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

[2022] SGHC 258

Companies Winding Up No 95 of 2022

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

And

In the matter of Electronic Cash and Payment Solutions (S) Pte Ltd

Between

Atlas Equifin Private Limited

… *Claimant*

And

Electronic Cash and Payment Solutions (S) Pte Ltd

… *Defendant*

And

(1) Andy Lim
(2) Monica Kochhar
(3) Praveen Suri

… *Non-parties*

GROUNDS OF DECISION

[Companies — Winding up — Disputed debt]
[Insolvency Law — Winding up — Grounds for petition]
[Insolvency Law — Winding up — Standing of shareholder/contributory to oppose winding up application]

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Atlas Equifin Pte Ltd
v
Electronic Cash and Payment Solutions (S) Pte Ltd (Andy Lim and others, non-parties)

[2022] SGHC 258

General Division of the High Court — Companies Winding Up No 95 of 2022
Goh Yihan JC
21, 22 September 2022

13 October 2022

Goh Yihan JC:

1 This was the claimant's application for a winding up order to be made against the defendant pursuant to s 125(1)(*e*) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA").[1] The basis of the claimant's application was that the defendant's Indian subsidiary, Equity Capital Advisors (India) Private Limited ("ECAPS India"), entered into a Loan Credit Facility with the claimant. The defendant then entered into a guarantee to pay the claimant all sums due and payable by ECAPS India ("the Guarantee").[2] When ECAPS India defaulted on its payment to the claimant, the claimant then turned to the defendant to seek repayment under the Guarantee.[3] When the defendant

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1 HC/CWU 95/2022 filed on 28 April 2022.

2 Murtuza Ali aka Murtuza Ali Abbas Somjee's Affidavit dated 7 April 2022 ("Murtuza's Affidavit") at [5].

3 Murtuza's Affidavit at [14].

failed to pay, secure or compound the amount due to the claimant, the claimant proceeded to issue a statutory demand to the defendant.[4] This was not complied with. The applicant thus filed the present winding up application against the defendant on 28 April 2022.[5]

2 As against the claimant's application, Ms Monica Kochhar ("Monica"), the second non-party, who is a 32.6% shareholder and contributory of the defendant, sought and obtained leave to oppose the winding up application.[6] Monica filed her affidavit on 22 August 2022, alleging that (a) the debt owed by the defendant to the claimant is disputed, (b) the defendant remains a going concern, and (c) the claimant's winding up application is an abuse of process by the claimant to impose illegitimate pressure on the defendant.[7]

3 After hearing the parties and considering the relevant documents, I dismissed the claimant's application and declined to grant the winding up order sought against the defendant. Because this application raised the relatively unexplored issue of whether a shareholder/contributory has standing to oppose a creditor's winding up application, I now set out the grounds for my decision in greater detail.

Background facts

4 The broad background facts giving rise to the present application were undisputed. As I will explain below, the parties instead disputed the facts which

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4 Murtuza's Affidavit at [15]–[16].

5 Murtuza's Affidavit at [18]–[19].

6 Monica Kochhar's Affidavit dated 22 August 2022 ("Monica's Affidavit") at [1].

7 Monica's Affidavit at [6].

gave rise to the Guarantee. Leaving those facts aside for the moment, the claimant, Atlas Equifin Private Limited, is a company incorporated in India.[8] The defendant, Electronic Cash and Payment Solutions (S) Pte Ltd, is a start-up company incorporated in Singapore. The defendant, through its Indian subsidiary, ECAPS India, is in the business of offering an integrated financial services technology platform to businesses and consumers in India.[9]

5 As I mentioned above at [1], ECAPS India entered into a Loan Credit Facility Letter dated 4 January 2021 ("the Letter") with the claimant. Pursuant to the Letter, the defendant entered into the Guarantee. By the Guarantee, the defendant guaranteed to pay the claimant the sums payable by ECAPS India.[10] The defendant's board of directors had passed a resolution at a meeting on 24 December 2020 for the defendant to enter into the Guarantee.[11] The Guarantee was executed on behalf of the defendant by Mr Rakesh Kumar Aggarwal ("Rakesh"), who is one of its directors. Notably, Rakesh was both a director of the defendant, and also, the director and controlling shareholder of the claimant that provided the loan.[12]

6 Under the terms of the Letter, the claimant extended a total loan of INR 40,000,000 to ECAPS India.[13] After ECAPS India failed to repay the claimant the sum owing after 9 April 2021, the claimant issued a letter of demand dated 2 June 2021 to the defendant, as guarantor, for the repayment of

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8 Murtuza's Affidavit at [3].

9 Murtuza's Affidavit at [4]; Monica's Affidavit at [9].

10 Murtuza's Affidavit at [5].

11 Monica's Affidavit at [29]–[30].

12 Monica's Affidavit at [40].

13 Murtuza's Affidavit at [6].

the principal amount of INR 40,000,000 with interest.[14] The defendant failed to pay, secure, or compound the amount by the deadline stipulated in the letter of demand, which was 7 June 2021.[15]

7 On 22 February 2022, the claimant's solicitors issued a statutory demand to the defendant. By the terms of the statutory demand, the claimant demanded that the defendant make repayment by 15 March 2022. This was three weeks from the date of service of the statutory demand (*ie*, 22 February 2022).[16] The defendant still failed to make any payment.[17] As such, as of 31 March 2022, the defendant was indebted to the claimant in the sum of INR 49,231,229, which includes interest computed in accordance with the Letter.[18]

8 On 28 April 2022, the claimant filed the present application for a winding up order to be made against the defendant pursuant to s 125(1)(*e*) of the IRDA. The application was heard by a High Court Judge for the first time on 20 May 2022.[19] At the hearing, the defendant opposed the application, whereupon the Judge adjourned the application to be considered at a later date to allow the defendant the chance to file an affidavit. However, the defendant's

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14 Murtuza's Affidavit at [13]–[14].

15 Murtuza's Affidavit at [15].

16 Murtuza's Affidavit at [16].

17 Murtuza's Affidavit at [17].

18 Murtuza's Affidavit at [18].

19 Minute Sheet of hearing on 20 May 2022 by Justice Lee Seiu Kin at p 1.

solicitors discharged themselves on 22 June 2022,[20] and the application was fixed for a hearing for a final determination on 8 August 2022.[21]

9 Then, on 8 August 2022, Monica's solicitors attended before another High Court Judge to seek leave to file an affidavit to oppose the winding up application. The High Court Judge decided that Monica, as a contributory, had standing to be heard, even in a situation of winding up on the basis of the defendant's inability to pay its debt. As such, the Judge granted leave for Monica to file her affidavit and for a special date to be fixed to consider the application.[22] I eventually heard the application on 21 September 2022 and issued my decision to dismiss the same on 22 September 2022.

The relevant issues

10 From the background facts leading to the hearing before me, it would be clear that I had to consider the following issues in the present application:

(a) First, whether the claimant had made out the relevant ground for the defendant to be wound up.

(b) Second, whether Monica had legal standing to oppose the claimant's winding up application.

(c) Third, if Monica had such legal standing, whether she had successfully challenged the claimant's application.

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20 HC/SUM 2312/2022 filed on 22 June 2022.

21 Case Conference before AR Karen Tan on 30 June 2022.

22 Minute Sheet of hearing on 8 August 2022 by Justice Audrey Lim ("8 August Minute Sheet") at p 2.

11 In the event, I found that the claimant had made out the ground for the defendant to be wound up on the basis that it was unable to pay its debts under s 125(1)(*e*) read with the deeming provision in s 125(2)(*a*) of the IRDA. Where a company is unable or deemed unable to pay its debts, the creditor is *prima facie* entitled to a winding up order *ex debitio justitiae*, but nevertheless the court still retains the discretion to decline to make the winding up order (see the decision of the Court of Appeal in *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd (formerly known as Tong Teik Pte Ltd)* [2021] 2 SLR 478 at [85]).

12 However, given Monica's opposition, the claimant could not obtain an order for winding up on this ground alone. In this regard, I concluded that Monica had legal standing to oppose the claimant's winding up application. I then found that Monica had successfully challenged the claimant's application by raising a *bona fide* dispute on the validity of the debt that underlies the claimant's application. I accordingly dismissed the claimant's application. I now explain each of these findings in greater detail.

Whether the claimant had made out a ground for the defendant to be wound up

13 As a starting point, I was satisfied that the claimant had made out the ground for the defendant to be wound up under s 125(1)(*e*) read with s 125(2)(*a*) of the IRDA. I have already set out the undisputed facts in this regard at [6]–[9] above. In summary, ECAPS India defaulted on the loan provided by the Letter and failed to make payment for the principal loan amount and interest. The claimant called upon the defendant as guarantor to repay the loan amount no later than 7 June 2021. The defendant failed to repay the loan. The claimant issued a statutory demand on 22 February 2022 and the demand remained unsatisfied after three weeks had elapsed. Thus, by s 125(2)(*a*) of the IRDA, the

defendant was deemed unable to pay its debt. Accordingly, the claimant had made out the ground under s 125(1)(*e*) for the defendant to be wound up. Monica did not dispute this but based her objections to the winding up on the validity of the Guarantee that gave rise to the defendant's debt.

14 On this point, I should say that it was completely unnecessary and irrelevant for the claimant to have filed an affidavit by Mr Praveen Suri ("Praveen"), the third non-party and the Chief Executive Officer of the defendant, in the present application.[23] During the hearing before me, Ms Lim Shu Yi ("Ms Lim"), who appeared for the claimant, explained that they had filed Praveen's affidavit because it raised a matter of contingent liability since Praveen had also issued a statutory demand against the defendant.

15 I disagreed with this explanation. The claimant's case was based only on its own statutory demand dated 22 February 2022. It was not based on Praveen's statutory demand. If the claimant wished to file Praveen's affidavit, they ought to have sought the leave of court to do so, similar to how Monica sought leave to tender her affidavit for this present application. Indeed, when the parties appeared before a High Court Judge on 8 August 2022 in respect of Monica's affidavit, Ms Lim informed the court that her firm acted for Praveen but that no winding up application had been filed on Praveen's behalf.[24] This bolstered my view that Praveen's affidavit was entirely irrelevant to the present proceedings. I therefore ascribed no weight whatsoever to the contents of Parveen's affidavit.

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23 Praveen Suri's Affidavit dated 9 September 2022.

24 8 August Minute Sheet at p 1.

16 I would also add that parties should avoid filing affidavits that are not only irrelevant to the application at hand but also without having sought leave to do so. It is incumbent on all parties to assist the court in the expeditious and cost-effective resolution of proceedings. More generally, this means not obscuring the main issues in a given case by filing documents that are irrelevant to the resolution of the case at hand.

Whether Monica had legal standing to oppose the winding up application

Overview

17 Having concluded that the claimant had made out the ground for the defendant to be wound up under s 125(1)(*e*) of the IRDA, I turned to consider Monica's opposition to the winding up application. This required me to consider the threshold question of whether she had the legal standing to oppose the application in the first place. As a preliminary point, given that Monica had been granted leave by a High Court Judge to file her affidavit to oppose the claimant's application, I was of the view that this issue had already been decided by the Judge who granted such leave.

18 In any event, even on a substantive basis, I agreed with the submissions made on behalf of Monica that she had the legal standing as a shareholder/contributory to oppose the winding up application.

The relevant subsidiary legislation is not inconsistent with a shareholder/contributory having legal standing to oppose a winding up application

19 First, while there is no explicit conferral of a right on a shareholder/contributory to oppose a winding up application, I concluded that the relevant subsidiary legislation is not inconsistent with such a right. In this

regard, Rule 69 of the Insolvency, Restructuring and Dissolution (Corporate Insolvency and Restructuring) Rules 2020 ("CIR Rules 2020") ("Rule 69") provides as follows:

> **Copy of winding up application and supporting affidavit to be provided to creditor or contributory**
>
> 69. Every creditor or contributory of a company is entitled to be provided, by the applicant of a winding up application in respect of the company, with a copy each of the [winding up] application and the affidavit supporting the application within 48 hours after requiring the same, upon payment of $1 per page of such copy.

For clarity, the term "contributory", in relation to a company, refers to a person liable to contribute to the assets of the company in the event of its being wound up and includes the holder of fully paid shares, as defined in s 4(1) of the Companies Act 1967 (2020 Rev Ed) ("the Companies Act") (see s 2(1) of the IRDA). It is well-understood that prior to the commencement of winding up, that same person (*ie*, the contributory) would be referred to as a shareholder instead (see, for example, the decision of the High Court in *Ee Kee Chai v Chew Joo Song John and Others* [2006] SGHC 225 at [1] and the decision of the Court of Appeal in *Seah Teong Kang (co-executor of the will of Lee Koon, deceased) and another v Seah Yong Chwan (executor of the estate of Seah Eng Teow)* [2015] 5 SLR 792 at [47]). These terms can be used interchangeably depending on the context.

20 As such, Rule 69 is not inconsistent with the right of a shareholder/contributory to oppose a winding up application. In fact, I agreed with Monica that Rule 69 *prima facie* confers a right on a shareholder/contributory to oppose any winding application filed. Otherwise, why else would it be necessary for the shareholder/contributory to be provided

with the documents relating to the winding up application? Indeed, it is undisputed that creditors can oppose a winding up application and Rule 69 confers on them the right to obtain the same set of documents. As such, it can be concluded that, by conferring the same right on a shareholder/contributory to obtain those documents, the intent behind Rule 69 is similarly to give the shareholder/contributory the relevant information on a winding up application so that they can, if they so wish, oppose the application.

21 It might then be thought that shareholders/contributories are provided such documents only for information. However, in this regard, none of the provisions under Division 2 under Part 5 of the CIR Rules 2020, which concern the "[h]earing of winding up applications and winding up orders", explicitly exclude shareholders/contributories from being able to oppose a winding up application. In fact, Rule 72(1), which is concerned with affidavits filed in opposition of a winding up application, does not limit the right to oppose a winding up application to only the company facing the winding up. For completeness, Rule 72(1) provides as follows:

> **Affidavits opposing winding up application and affidavits in reply**
>
> 72.—(1) Every affidavit in opposition to a winding up application must be filed and a copy of the affidavit must be served on the applicant at least 5 days before the day appointed for the hearing of the application.

22 Accordingly, I concluded that, at the very least, the scheme of the CIR Rules 2020 (and, by extension, the IRDA) does not exclude a shareholder/contributory like Monica from having legal standing to oppose the winding up application. In fact, as I have explained above at [20], it might be possible to read specific provisions as conferring, albeit indirectly, a right on shareholders/contributories to so oppose. Whether shareholders/contributories

can succeed in their opposition, as well as the weight that a court would accord to such views, are quite different matters.

The English authorities support a shareholder/contributory having legal standing to oppose a winding up application

The relevant authorities in England

23 Second, the proposition that shareholders/contributories have the legal standing to oppose a winding up application is also supported by English authorities, such as *Re Camburn Petroleum Products Ltd* [1979] 3 All ER 297 ("*Re Camburn*"). In discussing the English authorities, I should note that my primary focus was on the existence of local cases. However, given that there was no local case on point, I turned to the English authorities. In *Re Camburn*, Slade J held that a court hearing a creditor's winding up action could "pay regard to the wishes of contributories" (at 303). However, the learned judge also said that a court would "ordinarily attach little weight to the wishes of contributories, in comparison with the weight it attaches to the wishes of an [unpaid] creditor" with the *prima facie* right to a winding up order (at 303).

24 Similarly, the learned authors of *McPherson & Keay's Law of Company Liquidation* (Sweet & Maxwell, 5th Ed, 2021) at para 3-104 ("*McPherson & Keay*") were also of the view that shareholders/contributories can raise opposition to a winding up application: "[o]pposition to winding up may proceed from the petitioner's fellow creditors … or from the company or (what is virtually the same thing) *from the shareholders*" [emphasis added]. For completeness, *Re Camburn* was also cited in *McPherson & Keay* at para 3-121 for the premise that the court may consider the views of contributories where a creditor petitions to the court for winding up.

25 *Re Camburn* was then endorsed in the subsequent English High Court decision of *Re Rodencroft Ltd* [2004] 1 WLR 1566 ("*Re Rodencroft*"). I found it relevant to go through this decision in some detail as it delved deeper into the question of whether a contributory has standing to oppose a winding up petition. In gist, Evans-Lombe J held that a contributory has the "*prima facie* right to appear on the [winding up] petition and file evidence in opposition" that was presented by the Secretary of State to wind up a company (and this rationale naturally extends to creditors' winding up petitions as well), provided that "he could demonstrate that [the company] was solvent" (at [23]). The rationale for requiring proof of solvency by the contributory is that the winding up petitioner should not be "put to the cost of a contested petition where the only opposition is from a contributory who cannot demonstrate that the company is solvent so that he has a genuine interest in the result" (at [21]).

26 It appears that the position in England has been settled after *Re Rodencroft*, and the leading academic texts on insolvency law recognise this as such (see *McPherson & Keay* at para 5-015, citing *Re Rodencroft* in the footnote):

> The company is, naturally, entitled to oppose a petition. But can a contributory of the company do so? *The answer appears to be in the affirmative if the contributory can establish that the company is solvent.*
>
> [emphasis added]

The authors of *Goode on Principles of Corporate Insolvency Law* (Kristin van Zwieten gen ed) (Sweet & Maxwell, 5th Ed, 2018) at para 5-21, footnote 222 also cite *Re Rodencroft* for the proposition that "[c]ontributories also have the right to be heard in opposition". Hence, it is well settled under English law that a shareholder/contributory has standing to oppose a winding up petition, but

subject to the condition that it can be established that the company is solvent (see also, Edward Bailey and Hugo Groves, *Bailey and Groves: Corporate Insolvency – Law and Practice* (LexisNexis, 5th Ed, 2021) at para 25.1, footnote 2).

The relevant authorities in England are highly applicable in the local context

27 More substantively, other than being the seminal case in England, I found *Re Rodencroft* to be a persuasive authority which can be applied in the local context for the following reasons.

28 First, there are similarities in the English and local legislative schemes that warranted this court placing some importance on *Re Rodencroft*. In this regard, Evans-Lombe J in *Re Rodencroft* made the observation (at [16]) that s 195(1)(*a*) of the Insolvency Act 1986 (c 45) (UK) (the "UK Insolvency Act 1986") appears to be the only provision which hints at the possible legal standing of the contributory to oppose the winding up petition. He also observed that the provision states that the court may "as to all matters relating to the winding up of a company, have regard to the wishes of … contributories of the company, as proved to it by any sufficient evidence" (at [13]). Evans-Lombe J noted (at [13]–[15]) that Slade J's decision in *Re Camburn* was premised in part on the older equivalent of s 195(1)(a) of the UK Insolvency Act 1986, which allowed the court the right under that section to "pay regard to the wishes of contributories, in deciding whether or not to make a winding up order on a creditors petition", although little weight should ordinarily be attached to the wishes of the contributories as compared to the weight attached to the wishes of unpaid creditors (at [15]).

29 It is therefore apposite to note that our local legislation also has a similar provision under s 201(1)(*a*) of the IRDA, which also provides as follows:

> **Meetings to ascertain wishes or contributories**
>
> 201. —(1) The Court may —
>
> (*a*) as to all matters relating to the winding up of a company, have regard to the wishes of the creditors or contributories as proved to the Court by any sufficient evidence;

30 Accordingly, similar to s 195(1)(a) of the UK Insolvency Act 1986, s 201(1)(*a*) of the IRDA also provides that the court may "as to all matters relating to the winding up of a company, have regard to the wishes of … contributories as proved to the Court by any sufficient evidence". Adopting the reasoning in *Re Rodencroft*, I concluded that this meant that shareholders/contributories in Singapore do have legal standing to oppose winding up applications, given that the court is entitled to consider their interests in a winding up. This makes sense as the court should have the discretion to consider the views of the stakeholders that are affected by the winding up, such as shareholders/contributories – especially when it can be shown that the company was solvent, such that these shareholders/contributories could have much to lose.

31 Second, Evans-Lombe J recognised in *Re Rodencroft* (at [17]) that while the various rules under the UK Insolvency Rules 1986 (SI 1986 No 1925) "do not appear to be drafted with the idea that a contributory might seek to appear on … a creditor's … petition in mind", conversely, "it is not possible to say that the rules are so inconsistent with the appearance of a contributory as to rule out that happening". Similarly, I have concluded above at [19] that there is nothing in the CIR Rules 2020 which suggests that a shareholder/contributory would not

have standing to oppose a winding up petition, and that instead, the scheme of the CIR Rules 2020 and (by extension the IRDA) suggests otherwise. The broader point is that the English approach shows that it is possible to read the statutory legislation permissively in relation to a shareholder/contributory's legal standing to oppose a winding up application.

32 Third, Evans-Lombe J noticed in *Re Rodencroft* (at [17]) that the UK statutory form 4.9, which allows parties to give notice of their intention to appear on a winding up petition, contains a list of those intending to appear and, more importantly, "make[s] provision for the inclusion of contributories". This must mean that there is no difficulty in granting leave to a shareholder/contributory to appear on a creditor's petition to oppose the making of a winding up order, since such provision has been made. The position is likewise similar in Singapore when giving notice of intention to appear. In this regard, Form CIR-15, as found in the First Schedule of the CIR Rules 2020, provides that a shareholder/contributory can express an intention to appear and *oppose* a winding up application. I reproduce the form in the relevant part for convenience:

FORM CIR-15

Rule 70(3)

INSOLVENCY, RESTRUCTURING AND DISSOLUTION ACT 2018
(ACT 40 OF 2018)

INSOLVENCY, RESTRUCTURING AND DISSOLUTION (CORPORATE INSOLVENCY AND RESTRUCTURING) RULES 2020

NOTICE OF INTENTION TO APPEAR ON WINDING UP APPLICATION

Name of Company: .....

Unique Entity No. / Registration No.: .....

> Take notice that
> .....
> ..... of (a)
> .....
> ..... a *creditor for $..... of
> ..... / ***contributory holding*** (b)
> ..... ***shares in the above company intends to appear*** on the hearing of the winding up application advertised to be heard on the ..... day of ..... [month] ..... [year] and to support (***or oppose***) such winding up application.
>
> Signed (c) .....
>
> ...
>
> [emphasis added in bold italics]

As such, it can be discerned that Parliament intended that a contributory holding shares in the company had the right to express its intention to appear at the winding up application, but more crucially, to also *oppose* such an application. Taking this reasoning from *Re Rodencroft*, which I regarded as applicable by analogy in Singapore, I determined that Form CIR-15 suggests that shareholders/contributories have the legal standing to oppose a winding up application. While it would have been preferable to have located such legislative intent within the main provisions of the IRDA, I did not think that it is an impediment to finding that a shareholder/contributory has legal standing for such intention to be located in the subsidiary legislation or forms. It may, however, be preferable, for Parliament to clarify, when appropriate, in the main provisions of the IRDA of its intention to allow for shareholders/contributories to oppose a winding up application.

33 Nevertheless, despite the above findings made regarding the standing of the shareholder/contributory, there is always the residual policy concern that a wave of shareholders/contributories might inundate the court with frivolous applications to oppose the winding up, which may be too disruptive to the winding up process and unnecessarily increase costs. Hence, distilling the assistance from the English cases, the following non-exhaustive basket of factors are, to my mind, useful in assisting the court in determining whether leave should be granted by the court for shareholders/contributories to oppose a winding up application:

(a) The court considers whether the shareholder/contributory owns a significant portion of the company's shareholding such that they have a substantial interest in opposing the winding up application.

(b) The shareholder/contributory should be able to demonstrate that the company was solvent. The rationale for requiring proof of solvency by the shareholder/contributory is that the winding up petitioner should not be "put to the cost of a contested petition where the only opposition is from a contributory who cannot demonstrate that the company is solvent so that he has a genuine interest in the result" (see *Re Rodencroft* at [21]).

(c) The shareholder/contributory must be acting *bona fide* (*eg*, no delaying of winding up proceedings unnecessarily).

(d) The court must weigh the interest of the shareholder/contributory against the wishes of an unpaid creditor. In this regard, the court would ordinarily attach little weight to the wishes of shareholders/contributories in comparison to the weight it would attach

> to the wishes of any creditor in the situation where the creditor proves both that he is unpaid and that the company is "unable to pay its debts" (see *Re Camburn* at 303).

34 In alluding to a leave requirement, I recognise that this may go against the grain of the reasons I have provided above in relation to the relevant subsidiary legislation and forms. However, I am of the view that such a requirement is necessary as a safeguard against frivolous opposition by shareholders. Indeed, the question of legal standing does not, by itself, confer a right for an opposition to be considered seriously by a court. A requirement for leave can co-exist consistently and is coterminous with the notion that a shareholder/contributory has the legal standing to be heard. However, if a leave requirement is thought to be unsuitable in the light of the legislative framework, the shareholder's opposition to a winding up application may be considered as a matter of weight and could conceivably be attributed no weight at all so as to amount to a shareholder/contributory not being granted leave to be heard at all.

35 In the present case, I reiterate that Monica had already been granted leave by a High Court Judge to file her affidavit to oppose the claimant's application (see above at [17]). Hence, I do not find it necessary to apply the factors set out above.

Monica as a shareholder/contributory has every right to raise submissions on the company agreements

36 Third, even if Monica did not have standing in relation to opposing the winding up application *per se*, I accepted that, in her capacity as a shareholder, she had every right to raise submissions on the company agreements, such as the Shareholder's Agreement dated 21 August 2018 ("the Shareholder's

Agreement") and Constitution which, as we shall see below, affect the winding up application in the present case. This is for the simple reason that Monica, as a shareholder, is a party to these agreements.

Conclusion on Monica's legal standing

37 Accordingly, for all these reasons and consistent with the grant of leave for Monica to file an affidavit in the present application, I found that Monica had the legal standing to oppose the winding up application.

38 I also dealt with a tangential point that Ms Lim raised before me; that is, even if Monica had standing, she should have taken out a shareholder's action to challenge the Guarantee prior to the present application. In my view, this was not relevant. Whether Monica ought to have taken out such an action is beside the point. The material matter was that the defendant was faced with a winding up application and Monica, as an interested shareholder, wished to challenge the application before the court. I did not think she could be faulted for that.

39 Having concluded that Monica has the legal standing to oppose the winding up application, I turned then to consider whether she had successfully raised any ground to successfully challenge the application.

Whether Monica has successfully challenged the claimant's application

Overview

40 Monica raised three points against the claimant's application, namely (a) Rakesh was not authorised to execute the Guarantee, (b) the Guarantee was not sealed and hence not valid, and (c) the present winding up application was an abuse of process.

41 In examining these grounds, I kept in mind that a winding up application is not the appropriate avenue for a creditor to enforce a disputed debt and should not be used as a means to enforce payment of a debt which is *bona fide* disputed or which can potentially be extinguished by a cross-claim, and that to do so is an abuse of the process of the court (see the decisions of the Court of Appeal in *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268 ("*Metalform*") at [62] and *BNP Paribas v Jurong Shipyard Pte Ltd* [2009] 2 SLR(R) 949 ("*BNP Paribas*") at [9]). A court's role in a winding up application is not to adjudicate or decide on the disputed debt (see *BNP Paribas* at [7]), and a winding up petition should not be used oppressively to put pressure on a company to pay or settle the debt on terms which it might not otherwise have done (see *BNP Paribas* at [8] citing *Re Yet Kai Construction Co Ltd* [2000] HKEC 186).

42 In this regard, as the Court of Appeal previously held in *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") (at [23]):

> With regard to the applicable standard for determining the existence of a substantial and *bona fide* dispute, it was our view that the applicable standard was no more than that for resisting a summary judgment application, *ie*, the debtor-company need only raise triable issues in order to obtain a stay or dismissal of the winding-up application.

Thus, all that Monica had to do in the present application was to raise the existence of a substantial and *bona fide* dispute of the debt underlying the statutory demand (for completeness, raising a serious cross-claim against the creditor is also an alternative, but that issue does not arise here). More accurately put, Monica need only raise triable issues in order to obtain a stay or dismissal of the winding up application. In order to raise such triable issues, what needs

to be shown is that there exists a substantial and *bona fide* dispute in relation to the debt (or a cross-claim) (see *Pacific Recreation* at [23] and [25]).

43 I note that *Pacific Recreation* referred to a "triable issues" standard, whereas the standard adopted in the previous decision of *Metalform* was the "unlikely to succeed" standard (*ie*, that the winding up application was unlikely to succeed). It has since been clarified that any linguistic divergence between the "triable issues" standard in *Pacific Recreation* and the "unlikely to succeed" standard in *Metalform* was "a distinction without difference" (see the High Court decisions of *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 at [26] and *Strategic Construction Pte Ltd v JH Projects Pte Ltd* [2018] 4 SLR 1192 at [20]).

44 But there remains another clarification to be made. While *Pacific Recreation* referred to the traditional "triable issues" standard, I note that in recent times, it appears that the standard of review had possibly shifted from that "triable issues" standard to a "*prima facie*" standard of review after two decisions handed down by the Court of Appeal had effected a sea change in the law (beginning with the decision of *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 ("*AnAn*")). The latest of these decisions was that in *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] 2 SLR 510 ("*Diamond Glass*").

45 In *Diamond Glass* (at [42]), the Court of Appeal reproduced portions of *AnAn* where the court undertook a comprehensive review of authorities in various jurisdictions before coming to the conclusion that for disputed debts and

cross-claims that were *subject to an arbitration agreement*, the *prima facie* standard of review should apply. The Court of Appeal then went on to state that "[a]lthough the ratio of *AnAn* concerned cross-claims and disputed debts that were subject to *an arbitration agreement* in the context of a winding up application, it is clear this Court's ruling there went beyond that narrow issue" [emphasis in original] (see *Diamond Glass* at [43]). This then led the Court of Appeal in *Diamond Glass* to conclude that the "*prima facie* standard of review should also apply in building and construction cases like the present where the cross-claim is not the subject of an arbitration agreement" as it "would make little sense for the *prima facie* standard of review to apply where the dispute comprised in the cross-claim or disputed debt is the subject of an arbitration agreement, and for the higher triable issue standard to apply where it is not" (at [44]). The logical consequence of the Court of Appeal's statements is that, technically, the *prima facie* standard of review would appear to apply generally to all other cases (even those not concerning the construction context).

46 However, I would be loath to apply the *prima facie* standard beyond the construction context that was applicable in *Diamond Glass*. It was quite clear that it was the unique circumstances of the construction context concerning the temporary finality of adjudication determinations under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) that weighed heavily on the Court of Appeal. It was in such a situation where the adjudication determination judgment debtor raises a cross-claim to challenge a winding up petition founded on the adjudication debt, that the court was minded to adopt the *prima facie* standard of review (see *Diamond Glass* at [83]). Hence, I leave the point open for future clarification and proceed to decide the case on the triable issues standard espoused in *Pacific Recreation*.

Rakesh was not authorised to execute the Guarantee

47 Monica's first argument, which was ably argued by Mr Lim Mingguan ("Mr Lim") who appeared on her behalf, was to dispute the defendant's debt to the claimant by alleging that Rakesh, a director of the defendant, was not authorised to execute the Guarantee on behalf of the defendant. This is because, so Mr Lim argued, the meeting of 24 December 2020, at which the Guarantee was approved, was irregularly convened for not having at least two non-interested directors. There being only two directors at the meeting, of which Rakesh was one of the two and who had competing interests, the quorum necessary for the meeting was never met. It was undisputed that Rakesh had a competing interest in the Guarantee because he is both a director of ECAPS India (the claimant), *and* also the defendant (see [5] above). Consequently, the board resolution which authorised: (a) the defendant to enter into the Guarantee, and (b) also authorised Rakesh (or any one director) to execute the Guarantee on behalf of the defendant, was invalid.

48 In this regard, the claimant attempted to argue that the wording of the board resolution meant that only one director was needed to constitute the quorum. I did not accept this argument as this was clearly not supported by a plain reading of the board resolution. All the board resolution stated was that "any one director" could *execute* the Guarantee.

49 Turning to the issue proper, I agreed with Monica's argument. There exists a substantial and *bona fide* dispute in relation to the Guarantee. I found that she had raised a triable issue as to the validity of the board resolution which authorised the defendant to enter into the Guarantee, and hence its ultimate

validity in relation to the defendant. In this regard, the defendant's Shareholder's Agreement provides materially as follows:[25]

> Clause 5.3.4: "Subject to the provisions of the [Companies Act], [the SHA], (including without limitation, Clause 8) and the Constitution, all decisions of the Board shall be taken by majority vote of the Directors … present or represented at a validly constituted Board Meeting."
>
> Clause 5.5.1: "Subject to the provisions of the [Companies Act], a valid quorum shall be constituted at a Board Meeting… only when: (i) *2 Directors or one third of the total number of Directors, whichever is higher, are present.*"
>
> [emphasis added]

50 Clauses 5.3.4 and 5.5.1 have to be read together with paragraph 109 of the defendant's Constitution, which provides that a "[a] Director shall not vote in respect of any contract or proposed contract with the Company in which he is interested, or any matter arising thereof, and if he does so vote his vote shall not be counted".[26]

51 I agreed with Monica that paragraph 109 of the Constitution needs to be read together with Clauses 5.3.4 and 5.5.1 of the Shareholder's Agreement.[27] While the question of quorum is usually directed at the *meeting generally* and not in relation to a *specific issue* tendered for resolution at the meeting, I found that a fair interpretation of the Constitution and the Shareholder's Agreement requires, with respect to a specific issue tendered at a meeting, that the quorum needs to consist of two *non-interested* directors who are able to vote. This is consistent with cases such as the High Court decision of *Tan Hup Thye v Refco (Singapore) Pte Ltd (in members' voluntary liquidation)* [2010] 3 SLR 1069

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25 Monica's Affidavit at [20].

26 Monica's Affidavit at [27(c)].

27 2nd Non-party's Written Submissions ("2NP WS") at [31].

("*Tan Hup Thye*") and *In re Greymouth Point Elizabeth Railway and Coal Company Limited* [1904] 1 Ch 32, in which it was held that a director who was interested in a contract was not entitled to vote in relation to that contract and hence would not count towards the quorum.

52 In this regard, I noted Ms Lim's helpful response that these cases can be factually distinguished from the facts at hand. However, I disagreed that such factual distinctions meant that the core proposition from the cases did not apply in the present application. In my view, these cases were relevant not so much for their factual matrices (important as they were), but for the *core* proposition that was *generally* applicable. In this regard, Judith Prakash J (as she then was) stated clearly in *Tan Hup Thye* (at [28]) that:

> … If the articles specify a certain quorum for a meeting, *that means that the basic element for the constitution of the meeting is the attendance of that specified number of persons being persons who are able to discuss and vote on the issues before the meeting.* Otherwise there would be no point in specifying a quorum at all. It is worth pointing out that a company is free to decide how to regulate itself and the articles of the defendant *could very well have provided that a director may vote in matters in which he is interested.* …
>
> [emphasis added]

53 In my judgment, this core principle applied in the present case. While, as Prakash J observed in *Tan Hup Thye*, companies are free to regulate themselves so as to allow for an interested director to vote, the fact is that this was not the case here. In the present case, the defendant's documents clearly provide that if Rakesh is an interested director, he cannot vote on the matter he is interested in. This is clearly provided for pursuant to paragraph 109 of the Constitution. Accordingly, Rakesh would not be able to participate in the relevant discussions on the Guarantee and the requisite quorum of two directors was not fulfilled. Considering the *rationale* behind a quorum, which is to enable

an objective and meaningful discussion of the matter at hand before a vote is taken, it would not make sense to insist that Rakesh could form part of the quorum, at the very least in relation to the Guarantee. Such an approach would render the entire purpose of a quorum moot.

54 However, in response to this argument, the claimant pointed out that Rakesh had declared his conflict at the relevant meeting and there were no objections raised. The claimant argued that this means that Rakesh could vote on the Guarantee and hence would count towards the requisite quorum. I disagreed with this submission. Whether an interested director could vote or not is a matter enshrined in the defendant's Constitution. Hence, it would take a special resolution to amend the Constitution to allow for an interested director to waive his conflict in the manner that Rakesh attempted to do. I accept, of course, that subject to written law, it is up to companies to regulate their own affairs. However, where there is a Constitution that provides for a specific issue (as in the present case), I did not think that that can be informally overcome without adhering to the proper process of amendment.

55 As a final point on this matter, Ms Lim pointed out at the hearing before me that the Shareholder's Agreement should trump the Constitution in the event of inconsistency. She pointed me to Clause 12 of the Shareholder's Agreement, which provides as follows:

> The Constitution shall be amended in conformity with this Agreement. In the event of inconsistency between the provisions of this Agreement and the Constitution, the terms of this Agreement shall prevail and the Parties shall exercise, their voting rights attached to their Shares to alter the Constitution in a manner consistent with this Agreement.

As such, Ms Lim submitted that since Rakesh had declared his conflict of interest, and the meeting had resolved to disregard his conflict, paragraph 109 of the Constitution should be construed in accordance with the Shareholder's Agreement to allow for Rakesh to vote and hence count towards the requisite quorum. Put another way, Clause 5.3.4 of the Shareholder's Agreement should trump the Constitution. This is because, on its face, Clause 5.3.4 does not prohibit an interested director from voting and, as such, does not prevent such a director from counting towards the requisite quorum.

56 I disagreed with this submission. First of all, I did not see a conflict between Clause 5.3.4 and paragraph 109 of the Constitution. In my view, they can co-exist perfectly well: whereas Clause 5.3.4 sets out the requisite *number* of directors to constitute the quorum, paragraph 109 provides, in a limited way, *how* that number is to be counted (*ie*, that interested directors cannot vote and hence not be counted as part of the quorum, as per the case law). Accordingly, I did not see any inconsistency that would require Clause 5.3.4 to be read any differently.

57 Second, as I clarified during the hearing, not all the shareholders were present at the relevant meeting. Therefore, there could not have been some kind of informal special resolution passed to amend the Constitution to allow for Rakesh to vote despite his interest in the Guarantee. In any case, even if all the shareholders had been present, there was simply no attempt, formal or informal, to undertake an amendment to paragraph 109 of the Constitution to allow Rakesh to vote on the Guarantee properly.

58 For all these reasons, I find that Monica had, at the very least, raised a triable issue as to the manner in which the Guarantee was procured by the

defendant and hence, its very validity in relation to the defendant. In particular, I found that Monica had raised a triable issue as to the validity of the board resolution which authorised the defendant to enter into the Guarantee, due to arguable questions about whether the requisite quorum for the relevant meeting was met. Correspondingly, the fact that the board resolution had authorised "any one" director to execute the Guarantee was not effective for Rakesh, as that one director, to execute the Guarantee on behalf of the defendant.

59 For completeness, I did not regard it as material that the validity of the Guarantee had not been challenged until the present application. As I said at the hearing, if the Guarantee had a problem to begin with, then its validity is liable to be questioned at any point in time, subject to arguments founded on waiver and/or estoppel, which had not been raised. Thus, for this reason alone, I declined to grant the winding up order sought by the claimant.

The Guarantee was not sealed and hence not valid

60 Second, Mr Lim submitted that the was not sealed and hence is not a valid document giving rise to obligations.[28] Mr Lim cited the Court of Appeal decision of *Lim Zhipeng v Seow Suat Thin and another matter* [2020] 2 SLR 1151 for the proposition that, for deeds to be valid and enforceable, there must be a physical manifestation of a seal.[29] Failing that, the document may still be a contract, but the claimant must then show that it had given consideration to the defendant for it.

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28 2NP WS at [37].

29 2NP WS at [38].

61 I disagreed with Mr Lim. Mr Lim did not refer to s 41B of the Companies Act, which provides as follows:

> 41B.—(1) A company may execute a document described or expressed as a deed without affixing a common seal onto the document by signature —
>
> (*a*) on behalf of the company by a director of the company and a secretary of the company;
>
> (*b*) on behalf of the company by at least 2 directors of the company; or
>
> (*c*) on behalf of the company by a director of the company in the presence of a witness who attests the signature.
>
> (2) A document mentioned in subsection (1) that is signed on behalf of the company in accordance with that subsection has the same effect as if the document were executed under the common seal of the company.

62 In the present case, the Guarantee was signed by Rakesh, a director, on behalf of the defendant. It was also signed in the presence of a witness, Mr Kiran Sreedharan, who attests to the signature. Hence, pursuant to s 41B(1)(*c*) read with s 41B(2) of the Companies Act, the Guarantee has the same effect as if it was executed under the common seal of the defendant. Leaving aside the arguments about Rakesh's authority to enter into the Guarantee in the first place, the Guarantee would not be invalid for not being sealed. To be fair, Mr Lim, perhaps being aware of this provision in the Companies Act, did not press the point at all during oral submissions.

The present winding up application is an abuse of process

63 Third, Monica submitted that I should exercise my discretion and decline to grant the winding up order sought since it was an abuse of process. Monica said this was so because (a) the winding up application was commenced on the basis of a disputed debt, and (b) Rakesh has effectively engineered the

circumstances giving rise to the claimant's basis to commence the winding up application.[30]

64 Given my findings above, I did not need to make any finding that the present winding up application was an abuse of process. I therefore declined to base my decision in the present application on this ground.

Conclusion

65 In conclusion, I found that Monica had successfully challenged the claimant's application to wind up the defendant. In the premises, I dismissed the claimant's application for a winding up order against the defendant, with costs to be determined after the parties have written in with their submissions on the matter.

66 In closing, I would like to thank both Ms Lim and Mr Lim, as well as their respective teams, for their very helpful submissions in this application.

Goh Yihan
Judicial Commissioner

[30] 2NP WS at [41]–[45].

Renganathan Nandakumar, Nandhu, Lim Shu Yi and Lu Yanrong Elycia (RHTLaw Asia LLP) for the claimant;
The defendant absent and unrepresented.
Charlene Wee (Morgan Lewis Stamford LLC) for the first non-party;
Lim Mingguan and Choo Hao Ren Lyndon (Providence Law Asia LLC) for the second non-party;
Lim Yew Jin for the Official Receiver (Ministry of Law (IPTO)).
