the event that (i) any Rent or Service Charge or any other sums payable is unpaid for 14 days, or (ii) the defendant fails or neglects to perform or observe any covenants, conditions, or agreements, among other things, the claimant could re-enter the premises to repossess the premises.

(d) Finally, the Lease Agreement provided that the defendant was to pay to the claimant (i) one month's advance rent and service charge upon acceptance of the letter of offer (the "Advance"), and (ii) a security deposit equivalent to four-and-a-half months' Rent and Service Charge (the "Security Deposit"). In this connection, it was agreed that, unless expressly agreed in writing by the claimant, the claimant is entitled to retain the Security Deposit should the defendant purport to terminate the Lease Agreement prematurely before the expiry of the agreed three-year fixed term.

5 The parties' dispute concern whether the Lease Agreement was terminated by an oral agreement following a meeting between the parties on 10 October 2022 (the "October Meeting").

6 The claimant's version of events is that during the October Meeting, the defendant's representatives informed the claimant's representatives that the Viva Group no longer had the necessary capital to proceed with the leases under the Lease Documents. Since the Lease Documents did not provide for a right to early termination, the Viva Group, including the defendant, proposed that Robson could retain the Advance and Security Deposit with respect to each lease, in consideration for allowing the various Viva Group entities to terminate the Lease Documents (the "Proposal"). While the claimant's representative listened to this Proposal, its position is that it did not accept it. Instead, immediate steps were taken to correct any misunderstanding that the defendant may have regarding the October Meeting. In this regard, the claimant's representative spoke with the defendant's Ms Evelyn Ku ("Ms Ku") to make clear that it had not agreed to the Proposal. However, as a gesture of good-will, the claimant would try to find replacement tenants and if it managed to do so, then parties could discuss the commercial terms of the Proposal.

7 In the end, the claimant managed to find replacement tenants in respect of the Café and Gallery Units. The claimant therefore allowed the relevant Viva Group entities to terminate the Lease Documents for those units prematurely. As such, the parties executed a deed of surrender with respect to each of the Café and Gallery Units in December 2022 and January 2023, respectively (collectively, the "Deed(s) of Surrender"). In contrast, there was no replacement tenant willing to take up the Office Unit. Hence, according to the claimant, the Lease Agreement was never terminated.

8 By this version of events, the Lease Agreement continued afoot. Because the defendant never paid its outstandings under the Lease Agreement, the claimant issued a statutory demand ("SD") on 23 June 2023 in respect of the underlying debt to this application, namely the Rent and Service Charge for the

lease of the Office Unit for the period from 1 January 2023 to 30 June 2023 (the "Debt"). After deducting the Advance and Security Deposit from the Debt, the amount owned by the defendant to the claimant remains $142,785.72 as on 23 June 2023. Since the SD has not been satisfied within the statutorily prescribed three-week period, the defendant is deemed unable to pay its debts pursuant to s 125(2)(*a*) of the IRDA.

The parties' positions

9 As against the claimant's version of events, the defendant raises a number of defences. These are that (a) the Debt does not exist as the Lease Agreement was terminated by mutual agreement entered into by the claimant and the defendant on 10 October 2022, and for valuable consideration, (b) the Debt is disputed on substantial grounds and the claimant was fully aware of such grounds from 6 March 2023, and (c) the amount of the Debt stated in the SD is wrong as it had not taken into account the amount already paid to the claimant as deposits and advance payment.

10 To substantiate its points, the defendant points out that the claimant's conduct after 10 October 2022 was consistent with the parties' understanding that the Lease Agreement had been terminated. In particular, there was no communication between the parties from 19 October 2022 until 6 March 2023. The claimant also did not follow up with the defendant with the usual lease commencement and management activities, such as the collection of keys, the fitting out of the Unit, taking possession of the Unit, and/or invoicing the defendant. As such, the defendant further submits that the present application is defective and an abuse of process. In particular, the defendant emphasises that the proposal discussed on 10 October 2022 was to terminate all of its leases at 61RR and not just any one or two of them.

11 In turn, the claimant's position is that the termination agreement which the parties allegedly reached on 10 October 2022 either does not exist or is ineffective due to the presence of the NOM Clause. In any event, the defendant's own subsequent conduct and documentary evidence are inconsistent with there being any such alleged termination agreement.

12 In sum, the sole question that arises from these various defences is whether there exists a triable issue that the Lease Agreement was terminated by an oral agreement at the meeting on 10 October 2022. Indeed, in order for a debtor company to avoid a winding up order, it must raise one or more triable issues by adducing evidence that supports its contention that there is a substantial and *bona fide* dispute (see the Court of Appeal decision of *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 at [17]–[19]).

My decision: the application is allowed

13 In my judgment, the defendant's defences, which really relate to the question of whether there was an oral agreement between the parties to terminate the Lease Agreement following the meeting on 10 October 2022, do not raise any triable issues.

14 First, it is undisputed that the Lease Agreement contains a NOM Clause. As such, even if the parties had entered into an oral agreement on 10 October 2022, that agreement cannot lightly supersede the express terms of the Lease Agreement, including the NOM Clause. As the Court of Appeal held in *Charles Lim Teng Siang and another v Hong Choon Hau and another* [2021] 2 SLR 153 (at [61]), a NOM Clause raises a rebuttable presumption that, in the absence of an agreement in writing, there would be no variation of the underlying contract.

In the present case, the defendant has not raised any convincing evidence to show that the parties intended to vary the Lease Agreement. As such, the defendant's defence as premised on the oral agreement to terminate is a non-starter. The parties cannot validly enter into such a termination agreement without it being in writing. In this regard, it is undisputed that there is no deed of surrender in relation to the Lease Agreement, while there are Deeds of Surrender for the other Lease Documents.

15 Second, the parties' conduct after 10 October 2022 is consistent with there being no oral agreement to terminate the Lease Agreement. Most crucially, the claimant sent the defendant a notice of assignment of the Lease Agreement on 16 November 2022. Had the Lease Agreement been validly terminated in October 2022, there would have no need to send this notice, nor would the defendant have acknowledged receipt of it without raising any queries. While the defendant has disputed the authenticity of the signature of its representative on the notice, the defendant has not raised any evidence in support of such a serious allegation. Also, while the defendant alleges that the claimant did not reach out to it until 6 March 2023 in respect of rental invoices and other matters, this is flatly contradicted by, among other things, WhatsApp correspondence between the claimant's Mr Michael Sidaway and the defendant's Ms Ku in February 2023 about where to send the invoices. Moreover, even by March and April 2023, the defendant's representatives were still messaging (over WhatsApp) the claimant about an "amicable resolution" of the Lease Agreement and similar matters. If there was indeed an oral agreement to terminate the Lease Agreement following the October Meeting, then there would be no reason for the defendant to send these messages to the claimant. These messages would only make sense if the parties had not reached a definite agreement to terminate the Lease Agreement.

16 Third, while the defendant's Ms Ku sent an email on 19 October 2022 to confirm that the defendant would not proceed with the leases at 61RR, I do not find that email to be material. For completeness, the email had stated:

> As per discussion between Anthony and Lian last week, we would not proceed with the leases at 61RR. Both parties are agreeable that the matters are considered closed with the forfeiture of the security deposits. Please send us an official letter to wrap things up. Thanks.

It is not disputed that the claimant did not send any such "official letter" to confirm the contents of this email. In any event, given the presence of the NOM Clause, the defendant bears the onus of following up further if the claimant (or Robson) had not responded to this email.

17 Fourth, the claimant issued Deeds of Surrender for the Café and Gallery Units in December 2022 and January 2023, respectively. If, as the defendant alleges, the parties had reached an agreement at the October Meeting to terminate the Lease Documents forthwith, including the Lease Agreement, then it is inexplicable why the claimant would not only have taken a few months after October 2022 to prepare these documents, but also issued them separately as opposed to at one go (see also the High Court decision of *SCP Holdings Pte Ltd v I Concept Global Growth Fund and another matter* [2023] SGHC 269, which also considered the time taken to prepare the relevant documentation as a factor in negating an account of an oral agreement). This put paid to the defendant's argument that the parties had an agreement on all of the leases collectively; if that were the case, the parties would not be discussing these deeds on a unit-by-unit basis.

18 Finally, while the defendant has raised all kinds of alleged inconsistencies in the claimant's affidavit – which I need not explore in detail – they do not relate to the core issue in the present case: did the parties enter into

a valid oral agreement to terminate the Lease Agreement? In my view, these inconsistencies, even if they exist, have no bearing on this core issue.

Conclusion

19 For all the reasons above, I conclude that there is no triable basis on which to allege that the Debt is disputed. As all the papers are in order, I allow the application. I make the winding up order against the defendant, as well as the consequential orders.

20 I also order that the defendant pays costs of $10,000 plus reasonable disbursements to the claimant.

Goh Yihan
Judge of the High Court

Hing Shan Shan Blossom, Chin Tian Hui Joshua and
Clarie Ong Bee Sim (Drew & Napier LLC) for the claimant;
Tan Heng Thye (CSP Legal LLC) for the defendant.