IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 250

Companies Winding Up No 183 of 2018

Between

VTB Bank (Public Joint Stock Company)

… *Plaintiff*

And

Anan Group (Singapore) Pte Ltd

… *Defendant*

GROUNDS OF DECISION

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Dedar Singh Gill JC:

Introduction

1 This was an application by the plaintiff, VTB Bank (Public Joint Stock Company) ("the Plaintiff") to wind up the defendant, Anan Group (Singapore) Pte Ltd ("the Defendant"), on the ground that it was unable to pay its debts. The Defendant opposed the application on the basis that there was a disputed debt between them that was governed by an arbitration agreement. This raised the issue of what standard of proof the Defendant was required to meet. Was it the orthodox standard for a dismissal of a winding up application, which requires the Defendant to show triable issues, or a different lower standard?

2 At the conclusion of the hearing on 7 September 2018, I found in favour of the Plaintiff and ordered that the Defendant be wound up. I now set out the full grounds of my decision.

Background facts

3 The Plaintiff is a state-owned Russian bank. The Defendant is a Singapore-incorporated company and its principal activity is that of a holding company.

The Global Master Repurchase Agreement

4 On 3 November 2017, the Plaintiff entered into a repurchase transaction with the Defendant on the terms set out in a global master repurchase agreement ("the GMRA").[1] Under the GMRA, the Defendant agreed to sell global depository receipts ("GDRs") of shares in EN+ Group PLC ("EN+") against payment of the purchase price by the Plaintiff, and to repurchase the GDRs on a later date at pre-agreed rates ("the Transaction"). The Defendant was under an obligation to maintain sufficient collateral in respect of the Transaction by maintaining the Repo Ratio (calculated in accordance with the formula in cl 20 of Annex 1 to the GMRA) at a level below the Margin Trigger Repo Ratio (defined as 60% in the GMRA), failing which the Plaintiff could exercise its contractual right to call on the Defendant to top up the amount of collateral. The Defendant was also under an obligation to maintain the Repo Ratio at a level below the Liquidation Repo Ratio (defined as 75% in the GMRA).

5 On 7 November 2017, pursuant to the GMRA, the Defendant sold the Plaintiff approximately 35,714,295 EN+ GDRs for approximately US$249,999,990. At the time, EN+ shares were worth approximately US$13 per share.[2]

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1 Plaintiff's Bundle of Documents, Tab 1.

2 Affidavit of Zang Jianjun dated 30 August 2018, paras 6 and 13.

6 On 6 April 2018, the United States Department of Treasury's Office of Foreign Assets Control designated certain persons to its Specially Designated Nationals List, and among those on the list included EN+, Mr Oleg Deripaska (the ultimate controlling shareholder of EN+), and two direct major shareholders of EN+. The effect of this designation was that any assets belonging to these persons and subject to the US jurisdiction were frozen, and US persons were generally prohibited from dealing with them ("the OFAC Sanctions"). According to the Defendant, the OFAC Sanctions caused the share price of EN+ to plummet.[3]

7 On the same day, the Plaintiff issued a margin trigger event notice, informing the Defendant that the Repo Ratio had exceeded the Margin Trigger Repo Ratio and sought payment of a sufficient cash margin to restore the level of the Plaintiff's collateral.[4] The Defendant failed to do so within the contractually stipulated timeframe.

8 On 9 April 2018, EN+ shares were trading at US$5.60 per share.[5]

9 On 10 April 2018, the Plaintiff issued a notice to the Defendant setting out the circumstances of the Defendant's defaults under the GMRA.[6] This was followed by a default notice on 12 April 2018, in which the Plaintiff designated 16 April 2018 as the early termination date.[7]

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3 Affidavit of Zang Jianjun dated 30 August 2018, para 17.

4 Plaintiff's Bundle of Documents, Tab 2, p 66.

5 Affidavit of Zang Jianjun dated 30 August 2018, para 17.

6 Plaintiff's Bundle of Documents, Tab 2, p 67.

7 Plaintiff's Bundle of Documents, Tab 2, p 68–69.

10 On 24 April 2018, the Plaintiff sent a calculation notice to inform the Defendant that the balance payable to the Plaintiff as of that date was US$170,292,452.03.[8]

11 On 19 July 2018, the Plaintiff sent a revised calculation notice to the Defendant setting out the revised balance payable as of that date, which was US$166,432,652.28.[9]

12 On 23 July 2018, the Plaintiff's solicitors served a statutory demand for the sum of US$170,388,766.03 (being the revised balance payable plus accrued interest) on the Defendant.[10] Three weeks lapsed without the Defendant paying the sum owed, or securing or compounding the same to the reasonable satisfaction of the Plaintiff.

13 On 30 July 2018, a subsidiary of the Defendant, AnAn International Limited, issued a company announcement on the Singapore Stock Exchange ("SGX") website stating that the Defendant had received a statutory demand from the Plaintiff. The announcement went on to state:[11]

> 4.1 It is understood from [the Defendant] that [it] has objections to the statutory demand, including the fact that the amount claimed was formulated by [the Plaintiff] independently of [the Defendant].
>
> 4.2 It is further understood from [the Defendant] that [it] had, as a cornerstone investor, invested US$500,000,000 in EN+ Group PLC during the latter's listing on the London Stock Exchange, and that as a result of US governmental sanctions made against EN+ Group PLC and its ultimate controlling shareholder on 6 April 2018, the GDRs suffered great

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8 Plaintiff's Bundle of Documents, Tab 2, p 70–75.

9 Plaintiff's Bundle of Documents, Tab 2, p 76–78.

10 Plaintiff's Bundle of Documents, Tab 5.

11 Plaintiff's Bundle of Documents, Tab 6.

> downward price movement. [The Defendant] takes the view that this an unforeseeable *force majeure*.

14 On 10 August 2018, the Defendant's solicitors wrote to the Plaintiff's solicitors stating that the Defendant "disputes" the outstanding sum, and that the Defendant was in the process of applying for an injunction to restrain the Plaintiff from commencing winding up proceedings.[12]

15 On 11 August 2018, the Plaintiff's solicitors responded via letter, highlighting that the Defendant had not, apart from a bare allegation, explained why the sum was disputed, or particularised or substantiated the alleged dispute. It was also pointed out that the GMRA did not contain a *force majeure* clause. Finally, the Plaintiff indicated its intention to proceed with the winding up application.[13]

Court proceedings

The Defendant's application to restrain the Plaintiff from commencing winding up proceedings

16 Meanwhile, on 10 August 2018, the Defendant filed an application in Originating Summons No 975 of 2018 ("OS 975") to restrain the Plaintiff from commencing proceedings or making any application for the winding up of the Defendant on the basis of the statutory demand. In its supporting affidavit for OS 975, the Defendant detailed how the OFAC Sanctions (described at [6] above) came about on 6 April 2018. According to the Defendant, the OFAC Sanctions caused the share price of EN+ to plummet from approximately US$12.20 (on 5 April 2018) to US$5.60 per share (on 9 April 2018). The Defendant went on to state:[14]

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12 Plaintiff's Bundle of Documents, Tab 7.

13 Plaintiff's Bundle of Documents, Tab 8.

> 22. As a result of the far-reaching OFAC Sanctions which were unforeseeable and were not brought about by the act or default of the [Defendant], the Reference Price and Reference Value was decreased, which resulted in the Margin Trigger Event and the Liquidation Event. The [Defendant's] position is that the GMRA has been rendered radically different from that which was originally envisaged.
>
> 23. As a result of the above, the [Defendant's] case is that the GMRA has been frustrated, and that therefore, the GMRA is terminated automatically without more, thus releasing [the Plaintiff] and the [Defendant] from further performance. As a result, the alleged debt of US$170,388,766.03 as stated in the Statutory Demand is not due and owing from the [Defendant] to [the Plaintiff].

17 On 13 August 2018, the Defendant filed Summons No 3677 of 2018 ("SUM 3677") in OS 975, which was an application for an interim injunction to restrain the Plaintiff from commencing proceedings to wind up the Defendant pending the disposal of OS 975. In the supporting affidavit for SUM 3677, the Defendant again took the position that the GMRA had been frustrated, and so there was a serious question to be tried as to whether the Plaintiff was entitled to the debt amount of US$170,388,766.03.[15]

18 SUM 3677 was heard by Andrew Ang SJ on 13 August 2018. At the hearing, counsel for the Defendant argued that because the alleged dispute as to the debt was governed by an arbitration agreement in the GMRA, the standard of proof it was required to meet was not that of triable issues. Rather, a different lower standard was applicable – the question was whether a *prima facie* dispute existed. In support of this proposition, the Defendant cited the English Court of Appeal decision of *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] Ch 589 ("*Salford*") and the Singapore High Court decision of *BDG v BDH* [2016]

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14 Affidavit of Zang Jianjun dated 10 August 2018, paras 18–23.

15 Affidavit of Zang Jianjun dated 28 August 2018, p 9, paras 18–19 (an unaffirmed version of this affidavit was exhibited in the Affidavit of Lee Wen Rong Gabriel dated 13 August 2018, Exhibit LWRG-1).

5 SLR 977 ("*BDG*"), which I will discuss in greater detail below. After hearing the arguments, Ang SJ dismissed the Defendant's application on the basis that he was not satisfied that there was a *bona fide* dispute. Ang SJ also pointed out that the Defendant had not suggested that the OFAC Sanctions had prohibited it from performing its obligations under the GMRA.[16] The Defendant has not appealed against this decision.

The Plaintiff's winding up application

19 On 17 August 2018, the Plaintiff filed the present application in Companies Winding Up No 183 of 2018 ("CWU 183") seeking to wind up the Defendant on two alternative bases:

(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.

20 On 20 August 2018, the Plaintiff filed an application in Summons No 3795 of 2018 ("SUM 3795") to appoint three individuals as joint and several provisional liquidators of the Defendant.

21 On 24 August 2018, Ang SJ heard SUM 3795 on an expedited basis and granted the Plaintiff's application to appoint the provisional liquidators.[17] For completeness, I should mention that the Defendant appealed against this decision and also sought a stay of execution pending the outcome of the appeal.

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16 Plaintiff's Bundle of Documents, Tab 9, p 111.

17 Plaintiff's Bundle of Documents, Tab 10, pp 115–121.

However, it subsequently withdrew the stay application after I ordered the Defendant to be wound up on 7 September 2018. Soon after, the Defendant withdrew the appeal against Ang SJ's decision on SUM 3795 as well.

22 On 30 August 2018, the Defendant filed an affidavit-in-reply to the Plaintiff's supporting affidavit for CWU 183. The Defendant again disputed the debt owed to the Plaintiff, arguing that the OFAC Sanctions had caused the margin trigger event. Notably, this time, the Defendant not only alleged that the OFAC Sanctions were an event of frustration, but also a *force majeure* event:[18]

> 24. The [Defendant] disputes that it owes the Alleged Debt to [the Plaintiff]. The [Defendant's] case is that the GMRA has been frustrated *or that there has been a force majeure event*, and that therefore, the GMRA is terminated automatically without more, thus releasing [the Plaintiff] and the [Defendant] from further performance.
>
> 25. As a result of the far-reaching OFAC Sanctions which were unforeseeable and were not brought about by the act or default of the [Defendant], the Reference Price and Reference Value was decreased, which in turn resulted in the Margin Trigger Event and the Liquidation Event. The [Defendant's] position is that the GMRA has been rendered radically different from that which was originally envisaged.
>
> 26. As a result of the above, the [Defendant's] case is that the GMRA has been frustrated *or a force majeure event has occurred*, and that therefore, the GMRA is terminated automatically on 6 April 2018 without more, thus releasing [the Plaintiff] and the [Defendant] from further performance. As a result, the [Defendant's] position is that the Alleged Debt is not due and owing from the [Defendant] to [the Plaintiff].
>
> [emphasis added]

23 Further and in the alternative, the Defendant also disputed the quantification of the debt at US$170,388,766.03:[19]

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18 Affidavit of Zang Jianjun dated 30 August 2018, paras 24–26.

19 Affidavit of Zang Jianjun dated 30 August 2018, paras 27–29.

> 27. Further, and in the alternative to the [Defendant's] position as set out above at paragraphs 12 to 22, the [Defendant], even if it is found liable at arbitration, disputes the quantification of the Alleged Debt.
>
> 28. Some of the reasons for the dispute of the quantification is [*sic*] as follows:
>
> > a. [The Plaintiff] has included in its computation costs such as "*hedge unwind costs*", with no supporting documentation whatsoever;
> >
> > b. [The Plaintiff] has not adequately explained or substantiated its selection of "*Appropriate Market*" and computation of "*Net Value*"; and
> >
> > c. the Interest Rate used by the [Plaintiff] is inaccurate and not supported by documentation.
>
> 29. Notwithstanding that the [Defendant] is in the midst of computing what the precise amount it may theoretically owe to [the Plaintiff], if at all, I believe that the difference is easily over USD$150 million, which is about approximately 88% less than what the Plaintiff is alleging.

24 The Defendant then asserted that the question of whether it owed US$170,388,766.03 to the Plaintiff as well as the dispute over the quantification of the debt should both be resolved by arbitration, pursuant to Clause 15 of Annex 1 of the GMRA.[20] The relevant portion of this clause reads:

> (b) Any dispute arising out or in connection with this Agreement, including any question regarding its subject matter, existence, negotiation, validity, termination or enforceability (including any non-contractual dispute or claim) (a "Dispute"), shall be referred to arbitration and finally settled on the following terms:
>
> > (i) the arbitration shall be conducted in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") which Rules are deemed incorporated into this Clause;
>
> …

[20] Affidavit of Zang Jianjun dated 30 August 2018, paras 30 and 33.

Arbitration proceedings

25 It transpired that on 23 August 2018 – which was after the Plaintiff filed CWU 183, but before the Defendant filed its affidavit-in-reply to the Plaintiff's supporting affidavit for CWU 183 – the Defendant filed a notice of arbitration at the Singapore International Arbitration Centre, referring questions relating to the existence of the debt and the quantification of the debt amount to the arbitral tribunal.[21] In relation to the former, the Defendant again referred to the OFAC Sanctions as an event of frustration (though, notably, not a *force majeure* event):

> 12. The OFAC Sanctions was [*sic*] a supervening event that significantly changed the nature of the contractual rights and/or obligations between the parties. As a result of the OFAC Sanctions, the GMRA was frustrated, and parties released from their obligations under the GMRA forthwith.

26 The Defendant also took issue with the Plaintiff's computation of the debt amount of US$170,388,766.03:

> 15. Further and/or in the alternative, even if the GMRA has not been frustrated, the [Defendant] disputes the computation of the sum US$170,388,766.03 by the [Plaintiff]. Amongst other things:
>
> a. the [Plaintiff] has included in its computation costs such as "*Hedge Unwind Costs*", with no supporting documentation whatsoever;
>
> b. the [Plaintiff] has not adequately explained and/or substantiated its:
>
> i. selection of "*Appropriate Market*";
>
> ii. computation of the "*Net Value*"; and
>
> c. the Interest Rate used by the [Plaintiff] is inaccurate and not supported by documentation.
>
> 16. In light of the foregoing, the amount allegedly owing by the [Defendant] is not US$170,388,766.03, but is much lower.

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[21] Plaintiff's Bundle of Documents, Tab 11.

> 17. The [Defendant] therefore seeks the determination by the Tribunal to be appointed on the issues of: (a) whether the GMRA is frustrated; and (b) further and/or in the alternative, the amount owing by the [Defendant] to the [Plaintiff].

My decision

27 The court may order a company to be wound up if one of the grounds under s 254(1) of the CA is satisfied. For present purposes, it is only necessary to consider the ground in s 254(1)(*e*), *ie*, that the company is unable to pay its debts. In this connection, a company shall be deemed unable to pay its debts if a creditor to whom the company is indebted in a sum exceeding S$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 (see s 254(2)(*a*) of the CA). The court's discretion to wind up a company is a wide one which "must not [be] fetter[ed] by rigid rules from which a judge is never at liberty to depart" (see *Ward v James* [1966] 1 QB 273 at 295, cited in *Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd* [1979–1980] SLR(R) 511 at [16]), although in practice, this broad discretion has generally been exercised along fairly settled lines under well-established categories. These include disputed debts and cross-claims (see *Woon's Corporations Law* (Walter Woon SC, gen ed) (LexisNexis, Looseleaf Ed, 2018, September 2018 release) at paras 755–800).

28 The present application concerned the first category mentioned above (*ie*, disputed debts). The main issue was whether the Plaintiff's application to wind up the Defendant ought to be dismissed on the ground that the debt on which its statutory demand was based was disputed. It is trite law that a debtor-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 (see *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") at [17]).

29 Ordinarily, the applicable standard of proof is one of triable issues (see *Pacific Recreation* at [23]). However, the Defendant argued that because there was an arbitration agreement contained in the contract from which the debt arose (*ie*, the GMRA), the applicable standard of proof was whether there was a *prima facie* case of dispute which fell within the scope of that arbitration agreement. In support of this proposition, the Defendant again relied on *Salford* and *BDG*, as it did at the hearing of SUM 3677 before Ang SJ (see [18] above).

30 Having considered the parties' submissions and the relevant authorities, I concluded that despite the presence of the arbitration agreement in the GMRA, the Defendant was required to establish the existence of a substantial and *bona fide* dispute over the debt and that the relevant standard of proof in this regard was that of triable issues. In my view, the Defendant failed to establish this because its case was clearly unsustainable in law. Even if the Defendant were correct that it was only required to meet a different and lower standard of proof under the *BDG* approach, it would still be necessary to establish that the dispute as to the debt was *bona fide* or genuine. In this regard, I concluded that the Defendant's lack of *bona fides* was betrayed by the shifting nature of its case and the lack of any genuine attempt to quantify the alleged reduced debt amount.

Whether the applicable standard of proof is one of triable issues or a* prima facie *case of dispute

31 I turn first to the issue of the standard of proof that the Defendant was required to meet in disputing the debt owed to the Plaintiff. In this regard, it is useful to set out the difference between the two competing standards, and the practical implications arising therefrom.

32 Under the triable issues standard, whether a dispute exists requires the court to examine the affidavit evidence, and consider whether on such material, an arguable case could be made meriting the holding of a trial of the issues (see *BDG* at [20]). This is the same standard as that required to defeat a summary judgment application (see *Mohd Zain bin Abdullah v Chimbusco International Petroleum (Singapore) Pte Ltd and another appeal* [2014] 2 SLR 446 at [16]). While the triable issues standard has been noted to be a "low threshold" (see *Pacific Recreation* at [26]), it still requires more inquiry and assessment than a standard requiring only making out that a dispute exists *prima facie* (see *BDG* at [20]). Thus, if the Defendant were correct that the applicable standard is one of a *prima facie* case of dispute and not triable issues, then it would effectively be easier for the Defendant to establish that the Plaintiff's winding up application should be dismissed.

Authorities in support of the standard of a prima facie *case of dispute*

33 I turn now to the authorities relied in support of the Defendant's argument that the lower standard of proof should apply. As earlier mentioned, the key authorities relied on by the Defendant for this point were the English Court of Appeal decision of *Salford* and Singapore High Court decision of *BDG*. For completeness of analysis, I will also make reference to other decisions that

are relevant to the issue before me although they may not have been specifically raised by the parties in the present application.

34 I begin with *Salford*. The key issue in that case was whether the petition to wind up a company on the ground of its inability to pay its debts should be stayed, where the underlying debt arose out of a contract containing an arbitration agreement. The court first considered whether s 9 of the Arbitration Act 1996 (c 23) (UK) ("UK AA") applied. If so, then the grant of a stay in favour of arbitration was mandatory. The relevant portions of s 9 of the UK AA read:

> (1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
>
> …
>
> (4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

35 Sir Terence Etherton C (as he then was) (with whom Longmore and Kitchin LJJ agreed) held that s 9 of the UK AA did not apply to a winding up petition brought on the basis of the company's inability to pay its debt since such a petition was not a "claim" for the payment of the debt (at [26] and [31]). The learned judge further noted that it was "highly improbable that Parliament, without any express provision to that effect, intended [s] 9 of the [UK AA] to confer on a debtor the right to a non-discretionary order striking at the heart of the jurisdiction and discretionary power of the court to wind up companies in the public interest where companies are not able to pay their debts" (at [35]).

Accordingly, a mandatory stay in favour of arbitration under s 9 of the UK AA could not be granted.

36 Nonetheless, Sir Etherton held that the court's discretionary power to wind up a company under the Insolvency Act 1986 (c 45) (UK) ("UK Insolvency Act") ought to be exercised consistently with the legislative policy embodied in the UK AA:

> 39 My conclusion that the mandatory stay provisions in section 9 of the [UK AA] do not apply in the present case is not, however, the end of the matter. Section 122(1) of the [UK Insolvency Act] confers on the court a discretionary power to wind up a company. It is entirely appropriate that the court should, save in wholly exceptional circumstances which I presently find difficult to envisage, exercise its discretion consistently with the legislative policy embodied in the [UK AA]. This was the alternative analysis of Warren J in the *Rusant* case, at para 19.
>
> 40 Henry and Swinton Thomas LJJ considered in *Halki Shipping Corpn v Sopex Oils Ltd* [1998] 1 WLR 726 that the intention of the legislature in enacting the [UK AA] was to exclude the court's jurisdiction to give summary judgment, which had not previously been excluded under the Arbitration Act 1975. It would be anomalous, in the circumstances, for the Companies' Court to conduct a summary judgment type analysis of liability for an unadmitted debt, on which a winding up petition is grounded, when the creditor has agreed to refer any dispute relating to the debt to arbitration. Exercise of the discretion otherwise than consistently with the policy underlying the [UK AA] would inevitably encourage parties to an arbitration agreement – as a standard tactic – to bypass the arbitration agreement and the [UK AA] by presenting a winding up petition. The way would be left open to one party, through the draconian threat of liquidation, to apply pressure on the alleged debtor to pay up immediately or face the burden, often at short notice on an application to restrain presentation or advertisement of a winding petition, of satisfying the Companies Court that the debt is bona fide disputed on substantial grounds. That would be entirely contrary to the parties' agreement as to the proper forum for the resolution of such an issue and to the legislative policy of the [UK AA].
>
> 41 There is no doubt that the debt mentioned in the Petition falls within the very wide terms of the arbitration clause

> in the Lease … For the reasons I have given, I consider that, as a matter of the exercise of the court's discretion under s 122(1)(f) of the 1986 Act, it was right of the court either to dismiss or stay the Petition so as to compel the parties to resolve their dispute over the debt by their chosen method of dispute resolution rather than require the court to investigate whether or not the debt is bona fide disputed on substantial grounds.

37 Accordingly, the English Court of Appeal dismissed the appeal and maintained the stay of the winding up petition.

38 I note that *Salford* has since been referred to in several English authorities. These include the Court of Appeal decision of *Revenue and Customs Commissioners v Changtel Solutions UK Ltd (formerly ENTA Technologies Ltd)* [2015] 1 WLR 3911 and the High Court decisions of *Eco Measure Market Exchange Ltd v Quantum Climate Services Ltd* [2015] EWHC 1797 (Ch) ("*Eco Measure*") and *Fieldfisher LLP v Pennyfeathers Ltd* [2016] EWHC 566 (Ch) ("*Fieldfisher*").

39 Outside of England, *Salford* has been cited with approval by the Singapore High Court. This brings me to the second key authority relied on by the Defendant, *BDG*. The plaintiff in that case sought an injunction to restrain the defendant from presenting a winding up application, on the basis that there was a dispute between them that was governed by an arbitration clause. The plaintiff argued that the position in *Salford* should be adopted because it was consistent with Singapore's pro-arbitration policy, and accordingly that a different standard of proof ought to apply where an application to enjoin the presentation of a winding up application is made on the basis that there is a dispute between the parties which is subject to an arbitration clause (at [9] and [21]). Aedit Abdullah JC (as he then was) agreed with the plaintiff, and held as follows:

> 22 I accept that the broad approach in *Salford Estates* should be followed. The objective of the triable issue or good arguable case standard is to ensure that winding-up is not staved off on flimsy or tenuous grounds. Similarly, summary judgment should not be avoided if the defendant's case is without foundation or basis. The triable issue standard thus ensures that remedies are readily obtained when nothing much can be said against the claim or application. This helps to oil the machinery of commerce and trade, and presumably helps promote certainty and efficiency. That objective is however less pressing and dominant when one is confronted with an arbitration clause. The countervailing concern is to hold parties to their agreement; if they have made a bargain that disputes are to be arbitrated, then they should be held to it. It may be that their case is weak, and would be readily dismissed by the arbitrators; but such weakness of the case would be a matter for the arbitrators to decide. The Court should not generally step in; indeed, it may be that the parties selected process, arbitration, may lead to a different result from the Court's assessment. Given such different considerations, the adoption of a different standard from the usual one in the stay or enjoining of winding up proceedings would be justified on principle. In addition, in these situations, the parties are essentially in dispute about the existence of a dispute. Trying to ascertain a triable issue in this context is likely to be an exercise that is not fruitful, efficient or proportionate, without any countervailing benefit.
>
> 23 It may be thought that adopting this lower standard would stymie the winding up regime by opening the door to gaming of the system by companies desperate to fend off their creditors. There are two responses to this. Firstly, if indications are that issues are not raised *bona fide*, that would be a reason to find that there is no dispute *prima facie*, or that the court's powers should not be exercised in the applicant's favour. Secondly, any apparent injustice suffered by the creditors would have to be assessed in the context of the bargain struck between these creditors and the company. Arbitration would have been contemplated as being part of the process from the moment the parties signed off on the agreement. Nothing inequitable or unfair would result from the parties being made to go through arbitration before they invoke the winding up process. If an arbitration clause was included, there is no real injustice: *pacta sunt servanda*.

40 On the facts, Abdullah JC found that the plaintiff-company had successfully established a *prima facie* case that (a) a dispute existed; (b) it had complied with the requirements of the dispute resolution clause; and (c) such

dispute fell within the scope of the arbitration clause (at [26], [28] and [30]). Accordingly, the injunction against the defendant-creditor was granted. An appeal was filed against Abdullah JC's decision but the hearing was subsequently vacated after the defendant-creditor was put into creditors' voluntary liquidation.

41 Finally, there are two recent decisions of the Hong Kong Court of First Instance which are relevant to the present case. The first of these is *Lasmos Limited v Southwest Pacific Bauxite (HK) Limited* [2018] HKCFI 416 ("*Lasmos*"). The learned judge, Jonathan Harris J, cited both *Salford* and *BDG* in the course of conducting a general survey of the authorities in Hong Kong, England and Singapore which considered the question of what impact the presence of an arbitration clause in an agreement giving rise to a debt relied on to support a winding up petition has on the exercise of the court's discretion to make a winding up order.

42 With reference to the reasoning employed by Sir Etherton in *Salford* (see [36] above), Harris J observed that like the UK, Hong Kong has enacted legislation advancing a policy encouraging and supporting party autonomy in determining the means by which a dispute arising between them should be resolved (*ie*, the Arbitration Ordinance (Cap 609) (HK)), and that the courts of Hong Kong have been strongly supportive of the development of arbitration and the policy underlying the Arbitration Ordinance (at [15]–[16]). He then noted that to conduct a summary judgment type analysis of liability for an unadmitted debt on which a winding up petition is grounded, when the creditor has agreed to refer any dispute relating to the debt to arbitration, would give no weight to the policy underlying the Arbitration Ordinance (at [17]).

43 As for *BDG*, Harris J noted that Abdullah JC considered that the standard of proof that the debtor-company was required to meet was one of a *prima facie* dispute, that the court would not be concerned with the strength of its defence, and that it was also necessary for it to demonstrate *prima facie* compliance with the dispute resolution clause (at [22]–[23]).

44 Having concluded his survey of the authorities, Harris J held at [31] that he intended to depart from the approach taken by earlier Hong Kong authorities, and thus held that a winding up petition should generally be dismissed where:

(a) the company disputes the debt relied on by the petitioner;

(b) the contract under which the debt is alleged to arise contains an arbitration clause that covers any dispute relating to the debt; and

(c) the company takes the steps required under the arbitration clause to commence the contractually mandated dispute resolution process and files an affidavit in opposition to the winding up petition.

45 On the facts of *Lasmos*, since the company sought to be wound up disputed the debt and required the dispute to be resolved in accordance with the arbitration agreement, the winding up petition was struck out (at [1] and [32]).

46 The second case is *Re: Hong Kong Sports Industrial Development Limited (formerly known as LeTV Sports Culture Develop (Hong Kong) Co. Limited)* [2018] HKCFI 1309 ("*HK Sports*"), which was also decided by Harris J, and just several months after *Lasmos*. The parties entered into a settlement agreement which provided for the payment of US$40.6 million in accordance with an instalment schedule. It also provided that in the event of default in the payment of any of the instalments, the entire initial agreed amount

of US$40.6 million less any payments received should become immediately due and payable. Thus, when the company failed to pay the last two instalments, the petitioners commenced an arbitration to obtain an award in their favour for this amount. In the meantime, the petitioners also filed a winding up petition on the basis of the two instalments that were payable to them.

47 The company resisted the winding up petition on the basis of the on-going arbitration. In response, the petitioners argued that they were entitled to issue the present petition because there was clearly a significant sum payable by the company, which could not be disputed. Harris J noted from the affidavit filed on behalf of the company that there was no explanation of why at least a sum of US$12,905,000 was not payable, and that the payment of this sum was not an issue in dispute in the arbitration. He thus held as follows (at [5]):

> That being the case, there is no evidence before the court which demonstrate[s] a *bona fide* defence on substantial grounds to the claim for that sum and I can see no justification for requiring the arbitration to be completed before allowing the petitioners to petition to wind up the Company for the significant debt which, on the basis of the evidence before me, is indisputably payable to them.

48 Thus, notwithstanding the on-going arbitration, Harris J ordered that the company be wound up. The significance of *HK Sports* is that the mere spectre of arbitration does not mean that the court must invariably dismiss or stay a winding up application. If, as in *HK Sports*, a significant portion of the debt is not disputed in the arbitration and the company is unable to pay that sum, it may be that the court's discretion should be exercised in favour of granting the winding up order. The decision in *HK Sports* thus supplements *Lasmos* by making clear that in exercising its discretion, the winding up court can and should consider the precise nature and extent of the dispute as to the debt which the debtor-company says should be resolved in arbitration.

Authorities in support of the standard of triable issues

49 I turn now to the key authorities relied on by the Plaintiff for the proposition that the applicable standard of proof is that of triable issues, even if there is a dispute between the parties that is governed by an arbitration agreement.

50 The first of these is the decision of the High Court in *Re Sanpete Builders (S) Pte Ltd* [1989] 1 SLR(R) 5 ("*Sanpete*"). The parties, Sanpete Builder (S) Pte Ltd ("Sanpete") and Nakano Singapore (Pte) Ltd ("Nakano"), entered into a sub-contract. Subsequently, Nakano petitioned for Sanpete to be wound up on the basis that it had failed to pay a debt of $4 million demanded by Nakano by way of statutory notice, among other reasons. In response, Sanpete argued that Nakano was precluded from presenting the petition since the sub-contract provided for the submission of disputes between the parties to arbitration. Chao Hick Tin JC (as he then was) rejected this argument, holding as follows (at [37]):

> All this clause means is that instead of a dispute being submitted to the ordinary courts of law the parties have agreed that it be submitted to arbitration. But the real question is still whether the contention by Sanpete that it is entitled to claim liquidated damages or unliquidated damages and set them off against the moneys due to Nakano under the subcontract is a *bona fide* claim based upon substantial grounds which ought to go to arbitration under cl 18 …

51 In other words, Chao JC was of the view that it was for the court to consider whether the debtor-company had a *bona fide* claim based on substantial grounds which ought to go to arbitration. On the facts, Chao JC concluded that the winding up petition was not a proceeding within the scope of the arbitration agreement (at [38]), and that Sanpete had not shown that the sum claimed by Nakano was *bona fide* disputed on substantial grounds or that it had a

counterclaim based on substantial grounds (at [47]). He thus granted the winding up (at [64]).

52 The Plaintiff next relied on the decision of the Court of Appeal in *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268 ("*Metalform*"). In that case, the respondent ("Holland") served a statutory demand on the appellant ("Metalform") requiring it to pay an undisputed debt. Subsequently, Metalform applied to the High Court for an injunction to restrain Holland from presenting a winding up petition until Metalform's claim for damages against Holland arising under a sale-and-purchase agreement ("SPA") had been determined in arbitration. Critically, it was common ground between the parties that the arbitrator was the proper adjudicator of this issue (see *Metalform* at [89(b)]).

53 The High Court judge held that Metalform had a genuine cross-claim based on substantial grounds in that it did not invent the cross-claim in order to ward off the threatened winding up proceedings. Nonetheless, the injunction application was dismissed on the basis that the security held in escrow for any claims against Holland under the SPA reduced the quantum of the cross-claim to the extent that it was not equal to or in excess of the undisputed debt.

54 On appeal, the Court of Appeal agreed with the High Court that Metalform had a genuine cross-claim based on substantial grounds (see [47], [52]–[53] and [55]). However, the Court of Appeal went on to explore the question of what standard of proof the debtor-company should be required to meet in a "cross-claim" situation. The Court observed that Singapore, England and Australia uniformly took the position that in order for an injunction restraining the filing of a petition to be granted, the debtor-company must 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 (at [77]). For convenience, I refer to this as the "unlikely to succeed" standard. On the other hand, the position in New Zealand required the debtor-company to show that a winding up petition against it was bound to fail (at [80]). Ultimately, the Court of Appeal rejected Holland's argument that the "bound to fail" standard should apply, in favour of retaining the "unlikely to succeed" standard. The Court of Appeal held (at [86]):

> In our view, the "bound to fail" test is in principle the wrong test to apply in cross-claim cases, whether the debt is disputed or undisputed. As a matter of evidence, until the cross-claim is tried, it would be impossible to tell what the decision of the court would be, either on the merits of the cross-claim or whether its quantum would equal or exceed the undisputed debt. Applying such a stringent test at the hearing of any application to restrain a winding-up petition would effectively lead to the dismissal of the application. It would amount to applying a principle of law rather than a principle of evidence.

55 To be clear, the "unlikely to succeed" standard in *Metalform* is no different from the "triable issue" standard set out in *Pacific Recreation*. As noted by Quentin Loh J 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 Theme Park Investments Ltd)* [2011] 4 SLR 997 ("*Denmark*") at [26]):

> I would also add that any linguistic divergence between the "triable issue" test (see *Pacific Recreation* at [23]–[24]) and the "unlikely to succeed test" (see *Metalform* ([21] *supra*) at [86]–[87]) is a distinction without difference. As Lawrence Collins LJ remarked in *Ashworth v Newnote Ltd* [2007] EWCA Civ 793 ("*Ashworth*") at [33]:
>
> > It seems to me that a debate (see e.g. *Kellar v BBR Graphic Engineers (Yorks) Ltd* [2002] BPIR 544, 551) as to whether there is a distinction between the 'genuine triable issue' test for cross-claims and 'real prospect of succeeding on the claim' (i.e. on the cross-claims) involves a sterile and largely verbal question, and that there is no practical difference between 'genuine triable

> issue' and 'real prospect' of success and certainly not in this case.

56 Finally, the Plaintiff referred to the High Court decision of *Denmark*. The defendant ("Ultrapolis") owed the plaintiff ("DSK") a debt pursuant to an arbitration award, which was registered as a judgment under the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"). Subsequently, DSK served a statutory demand on Ultrapolis demanding payment of the judgment debt. Ultrapolis did not comply with the statutory demand, and thus DSK applied for it to be wound up. In resisting the application, Ultrapolis raised, among other grounds, the argument that it had a genuine cross-claim against DSK which was to be decided in a second set of arbitration proceedings between them. Against this backdrop, in considering the standard of proof that Ultrapolis was required to meet, Loh J held that regardless of whether the case was one of a "cross-claim" or a "disputed debt", the applicable standard was no more than that for resisting a summary judgment application, *ie*, the triable issues standard (at [24]–[25], citing *Pacific Recreation* at [23]). I note that Ultrapolis' appeal against this decision was deemed withdrawn due to its failure to comply with certain procedural deadlines.

Discussion

57 As can be seen from the preceding paragraphs, there were two distinct lines of authorities before this court. The authorities supporting the Plaintiff's position spoke with one voice that the applicable standard of proof is that of triable issues, even where there is an arbitration agreement governing the dispute. On the other hand, the authorities supporting the Defendant's case that a different and lower standard of proof should apply were all fairly recent, with the common underlying thread of according greater primacy to arbitration

agreements and party autonomy in general. The question which then arose was this: which line of authorities should be followed?

58 In my judgment, this court could not depart from the position established by the line of authorities cited by the Plaintiff, which included the Court of Appeal decision of *Metalform*. To briefly recapitulate, the debtor-company in *Metalform* sought an injunction to restrain the creditor from presenting a winding up petition on the basis that it had a cross-claim which was equal to or in excess of the debt. Critically, it was common ground between the parties that the proper adjudicator of the cross-claim was the arbitrator. Thus, *Metalform* stands for the principle that *even if* there is a dispute between the parties which goes to the crux of the applicant-creditor's winding up petition *and* such dispute is governed by an arbitration agreement, the standard of proof is that of triable issues.

59 I should add that I did not consider it to be of much significance that *Metalform* was a "cross-claim" case while the present application was a "disputed debt" case. There is no distinction between a genuine cross-claim of substance in an amount exceeding the amount of the petitioner's debt and a seriously disputed debt insofar as both situations may call into question the *locus standi* of the creditor to present a winding up petition against the debtor (see *Metalform* at [64]–[70], particularly at [68]).

60 Likewise, it did not matter that *Metalform* involved an application by the debtor-company to enjoin the creditor from commencing winding up proceedings in the first place, while the present case involved a debtor-company resisting a winding up application that had already been filed. As noted by the Court of Appeal in *Pacific Recreation*, the standards to be applied in both situations mirror each other (at [25]):

> The situation in *Metalform Asia* differed from that in the present case in that in the former, the court was considering whether to grant an injunction *before* the issuance of a winding-up petition, whereas in the latter, the question was whether a winding-up application which had already been filed ought to be stayed or dismissed. However, even in a case such as the present, the courts should not be quick to condemn viable companies which have plausible responses to claims made against them. Thus, this court noted at [87] of *Metalform Asia* that:
>
> > This standard of proof [*ie*, the "bound to fail" test] is also inconsistent with the standard that is applicable where the application is to stay the petition after it has been filed. The standard of proof in a stay application founded on a serious cross-claim on substantial grounds is that the petition is unlikely to succeed or that it is likely that the court will hold over the petition in order to allow the cross-claim to be determined first. ***There is no particular reason why the standard of proof should be higher in the first case [ie, in an application to restrain the filing of a winding-up petition] than in the second case [ie, in a stay application].*** Moreover, it is ironic that in the second case, irreparable damage might well have been done to the company by the filing of the petition, and yet the standard of proof in staying the petition is lower than the "bound to fail" standard. We therefore conclude that it is inappropriate to apply the "bound to fail" test in cross-claim cases.
>
> Both the strength of the company's cross-claim and the strength of the case raised by the company to dispute the debt can provide grounds for a court to prevent a winding-up application from proceeding any further, or to dismiss it entirely. ***The tests for both of the situations discussed in the passage quoted above thus necessarily mirror each other.***
>
> [original emphasis in italics; emphasis added in bold italics]

61 Therefore, notwithstanding these differences between *Metalform* and the present application, I was of the view that the former was of direct relevance and applicability to the case at hand. Accordingly, I was bound to follow the Court of Appeal's decision in *Metalform* that the standard of proof that a debtor-company is required to meet in a disputed debt case is that of triable issues, regardless of whether that dispute is governed by an arbitration agreement.

62 Nonetheless, I do accept that there is force in the policy reasoning underpinning the *Salford* approach. It is a well-established principle that for a creditor to try to enforce a disputed debt by means of a winding up petition amounts to an abuse of the court process (see *Metalform* at [62] and *Pacific Recreation* at [16] and [17]). This is arguably all the more so when the parties have expressly agreed that such disputes are to be resolved by arbitration. In such a situation, as Sir Etherton noted in *Salford* at [40]–[41], rather than encouraging parties to bypass their arbitration agreement by presenting a winding up petition, the court should dismiss or stay such petitions, and in so doing effectively compel the parties to resolve their dispute over the debt by their chosen method of dispute resolution. As noted by Abdullah JC in *BDG*, this approach holds the parties to their agreement, and there is nothing inequitable and unfair about compelling the parties to go through arbitration before invoking the winding up process (at [22]–[23]).

63 Further, from a macro perspective, it is clear that the *Salford* approach is largely pro-arbitration. One major pillar of Sir Etherton's reasoning in *Salford* was that the legislature's intention in enacting the UK AA was to exclude the court's jurisdiction to give summary judgment (at [40]). It was in that context that the learned judge concluded that it would be "entirely contrary" to such legislative policy if the court hearing the winding up proceedings were to be required to investigate whether or not the debt is *bona fide* disputed on substantial grounds (at [41]). The same approach was adopted by Harris J in *Lasmos*, who considered the legislative intent behind the Arbitration Ordinance, and concluded that it would be inconsistent with such intent for the court to conduct a summary judgment type analysis of liability in the context of winding up proceedings when parties had agreed to refer any disputes relating to the debt to arbitration (see [41]–[42] above).

64 Thus, a strong argument may likewise be made for the adoption of the *Salford* approach in Singapore, given her strong leaning towards upholding arbitration agreements. In this regard, the remarks of the Court of Appeal in *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 ("*Tjong Very Sumito*") are worth setting out at some length, since the Court clearly articulates the judicial policy of facilitating and promoting arbitration:

> 28 There was a time when arbitration was viewed disdainfully as an inferior process of justice. Those days are now well behind us. An unequivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore. It is now openly acknowledged that arbitration, and other forms of alternative dispute resolution such as mediation, help to effectively unclog the arteries of judicial administration as well as offer parties realistic choices on how they want to resolve their disputes at a pace they are comfortable with. More fundamentally, the need to respect party autonomy (manifested by their contractual bargain) in deciding both the method of dispute resolution (and the procedural rules to be applied) as well as the substantive law to govern the contract, has been accepted as the cornerstone underlying judicial non-intervention in arbitration. In essence, a court ought to give effect to the parties' contractual choice as to the manner of dispute resolution unless it offends the law.
>
> 29 … *Courts should therefore be slow to find reasons to assume jurisdiction over a matter that the parties have* ***agreed*** *to refer to arbitration. It must also be remembered that the whole thrust of the IAA is geared towards minimising court involvement in matters that the parties have agreed to submit to arbitration.* Concurrent arbitration and court proceedings are to be avoided unless it is for the purpose of lending curial assistance to the arbitral process. Jurisdictional challenges must be dealt with promptly and firmly. If the courts are seen to be ready to entertain frivolous jurisdictional challenges or exert a supervisory role over arbitration proceedings, this might encourage parties to stall arbitration proceedings. This would, in turn, slow down arbitrations and increase costs all round. In short, the role of the court is now to support, and not to displace, the arbitral process.

65 However, with respect, I considered the *Salford* approach to be too extreme insofar as it emphasises the absolute primacy of the arbitration

agreement. The key thrust of *Salford* was that "save in wholly exceptional circumstances", the court's discretion should be exercised in favour of dismissing or staying a winding up petition so as to compel the parties to resolve their dispute over the debt by their chosen method of dispute resolution (see *Salford* at [39]–[41], cited at [36] above). Notably, Sir Etherton did not elaborate on what these "wholly exceptional circumstances" were, save to note that he found such circumstances "difficult to envisage" (see *Salford* at [39]). In fact, as candidly observed by Nugee J in *Fieldfisher*, "[i]t [was] apparent, from the way in which the Chancellor expressed himself in [39] of *Salford Estates*, that he did not envisage that there would be any circumstances which were wholly exceptional" (at [29]). It may thus be appreciated that the *Salford* approach represents an unprecedented fettering of the court's broad discretion to order a winding up (see [27] above).

66 Further, according to *Salford* (at [41]), as long as the unadmitted debt falls within the terms of the arbitration agreement, the winding up court should not be required to investigate into whether the debt is *bona fide* disputed on substantial grounds. In reality, this would more often than not be the case, given the tendency for arbitration agreements to be drafted in rather wide terms. Thus, under the *Salford* approach, the debtor-company need only refuse to admit the debt, and then the mere presence of an arbitration agreement governing the dispute *ipso facto* means that the court should stay or dismiss the winding up petition in favour of arbitration. This approach leaves practically no allowance for the winding up court to examine the genuineness of the dispute raised by the debtor-company. Indeed, as observed in *Fieldfisher* at [26]:

> If the Companies Court, when faced with a winding-up petition, *ought to refrain from investigating the genuineness of any dispute* out of respect for the policy of the Arbitration Act, then, as far as I can see, it ought equally to refrain from doing that in the case of administration as in the case of winding up. …

[emphasis added]

67 On the whole, the *Salford* approach appears to "place a very heavy obstacle in the way of a party who presents a petition claiming sums due under an agreement that contains an arbitration clause" (see *Eco Measure* at [10]). This may be seen to deal a blow to the insolvency regime since creditors legitimately seeking to wind up insolvent companies may be delayed in or entirely derailed from the recovery of their debts by debtor-companies, which would be able to stave off winding up proceedings simply by raising disputes which they say should be resolved by arbitration, even if these allegations may be entirely unmeritorious.

68 I illustrate the above point with reference to the present case. The Defendant has raised three legal bases for its dispute as to the debt, in terms of liability as well as quantum, all of which it alleges should be resolved by arbitration: (a) frustration; (b) *force majeure*; and (c) the Plaintiff's computation method with regard to the damages payable by the Respondent (see [22]–[24] above). Under the *Salford* approach, merely raising these allegations would be sufficient cause for this court to dismiss the Plaintiff's winding up application. This would be so irrespective of any concerns this court might have over the Defendant's lack of *bona fides* in raising these disputes. In other words, in favour of according primacy to the arbitration agreement, the *Salford* approach effectively binds the hands of the winding up court.

69 In this regard, Abdullah JC's decision in *BDG* provided a helpful gloss to the *Salford* approach, as follows:

> (a) First, the applicable standard of proof should be pegged to that applied in cases for a stay of proceedings in favour of domestic arbitration, *ie*, a *prima facie* case of a dispute falling within the scope of

the arbitration agreement (see [21], [26] and [30]). In applying this standard, the court is not concerned with the merits of the defence; the weakness of the case is a matter for the arbitrators to decide (at [22]).

(b) Secondly, the debtor-company's *bona fides* is a relevant factor. If indications are that issues are not raised *bona fide*, that would be a reason to find that there is no dispute *prima facie*, or that the court's powers should not be exercised in the debtor-company's favour. This requirement would prevent debtor-companies from abusing the lower standard of proof to stave off winding up proceedings (at [23]).

70 I note that the concept of "*bona fide*" under the *BDG* approach bears a slightly different meaning as compared to under the orthodox approach. Under the latter, the inquiry into whether the dispute is "*bona fide*" is, in substance, equivalent to the inquiry into whether the dispute is "substantial". As stated by Lord Greene MR in *Re Welsh Brick Industries, Ltd* [1946] 2 All ER 197 at 198 (referred to in *Pacific Recreation* at [23]), whether there is a *bona fide* dispute is simply "another way" of putting the question of "whether or not there is some substantial ground for defending the action". Thus under the orthodox approach, the inquiry into the "*bona fide*" nature of the dispute necessarily involves a consideration of the strengths or merits of the debtor-company's defence. In contrast, under the *BDG* approach, the winding up court is *not* to consider the strength or merits of the debtor-company's case at all (see [69(b)] above); the inquiry into the "*bona fide*" requirement is simply limited to a consideration of the *genuineness* of the debtor-company's defence.

71 Overall, it seemed to me that *BDG* provided a middle ground between the orthodox approach and the *Salford* approach. In particular, *BDG* provided a more nuanced approach than *Salford* on how the courts should respond to the

competing tensions at play at the intersection between the domains of arbitration and insolvency. For clarity, I set out these three approaches again:

(a) Under the orthodox approach (*per Pacific Recreation* and *Metalform*, among others), the debtor-company needs to establish the existence of a substantial and *bona fide* dispute over the debt. If the debtor-company is able to show triable issues, the winding up court will grant an injunction to restrain the applicant-creditor from commencing winding up proceedings or stay or dismiss a winding up application, as the case may be.

(b) Under the *Salford* approach, the debtor-company need only show that there is a dispute over the debt which is governed by an arbitration agreement. This does not require the winding up court to investigate into whether the debt is *bona fide* disputed on substantial grounds. Save in wholly exceptional circumstances, the court should dismiss or stay the winding up petition.

(c) Under the *BDG* approach, the debtor-company needs to establish a *prima facie* case that there is a dispute between the parties which falls within the scope of the arbitration agreement, and that the debt is *bona fide* (or genuinely) disputed.

72 Accordingly, if I had not considered myself bound by the Court of Appeal decision of *Metalform* to apply the orthodox approach, I would have been amenable to applying the *BDG* approach in the present case. I should mention that Ang SJ also did not appear to apply the strict *Salford* approach in determining SUM 3677, which was the Defendant's application for an interim injunction to restrain the Plaintiff from commencing winding up proceedings. It will be recalled that both *Salford* and *BDG* were cited to the learned judge, and

that he dismissed the application on the basis that he was "not satisfied that there [was] a *bona fide* dispute" (see [18] above). If Ang SJ had applied the strict *Salford* approach, the mere fact that there was a dispute as to the debt that fell within the scope of the arbitration agreement in the GMRA would have been sufficient cause for the interim injunction to be granted for the purpose of compelling the parties to resolve their dispute via arbitration.

73 As I will discuss in the following section, I did not consider that the Defendant had raised a *bona fide* dispute regarding the debt of US$170,388,766.03 – ***either*** in the orthodox sense that there were substantial grounds for defending the action, ***or*** in the narrower *BDG* sense that the debt was genuinely disputed. Accordingly, ***regardless*** of whether the orthodox or the *BDG* approach applied, I held that the Defendant failed to establish its case that the Plaintiff's winding up application should be dismissed.

Whether the debt was **bona fide** *disputed*

74 To begin with, between the period of 10 April 2018 (when the Defendant was first notified of its default under the GMRA) and 9 August 2018, the Defendant never disputed its liability to pay the amount as stated in the various calculation notices, or the amount itself (see [9]–[13] above). For completeness, I should add that I do not consider that the announcement put up by AnAn International Limited on the SGX website on 30 July 2018 counts for a communication from the Defendant. The Defendant argued that its silence for this period, even in the face of repeated claims against it, did not preclude the existence of a dispute (see *Tjong Very Sumito* at [61]). I agreed that the Defendant's silence for this period, taken by itself, would have been insufficient to demonstrate the Defendant's lack of *bona fides*. However, viewing this silence in context with what happened thereafter, I agreed with the Plaintiff that

the Defendant clearly lacked a genuine belief in any of the grounds it put forward as the basis for the alleged dispute. In my view, the fact that the Defendant's case continually morphed and shifted over a short span of time from 10 to 30 August 2018 betrayed its lack of *bona fides*.

75 The very first instance of direct communication from the Defendant was by way of its letter dated 10 August 2018. However, that letter only mentioned in vague terms that the Defendant "disputes that the said sum of US$170,388,766.03 is due and owing". It did not provide any elaboration as to whether this was a dispute as to liability and/or quantum, and on what legal basis this dispute was mounted (see [14] above). It was soon revealed that the Defendant's case was that the GMRA had been frustrated by the OFAC Sanctions and the falling share price of EN+ (see [16]–[17] above). Aside from this, no other grounds of dispute were raised in the Defendant's supporting affidavits for OS 975 and SUM 3677 dated 10 and 13 August 2018 respectively, and at the hearing on 13 August 2018 before Ang SJ.

76 Yet, not long after, in its notice of arbitration filed on 23 August 2018, the Defendant disputed for the first time the computation method used by the Plaintiff, in addition to the initial ground of frustration (see [25] above). Further, just one week later on 30 August 2018, the Defendant raised the *force majeure* argument for the first time in these proceedings (although, as noted at [74] above, it was mentioned in the SGX announcement by the Defendant's subsidiary). Thus, all in all, the Defendant raised three grounds on which it disputed the debt.

77 I deal first with the frustration ground, which was essentially the only aspect of the Defendant's case that remained constant. It will be recalled that the Defendant had first raised this argument at the hearing of SUM 3677 as its

sole basis for seeking an interim injunction against the Plaintiff. Ang SJ found no *bona fide* dispute as to the debt on the basis of frustration, and noted that the Defendant had not suggested that it had been prohibited by the OFAC Sanctions from performing its obligations under the GMRA.[22] The Defendant did not appeal against any portion of this decision (see [18] above). Yet, the Defendant raised the exact same ground to resist the winding up application subsequently filed by the Plaintiff, without providing any further substantiation as to why and how the doctrine of frustration was applicable. A party must be strictly held to its contractual obligations and should only be released from them where supervening events make it *impossible*, and not merely onerous, to fulfil them (see *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 ("*RDC*") at [80]). It was entirely unclear how the OFAC Sanctions and the falling share price of EN+ could be said to have made it impossible for the Defendant to comply with its obligation to maintain the required level of collateral in respect of the Transaction, such that the doctrine of frustration could plausibly apply. Accordingly, it seemed to me that the frustration ground could not have been raised *bona fide* – both in the orthodox sense that there were no substantial grounds for defending the action, and in the *BDG* sense that the dispute was not genuine.

78 I turn now to the *force majeure* ground. Quite aside from the belated nature in which this argument was raised, this ground was a complete legal non-starter. As observed by the High Court in *Magenta Resources (S) Pte Ltd v China Resources (S) Pte Ltd* [1996] 2 SLR(R) 316 (cited with approval in *RDC* at [57]), what is referred to as *force majeure* in our law is no more than a convenient way of referring to contractual terms that the parties have agreed upon to deal with situations that might arise, over which the parties have little

22 Plaintiff's Bundle of Documents, Tab 10, p 111.

or no control, that might impede or obstruct the performance of the contract (at [60]). The Court of Appeal in *RDC* also noted that the principal purpose of a *force majeure* clause is to contractually allocate the risks with regard to the occurrence of future events in specific circumstances, all of which are stipulated within the clause itself (at [53]). In other words, *force majeure* is a contractual doctrine, with its applicability strictly depending on the precise scope and ambit of the particular contractual clause. However, the GMRA does not contain a *force majeure* clause at all. The Defendant therefore cannot rely on the doctrine of *force majeure* as a basis to claim that the GMRA has been discharged by agreement. This was correctly pointed out to the Defendant as early as 11 August 2018, by the Plaintiff's letter to it (see [15] above). Yet, the Defendant persisted in raising the *force majeure* argument in its affidavit-in-reply dated 30 August 2018. Tellingly, even in that affidavit, the Defendant did not point to any specific contractual clause as the basis for its *force majeure* argument. This could only have been because it knew that there was no such basis to begin with. Again, it seemed to me that the *force majeure* argument could not have been raised *bona fide*, in both the orthodox and the *BDG* senses.

79 Finally, I come to the argument relating to the computation method adopted by the Plaintiff in calculating the damages payable by the Defendant. It should again be pointed out that this particular ground of dispute was raised at a fairly late stage. However, the more fundamental problem with the Defendant's case was that it did not properly substantiate its position as to what the correct computation method should be, nor did it state its case on the quantum of the debt owed to the Plaintiff. The closest that the Defendant came to doing so was in its affidavit-in-reply dated 30 August 2018, filed by its director Mr Zeng Jianjun. After listing the aspects of the Plaintiff's computation method with which it took issue, Mr Zeng merely stated as follows:[23]

> Notwithstanding that the [Defendant] is in the midst of computing what the precise amount it may theoretically owe to [the Plaintiff], if at all, I believe that the difference is easily over USD$150 million, which is approximately 88% less than what the Plaintiff is alleging.

80 As can be seen, the Defendant took no firm position on the amount by which the debt should allegedly be reduced. It also provided no explanation of how it arrived at its conclusion that the debt amount should be reduced by at least US$150 million. It was particularly ironic that the Defendant complained of the Plaintiff's failure to explain its computation method when this statement in its own affidavit-in-reply was bereft of any such explanation. I therefore did not consider that the dispute that the Defendant raised as to the computation method used by the Plaintiff was a *bona fide* dispute in the orthodox sense that there were substantial grounds for defending the action.

81 Further, in my view, the absence of any attempt to quantify the alleged reduced debt amount spoke to the Defendant's lack of *bona fides* in the *BDG* sense. Having regard to the fact that the margin trigger event notice had been issued on 6 April 2018 and the subsequent conduct of the Defendant (as detailed at [75]–[76]), I took the view that the Defendant deliberately omitted to particularise its case because it knew that *even if* it quantified the amount that the debt should allegedly be reduced by, there would still be a substantial debt owed to the Plaintiff, and that alone would be sufficient basis for the court to grant a winding up order. After all, the presumption of insolvency under s 254(2)(*a*) of the CA operates so long as the debtor does not pay a sum which is not in dispute, and that sum exceeds the prescribed minimum amount for the issuance of a statutory demand (see *Salford* at [28]–[29]; *Sanpete* at [53]–[63]; and *Denmark* at [38], citing *Pacific King Shipping Pte Ltd v Glory Wealth Shipping Pte Ltd* [2010] 4 SLR 413 at [26]). The fact of the matter was that the

[23] Affidavit of Zang Jianjun dated 30 August 2018, para 29.

Plaintiff had purchased approximately 35 million EN+ GDRs for nearly USD$250 million, before the share price plummeted from US$13 to US$5.60 per share (see [4]–[8] above). Under the GMRA, the Defendant was under an obligation to top up the amount of collateral; and having failed to do so, the Defendant was liable to pay damages to the Plaintiff (the frustration and *force majeure* grounds being unsustainable in law: see [77]–[78] above). Bearing in mind the massive sums involved in the Transaction, it was difficult to see how the Defendant's debt to the Plaintiff could ever be reduced to a sum below S$10,000, the prescribed minimum amount for the issuance of a statutory demand. Thus, the presumption of insolvency would still operate, leaving the Defendant liable to be wound up on the basis that it was unable to pay its debts.

82 This outcome is also consistent with the approach in *HK Sports* (see [46]–[47] above). The approach of the Hong Kong Court of First Instance may be summarised as follows: even if there is a dispute as to the underlying debt and such dispute is governed by an arbitration agreement, the winding up court is entitled to look at the precise nature and extent of the dispute as to the debt. In my view, as long as there is a sum payable which is greater than the statutory minimum required for the issuance of a statutory demand, and this sum is not disputed or cannot be disputed in the arbitration, the court's discretion may be exercised in favour of granting the winding up order. Given the massive sums of money involved in the Transaction, it was obvious that any debt owed by the Defendant would on any view exceed the minimum required for the issuance of the statutory demand. I therefore saw no justification for requiring the arbitration to be completed before allowing the Plaintiff to proceed to wind up the Defendant.

83 Ultimately, I was not convinced that the Defendant's dispute as to the Plaintiff's computation method was a genuine one, even if it appeared to be governed by the arbitration agreement in the GMRA. To my mind, if the defence raised is so obviously lacking in merit – as in this case – that the defendant's *bona fides* in raising that defence in the first place can be rightly called into question, the court cannot then turn a blind eye and allow such a plainly unmeritorious claim to go to arbitration. In such circumstances, it would only be proper for the winding up court to exercise its discretion in favour of granting the winding up.

84 Accordingly, regardless of whether the orthodox approach or the *BDG* approach applied, I did not consider that the debt was *bona fide* disputed by the Defendant. The Defendant therefore failed to establish its case that the Plaintiff's winding up application should be dismissed.

Conclusion

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

(a) pursuant to s 254(1)(*e*) read with s 254(2)(*a*) of the CA, that a winding up order be made against the Defendant;

(b) that Bob Yap Cheng Ghee, Wong Pheng Cheong Martin and Toh Ai Ling be appointed as joint and several liquidators of the Defendant; and

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

Dedar Singh Gill
Judicial Commissioner

Shobna d/o V Chandran, Lee Chia Ming, Ashwin Nair Vijayakumar and Alexander Choo Wei Wen (Dentons Rodyk & Davidson LLP) for the plaintiff;
Daniel Soo and Cumara Kamalacumar (Selvam LLC) for the defendant.