IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 205

Companies Winding Up No 393 of 2019

Between

RCMA Asia Pte Ltd

… *Plaintiff*

And

Sun Electric Power Pte Ltd

… *Defendant*

And

Energy Market Authority of Singapore

… *Non-party*

GROUNDS OF DECISION

[Insolvency Law] — [Winding up] — [Winding-up order]

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RCMA Asia Pte Ltd
v
Sun Electric Power Pte Ltd
(Energy Market Authority of Singapore, non-party)

[2020] SGHC 205

High Court — Companies Winding Up No 393 of 2019
Tan Siong Thye J
14 August, 7 September 2020

30 September 2020

Tan Siong Thye J:

Introduction

1 The defendant, Sun Electric Power Pte Ltd ("SEPPL"), is a Singapore-incorporated company engaged in the transmission, distribution and sale of electricity. SEPPL is wholly owned by Sun Electric (Singapore) Pte Ltd ("SESPL"), which is 99.9% owned by Sun Electric Pte Ltd ("SEPL"). Mr Matthew Peloso ("Mr Peloso") is the sole director of SEPPL and a 95% shareholder of SEPL.[1] The plaintiff, RCMA Asia Pte Ltd ("RCMA"), is a

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[1] Affidavit of David Maher, dated 18 December 2019 ("Affidavit of David Maher"), at para 6; Affidavit of Matthew Peloso, dated 13 August 2020 ("Affidavit of Matthew Peloso"), at para 1.

Singapore-incorporated company in the business of trading energy and other commodities.[2]

2 On 18 December 2019, RCMA applied for SEPPL to be wound up. The Energy Market Authority of Singapore was made a non-party to the application pursuant to s 29(8) of the Electricity Act (Cap 89A, 2002 Rev Ed). However, it was not present at the hearing of the application.

3 On 7 September 2020, I granted RCMA's application and ordered that SEPPL be wound up. On 9 September 2020, SEPPL filed a Notice of Appeal against my decision. I shall now set out the reasons for my decision.

4 I shall first deal briefly with Suit No 191 of 2018 ("Suit 191") in which RCMA commenced an action on 22 February 2018 to claim two sums with an aggregate of $7,466,668.01 from SEPPL. SEPPL has a counterclaim in Suit 191 for, amongst other things, liquidated damages of $1m. Suit 191 was relevant to RCMA's application to wind up SEPPL as RCMA argued that it was a contingent or prospective creditor of SEPPL under s 253(1)(*b*) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act") pursuant to its claim in Suit 191.

The background facts

Suit 191 and the Injunction

5 SEPPL was a licensee and participant in a scheme, known as the "Forward Sales Contract Scheme", introduced by the Energy Market Authority of Singapore. Under this scheme, SEPPL was required to carry out certain

[2] Affidavit of David Maher, at paras 3, 5 and 12.

market making obligations in the electricity futures market in respect of a volume of futures trade in return for incentive payments by SP Services Ltd. Subsequently, RCMA and SEPPL entered into an agreement for RCMA to assume SEPPL's market making obligations in exchange for a 70% share of all the incentive payments received by SEPPL from SP Services Ltd ("the Agreement").[3]

6 On 22 February 2018, RCMA commenced Suit 191, claiming a total sum of $7,466,668.01 against SEPPL. This amount comprised (a) the sum of $6,533,333.52, being RCMA's purported 70% share of the incentive payments; and (b) the sum of $933,334.49, which related to a prepayment loan given by RCMA to SEPPL.[4] At the time of the hearing of this application, the hearing of Suit 191 was pending.[5]

7 On 22 February 2018, RCMA applied for an *ex parte* interim injunction against SEPPL. The application was heard on 26 February 2018, where the court ordered that the application be heard on an *inter partes* basis. Pending the disposal of the *inter partes* hearing, the court granted RCMA an interim injunction restraining SEPPL, its directors, officers, employees, and/or agents from disposing, dealing with, or diminishing RCMA's 70% share of the incentive payments received by SEPPL in respect of market making trades taken on by RCMA prior to 26 February 2018.[6] On 11 May 2018, having heard parties' submissions, the court granted RCMA an interim injunction ("the

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3 Affidavit of David Maher, at paras 13 and 14.

4 Affidavit of David Maher, at para 16; Exhibit DM-3.

5 Affidavit of David Maher, at para 21.

6 Affidavit of David Maher, at paras 17 and 18; Exhibit DM-4.

Injunction"), pending the final determination of Suit 191, restraining SEPPL, its directors, officers, employees, and/or agents from disposing, dealing with, or diminishing the value of RCMA's 70% share of the incentive payments, including those *to be received* by SEPPL, in the amount of $6,533,333.52 ("the Funds"). This was on the condition that RCMA meet its obligations under the Agreement.[7]

8 The performance of these obligations was completed by RCMA in July 2018, following which the Funds were received by SEPPL in its Oversea-Chinese Banking Corp Ltd Bank account ("OCBC Account").[8]

Diminishing of the Funds

Withdrawals by Mr Peloso

9 On 24 September 2018, Mr Peloso withdrew $1.5m from SEPPL's OCBC Account. This sum was used to extend a loan to Sun Electric Energy Assets Pte Ltd ("SEEAPL"), a company wholly owned by SESPL and therefore also under Mr Peloso's control. SEEAPL made a partial repayment of $1.2m in respect of this loan, which was remitted to the OCBC Account. The outstanding amount of $300,000 was purportedly set off against moneys owed by SEPPL to SEEAPL.[9]

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7 Affidavit of David Maher, at para 19; Exhibit DM-5.

8 Affidavit of David Maher, at para 20.

9 Affidavit of David Maher, at para 62; 1st Affidavit of Matthew Peloso filed in HC/OS 1060/2019, dated 20 August 2019 ("JM Affidavit of Matthew Peloso"), at paras 10 and 48(k)–(l).

10 On 27 November 2018, 3 December 2018 and 17 December 2018, Mr Peloso made three further transfers totalling $6,091,555.39 from the OCBC Account to SEPPL's DBS Bank Ltd account ("DBS Account").[10]

Garnishment of the Funds

11 On 8 January 2019, a UAE-incorporated company, Kashish Worldwide FZE ("Kashish"), commenced a suit in Singapore against SEPPL for $6,995,755.78 pursuant to contracts for differences ("the CFDs") allegedly executed between Kashish and SEPPL. SEPPL did not enter an appearance. Thus, on 4 February 2019, Kashish obtained judgment in default of appearance against SEPPL for the claimed sum in addition to interest thereon and costs.[11]

12 On 13 February 2019, Kashish applied to garnish the DBS Account and obtained a garnishee order (dated 18 February 2019) for DBS Bank Ltd to show cause. A copy of this court order was served on SEPPL on 21 February 2019.

13 On 8 March 2019, the court granted Kashish's garnishee application and ordered DBS Bank Ltd to disburse the funds in the DBS Account to Kashish in partial satisfaction of the judgment debt owed to it by SEPPL. This was duly executed by DBS Bank Ltd, which informed SEPPL by way of a debit notice dated 21 March 2019 that it had debited the DBS Account in full pursuant to the court order.[12] As a result, there were no remaining moneys in the DBS Account.

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10 Affidavit of David Maher, at para 63; JM Affidavit of Matthew Peloso, at para 49.

11 Affidavit of David Maher, at paras 66(a)–b); JM Affidavit of Matthew Peloso, at paras 51–53.

12 Affidavit of David Maher, at paras 66(d)–(f); JM Affidavit of Matthew Peloso, at paras 55–56.

SEPPL's application for judicial management

14 SEPPL applied for judicial management ("JM") and interim judicial management ("IJM") on 21 August 2019 and 17 September 2019 respectively. The IJM application was dismissed on 23 September 2019, with costs of $3,500 ordered to be paid by SEPPL to RCMA. The JM application was similarly dismissed on 24 October 2019 because the court did not consider that the making of a JM order would be likely to achieve a more advantageous realisation of SEPPL's assets than a winding-up of SEPPL.[13] The court further ordered costs of $8,000 to be paid by SEPPL to RCMA.[14] These costs amounted to $11,500 in total ("the Costs").

15 On 30 October 2019, RCMA's solicitors sent a letter to SEPPL's solicitors requesting that SEPPL make payment of the Costs. However, SEPPL failed to do so.[15]

The Mareva injunction

16 On 16 September 2019, Dedar Singh Gill JC (as he then was) granted a Mareva injunction restraining SEPPL and its related entities from removing from Singapore any assets in Singapore, and/or disposing of, dealing with or diminishing the value of any assets whether in or outside Singapore, up to the value of $1,853,795.95.[16]

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13 Affidavit of David Maher, at p 109, Exhibit DM-8.

14 Affidavit of David Maher, at paras 25–28.

15 Affidavit of David Maher, at paras 29 and 30.

16 HC/ORC 6465/2019.

17 In doing so, Gill JC had considered that there was a real risk of dissipation of assets, based on the apparent breach of the Injunction through SEPPL's abovementioned withdrawal of moneys from the OCBC Account and the garnishment of the moneys in the DBS Account by Kashish (see *Sun Electric Pte Ltd and another v Menrva Solutions Pte Ltd and another* [2020] SGHC 18 ("*Sun Electric*") at [19], [24] and [26]).

Service of statutory demand on SEPPL

18 On 21 November 2019, RCMA's solicitors sent a letter served by hand and by registered mail to SEPPL's registered office, requiring SEPPL to make payment of $11,568.88, being the amount of the Costs and accrued interest ("the Statutory Demand").[17]

19 On 11 December 2019, SEPPL's solicitors responded to the Statutory Demand by letter. SEPPL admitted to owing RCMA $11,500 and interest of 5.33% *per annum*, and proposed to make payment to RCMA in instalments. SEPPL proposed to pay the first instalment of $3,000 on 13 December 2019, the second instalment of $3,000 on 27 December 2019 and the final instalment of $5,500 as well as all accrued interest on 10 January 2020. However, RCMA rejected this proposal on the same day.[18]

20 Nevertheless, RCMA received $3,000 from SEPPL by way of payment into RCMA's solicitors' client account on 13 December 2019. Thus, the amount of $8,568.88 in addition to accrued interest since 21 November 2019 remained due and owing from SEPPL to RCMA. Apart from the first instalment of

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17 Affidavit of David Maher, at para 50; Exhibit DM-15.

18 Affidavit of David Maher, at paras 51 and 52; Exhibit DM-16.

$3,000, no further payments were made by SEPPL to RCMA.[19] As of 24 August 2020, due to the accrual of interest on the outstanding Costs, the amount of $8,973.41 remained due and owing from SEPPL to RCMA.[20]

My decision

21 The grounds for winding-up relied upon by RCMA are ss 254(1)(*e*) and/or 254(1)(*i*) of the Companies Act.[21] Section 254(1)(*e*) pertains to the company being "unable to pay its debts", whereas s 254(1)(*i*) pertains to the court being of the opinion that it is "just and equitable that the company be wound up". Having considered the parties' submissions and the evidence, I found that both grounds were satisfied. Before addressing each of these grounds, I shall first deal with several preliminary issues.

Preliminary issues

Locus standi

22 RCMA submitted that it was entitled to apply for SEPPL's winding-up as it was a prospective or contingent creditor of SEPPL for $7,466,668.01 (the amount claimed by RCMA in Suit 191) and a creditor of SEPPL for $8,973.41 (the amount of the outstanding Costs and accrued interest).[22]

23 Section 253(1)(*b*) of the Companies Act states that a company may be wound up upon an order of the court on the application of "any creditor,

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19 Affidavit of David Maher, at paras 53 and 54.

20 PWS, at para 94.

21 PWS, at paras 5 and 45.

22 Plaintiff's Written Submissions dated 24 August 2020 ("PWS"), at para 4.

including a contingent or prospective creditor, of the company". In *Re People's Parkway Development Pte Ltd* [1991] 2 SLR(R) 567 at [10], the High Court cited the definition in *Re William Hockley Ltd* [1962] 1 WLR 555 at 558 that a "contingent creditor" is "a person towards whom under an existing obligation, the company may or will become subject to a present liability upon the happening of some future event or at some future date".

24 Here, under its obligations in the Agreement, SEPPL may become subject to a judgment debt upon Suit 191 being decided in favour of RCMA. Thus, RCMA was a contingent or prospective creditor of SEPPL. It was also a creditor of SEPPL for the amount of the outstanding Costs.

Threshold amount

25 Another preliminary issue was whether s 22(1)(*a*) of the COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) ("COVID-19 Act") applied to the present application. Section 22(1)(*a*) of the COVID-19 Act raises the threshold amount under s 254(2)(*a*) of the Companies Act from $10,000 to $100,000, as follows:

> **22.**–(1) During the prescribed period, the Companies Act … applies as if –
>
> (*a*) the reference in section 254(2)(*a*) of the Companies Act to '$10,000' were a reference to '$100,000'; and
>
> …

26 SEPPL submitted that s 22(1)(*a*) of the COVID-19 Act applied. Since the outstanding Costs and accrued interest amounted to $8,957.79 (based on SEPPL's own calculations), this fell short of the increased threshold amount of

$100,000. Therefore, SEPPL could not be deemed to be unable to pay its debts pursuant to s 254(2)(*a*) of the Companies Act.[23]

27 With respect, I disagreed with this submission. Section 2 of the COVID-19 (Temporary Measures) (Prescribed Period) Order 2020 (S 302/2020) defines the "prescribed period" as "6 months commencing on 20 April 2020". The COVID-19 Act was enacted in response to the economic impact of the COVID-19 pandemic. In particular, it was intended "to give breathing space" to businesses affected by the COVID-19 pandemic (see K Shanmugam, Minister for Law, "Second Reading Speech by Minister for Law, Mr K Shanmugam, on the COVID-19 (Temporary Measures) Bill" (7 April 2020) at para 63, mlaw.gov.sg (accessed 10 September 2020)). Given that purpose, the prescribed period must refer to the time at which the statutory demand was served, not the time of the hearing of the winding-up application.

28 Here, the Statutory Demand was served on SEPPL on 21 November 2019. This fell outside of the prescribed period. Therefore, s 22(1)(*a*) of the COVID-19 Act did not apply.[24]

Whether SEPPL was unable to repay its debts

The parties' submissions

29 RCMA submitted that SEPPL was deemed unable to pay its debts pursuant to s 254(2)(*a*) of the Companies Act as it failed to satisfy the Statutory Demand.[25] Alternatively, SEPPL was deemed unable to pay its debts pursuant

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23 Defendant's Written Submissions dated 24 August 2020 ("DWS"), at para 5.

24 PWS, at paras 54 and 55.

25 PWS, at para 115.

to s 254(2)(*c*) of the Companies Act, as SEPPL was both cash flow insolvent and balance sheet insolvent.[26]

30 In response, SEPPL submitted that after it made partial payment of $3,000, SEPPL's debt to RCMA in respect of the Costs was reduced to about $8,568.88, which was less than the $10,000 threshold in s 254(2)(*a*) of the Companies Act. Therefore, s 254(2)(*a*) did not apply to this case.[27] SEPPL further submitted that SEPPL was not in fact unable to pay its debts. This was evidenced by its latest balance sheet showing that (a) SEPPL's total current assets amounted to $479,770, whereas it had no current liabilities; and (b) excluding SEPPL's contingent liability to RCMA, SEPPL's total assets exceeded its total liabilities.[28]

The applicable law

31 Pursuant to s 254(1)(*e*) of the Companies Act, the court may order a winding-up if "the company is unable to pay its debts". Section 254(2) of the Companies Act provides a definition of a company's inability to pay its debts. There are three situations illustrated in this provision. Sections 254(2)(*a*) and 254(2)(*c*) of the Companies Act were relevant to this case. I shall first deal with s 254(2)(*a*) of the Companies Act.

SEPPL was insolvent under s 254(2)(a) of the Companies Act

32 Was the presumption of insolvency under s 254(2)(*a*) of the Companies Act inapplicable because SEPPL's outstanding debt (*ie*, the outstanding Costs)

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26 PWS, at paras 88 and

27 DWS, at para 7(b).

28 DWS, at para 2.

was less than $10,000 when RCMA filed its winding-up application? I shall refer to this provision to ascertain the point in time at which the $10,000 threshold should be operative. The said provision reads:

> **Definition of inability to pay debts**
>
> (2) A company shall be deemed to be unable to pay its debts if –
>
> > (*a*) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding $10,000 then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorised requiring the company to pay the sum so due, and the company has for 3 weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

33 It appeared from this provision that at the time the statutory demand is served on the company the debt must exceed $10,000. In this case, RCMA served the Statutory Demand on SEPPL for the payment of the debt sum of $11,568.88 which exceeded $10,000. Thereafter, SEPPL had three weeks from 21 November 2019 to pay this sum. However, SEPPL only paid $3,000 at the end of the three weeks (*ie*, 13 December 2019). Although the debt sum (including accrued interest) by then fell to $8,612.40 (*ie*, below the threshold amount of $10,000), it was not to the reasonable satisfaction of RCMA and RCMA thus lodged the present winding-up application on 18 December 2019. Therefore, RCMA had shown that s 254(2)(*a*) of the Companies Act was satisfied notwithstanding that the amount of the debt fell below $10,000 at the time the present winding-up application was lodged. SEPPL was accordingly deemed to be insolvent under s 254(2)(*a*) of the Companies Act.

34 Regarding the Statutory Demand, I would like to mention that at the hearing where I allowed RCMA's application to wind up SEPPL, I mistook the Statutory Demand to have included RCMA's claim of $7,466,668.01 in

Suit 191. Nevertheless, this was not a material error in my decision to grant RCMA's application to wind up SEPPL.

SEPPL was also insolvent under s 254(2)(c) of the Companies Act

35 Section 254(2)(*c*) of the Companies Act states that a company is deemed to be unable to pay its debts if:

> [I]t is proved to the satisfaction of the Court that the company is unable to pay its debts; and in determining whether a company is unable to pay its debts the Court shall take into account the contingent and prospective liabilities of the company.

36 This is a holistic and commercial inquiry into "the company's position taken as a whole by reference to whether a person would expect that at some point the company would be unable to meet a liability" (see *Chip Thye Enterprises Pte Ltd (in liquidation) v Phay Gi Mo and others* [2004] 1 SLR(R) 434 at [19]). It could involve the application of one or more of several tests, depending on the circumstances of the case. As Judith Prakash J (as she then was) in *Kon Yin Tong and another v Leow Boon Cher and others* [2011] SGHC 228 explained at [33], [36], [39] and [40]:

> 33 Despite the fact that no one single test is conclusive as a measure of solvency, it is commonly accepted that the two primary indicia of a company's inability to pay debts are the cash flow test and the balance sheet test. For most purposes, it is the present inability to pay debts that is the crucial factor.
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> …
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> 36 The cash flow test deems a company insolvent when it cannot meet its obligations as and when they fall due. The balance-sheet test, on the other hand, would deem a company insolvent when the current liabilities of the company exceed its assets.
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> …
>
> 39 On the other hand, the balance sheet test deems a company insolvent if its assets are insufficient to meet its

> liabilities, including contingent and prospective liabilities. It is thus a wider test than the 'cash flow' test which only takes into account debts.
>
> 40 A 'contingent liability' would refer to a liability or other loss which arises out of an existing legal obligation or state of affairs, but which is dependent on the happening of an event that may or may not occur. 'Prospective liability' however, has been judicially defined as 'a debt which will certainly become due in the future, either on some date which has already been determined or on some date determinable by reference to future events'. It thus embraces both future debts, in the sense of liquidated sums due, and non-liquidated claims.

37 Similarly, Ang Cheng Hock J in *Seah Chee Wan and another v Connectus Group Pte Ltd* [2019] SGHC 228 held at [63] that:

> A company is unable to pay its debts, or insolvent, if it fails either the cash flow test or the balance sheet test … A company that has failed to meet a current demand for a debt already due fails the cash flow test, while a company which presents a deficit on an overall balancing of liabilities against assets fails the balance sheet test … No one test is dominant, and both tests may be relevant depending on the circumstances of the case. Regard must ultimately be given to all the evidence which appears relevant to the question of insolvency …

(1) Cash flow insolvency

38 I begin the inquiry first from the perspective of the cash flow test. Having considered the parties' submissions and the evidence, it was clear that SEPPL was cash flow insolvent.

39 I found it particularly significant that Mr Peloso himself attested in his application to appoint a judicial manager over SEPPL that SEPPL was cash flow insolvent.[29] In an affidavit filed on behalf of SEPPL in respect of its JM application ("Mr Peloso's JM Affidavit"), Mr Peloso stated that as at 31 July

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29 PWS, at paras 98(a).

2019, SEPPL's cash balance amounted to $93,599.64 whereas its total current liabilities amounted to $1,845,662.12. Mr Peloso asserted unequivocally that this cash balance was "insufficient to satisfy [SEPPL's] current third party liabilities". This was supported by a copy of SEPPL's unaudited management accounts ("the Management Accounts").[30] Thus, based on Mr Peloso's own evidence, SEPPL was likely to be unable to meet its obligations as they fell due, if it was not already unable to do so.

40 Although that was the state of SEPPL's financial position in October 2019 (the time of the hearing of the JM application), the evidence suggested that this state of affairs persisted up till the hearing of the present application. In particular, it was undisputed that SEPPL owed a debt to RCMA in the form of the outstanding Costs and had been unable to fully discharge this debt. RCMA first requested for payment of the Costs in October 2019. In the 11 months between this initial request and the time of the hearing of the winding-up application, only $3,000 had been paid by SEPPL.[31] Although SEPPL continuously asserted that it was prepared to pay the outstanding Costs,[32] the fact remained that no such payment was ever made. In fact, when the parties first appeared before me on 14 August 2020, SEPPL's counsel emphatically stated that SEPPL was prepared to pay the outstanding Costs to RCMA within the next three days.[33] The hearing of the winding-up application was eventually adjourned to 7 September 2020. However, even on 7 September 2020, the outstanding Costs remained unpaid. As at 24 August 2020, the outstanding

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30 JM Affidavit of Matthew Peloso, at paras 23 and 24; Tab 4 of Exhibit MP-1.

31 PWS, at paras 89–94.

32 DWS, at para 5; NEs, 7 September 2020, at p 60, lines 19–20.

33 Defendant's Skeletal Submissions, dated 13 August 2020, at para 5.

Costs and accrued interest amounted to about $8,973.41 and this was a relatively small sum, particularly for a company which purported to have $40,929.72 in its bank balance as at 30 June 2020.[34] I found this highly concerning and this was a strong indicator of SEPPL's inability to pay its debts.[35]

41 Therefore, I concluded that SEPPL was cash flow insolvent. SEPPL's failure to pay the outstanding Costs (and accrued interest) to RMCA amounted to a failure to meet a current demand for a debt already due. Based on SEPPL's financial position in October 2019, this appeared to be one instance of a general inability to meet its financial obligations. Although SEPPL sought to persuade the court otherwise by the production of a one-page balance sheet, I did not place much weight on this balance sheet for reasons which I shall elaborate on below.

(2) Balance sheet insolvency

42 I turn now to the balance sheet test. In this respect, I also concluded that SEPPL was balance sheet insolvent.

(A) SEPPL'S BALANCE SHEET AS AT JULY AND SEPTEMBER 2019

43 As with the cash flow test, SEPPL's Management Accounts depicted a discouraging state of affairs for SEPPL in terms of balance sheet solvency. As at 31 July 2019, SEPPL's total assets amounted to $287,295.29 whereas its total liabilities (excluding contingent liabilities) amounted to $2,156,160.36. Including contingent liabilities, SEPPL's total liabilities amounted to

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34 Affidavit of Matthew Peloso, at p 5, Exhibit MP-1.

35 PWS, at para 95.

$10,397,998.91,[36] exceeding its total assets by $10,110,703.62. Clearly, SEPPL's total assets were dwarfed by its total liabilities.

44 This conclusion was affirmed by Mr Jotangia Paresh Tribhovan ("Mr Jotangia") of Grant Thornton Singapore Pte Ltd, who had been appointed by SEPPL to review SEPPL's financial condition for the purposes of the JM application.[37] In an affidavit filed on 21 October 2019, Mr Jotangia set out SEPPL's balance sheet as at 30 September 2019 ("the September 2019 Balance Sheet"). The September 2019 Balance Sheet was only marginally more optimistic than the Management Accounts. SEPPL's total assets had increased slightly to $377,342, whereas its total liabilities (excluding contingent liabilities) and total liabilities (including contingent liabilities) had decreased slightly to $2,021,530 and $10,263,369 respectively. On the whole, the September 2019 Balance Sheet reaffirmed the conclusion drawn from the Management Accounts that SEPPL's total liabilities greatly outweighed its total assets.

(B) SEPPL'S BALANCE SHEET BETWEEN SEPTEMBER 2019 AND APRIL 2020

45 From the above, I concluded that as at 30 September 2019, SEPPL was balance sheet insolvent. The question, therefore, was whether this state of SEPPL's insolvency persisted up till the date of the hearing of the winding-up application. In my view, it did. In reaching this conclusion, I found several points pertinent.

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36 JM Affidavit of Matthew Peloso, Tab 4 of Exhibit MP-1; PWS, at para 107.

37 Affidavit of Jotangia Paresh Tribhovan filed in HC/OS 1060/2019, dated 21 October 2019 ("JM Affidavit of Jotangia"), at para 4; PWS, at paras 109 and 111.

46 First, Mr Peloso in his JM Affidavit stated that SEPPL's operations had been loss-making for the seven months prior to 31 July 2019.[38] This was supported by the profit and loss statement in the Management Accounts, which showed SEPPL's gross profit amounting to $122,204.23 and total operating expenses amounting to $495,040.64. This resulted in a net loss of $352,672.[39] Therefore, it appeared to be that SEPPL had not been doing particularly well in the first half of 2019.

47 Secondly, Mr Jotangia's affidavit contained a 25-week cash flow forecast projecting SEPPL's cash inflows and outflows from October 2019 to April 2020. Mr Jotangia had concluded that SEPPL's operations could be conducted profitably during this period.[40] Based on the forecast, SEPPL's cash in its bank accounts would increase from $32,146 in the week commencing on 20 October 2019 to $216,708 in the week commencing on 12 April 2020.[41] This was more conservative than Mr Peloso's original projection, which had indicated that SEPPL's cash in its bank account would increase to $449,064 in the week of 12 April 2020.[42] Since SEPPL's business had been loss-making for the last seven months prior to 31 July 2019, it was dubious whether it could indeed achieve the profits projected by Mr Jotangia. Nevertheless, assuming Mr Jotangia's projections were correct, by April 2020, SEPPL's cash would increase by about $188,686. This number was obtained by subtracting from $216,708 (the amount of cash projected to be in SEPPL's bank account in the

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38 JM Affidavit of Matthew Peloso, at para 26.

39 JM Affidavit of Matthew Peloso, at Tab 4 of Exhibit MP-1.

40 JM Affidavit of Jotangia, at para 12.

41 JM Affidavit of Jotangia, at Exhibit PJ-5.

42 JM Affidavit of Jotangia, at Exhibit PJ-4.

week commencing on 12 April 2020) the sum of $28,022 (the amount of cash already in SEPPL's bank account as at 30 September 2019).

48 It would mean that by April 2020, SEPPL's total assets would have increased to approximately $566,028. This number was derived by adding $188,686 (the projected increase in cash assets) to $377,342 (the amount of SEPPL's total assets as at 30 September 2019). Even then, SEPPL's total assets would still be dwarfed by its total liabilities, both including and excluding contingent liabilities.[43] Of course, this assumed there was minimal or no change in SEPPL's total liabilities. This was a reasonable assumption given that about 70% of SEPPL's total liabilities comprised RCMA's contingent or prospective debt of $7,466,668.01.[44] Since RCMA's contingent or prospective debt remained unchanged till the date of the winding-up application, it was reasonable to conclude that there were no significant changes in SEPPL's total liabilities up till the date of the winding-up hearing. Therefore, I concluded that even if SEPPL were to be profit-making in the period between September 2019 and April 2020, it would still be balance sheet insolvent in April 2020.

(C) SEPPL'S BALANCE SHEET AFTER APRIL 2020

49 Thirdly, it was unlikely that this position changed significantly in the period between April 2020 and the hearing of the winding-up application. SEPPL had been loss-making in the seven months prior to 31 July 2019 and it was projected to make a modest profit at best in the months between September 2019 and April 2020. This was not likely to change significantly after April 2020. Rather, given the economic impact of the COVID-19 pandemic, it was

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43 PWS, at para 111.

44 PWS, at para 110.

more likely that SEPPL suffered further financial losses. Therefore, I concluded that as at the date of the hearing of the winding-up application, SEPPL was balance sheet insolvent.

(D) BALANCE SHEET PRODUCED BY SEPPL

50 In support of its contention that SEPPL was solvent, SEPPL produced a one-page balance sheet exhibited to Mr Peloso's affidavit, purportedly showing SEPPL's financial situation as at 30 June 2020 ("the June 2020 Balance Sheet").[45] However, I did not place much weight on this balance sheet for the following reasons.

51 First, the provenance of the June 2020 Balance Sheet was unclear. Mr Peloso in his affidavit claimed that it had been prepared by a qualified chartered accountant, Edmund Ho ("Mr Ho"). Counsel for SEPPL emphasised that the June 2020 Balance Sheet was stated to be "[p]repared by" and signed by "Edmund Ho, CPA (Aust)".[46] However, Mr Ho himself did not file an affidavit to attest to the accuracy of the June 2020 Balance Sheet or his relevant certifications.[47] The presence of a signature ostensibly belonging to Mr Ho was sorely insufficient. Neither could the court simply take the word of Mr Peloso and SEPPL's counsel as a given. There was, thus, no evidence regarding how the June 2020 Balance Sheet actually came about. This lack of clarity on the origins of the June 2020 Balance Sheet undermined its reliability.

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45 Affidavit of Matthew Peloso, at p 5, Exhibit MP-1; DWS, at para 2.

46 Affidavit of Matthew Peloso, at para 5; p 5, Exhibit MP-1; NEs, 7 September 2020, at p 86, lines 9–15; p 87, lines 11–12.

47 PWS, at para 104.

52 Secondly, the court was not provided with any explanation of how the June 2020 Balance Sheet had been prepared, or what information had been relied on in its preparation. This was partly due to the lack of an accompanying affidavit by Mr Ho. Further, unlike the September 2019 Balance Sheet prepared by Mr Jotangia, the June 2020 Balance Sheet did not contain any notes to explain how the figures had been derived or what assumptions had been made in its preparation.[48] This was especially concerning given several inconsistencies or inaccuracies in the June 2020 Balance Sheet, as follows:

(a) The June 2020 Balance Sheet did not reflect SEPPL's current liabilities at all. It only set out non-current liabilities and there was no entry for current liabilities. This was unlike the balance sheet contained in the Management Accounts and the September 2019 Balance Sheet, which reflected total current liabilities of $1,845,662.12 and $1,702,982 respectively.[49] In this respect, the June 2020 Balance Sheet appeared to be incomplete.

(b) The June 2020 Balance Sheet also did not reflect contingent liabilities, including RCMA's contingent or prospective debt of $7,466,668.01 (*ie*, the sum claimed in Suit 191). This was unlike the balance sheet contained in the Management Accounts and the September 2019 Balance Sheet, which reflected contingent liabilities of $8,241,838.55 and $8,241,839 respectively. Again, this suggested that the June 2020 Balance Sheet was incomplete.

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48 NEs, 7 September 2020, at p 8, lines 15–18.

49 Affidavit of Matthew Peloso, at p 5, Exhibit MP-1; JM Affidavit of Matthew Peloso, at p 64, Tab 4 of Exhibit MP-1; JM Affidavit of Jotangia, at pp 8–9.

(c) The June 2020 Balance Sheet contained an entry for "Other liabilities" amounting to $927,594.61. This figure corresponded exactly to the outstanding amount Mr Peloso claimed was owed by SEPPL to Kashish in his JM Affidavit.[50] If that was indeed the case, this sum should have been reflected as a current liability, given that it was a judgment debt already due and owing to Kashish pursuant to the default judgment Kashish obtained against SEPPL.

53 The aforementioned points in addition to the complete lack of explanation by Mr Ho, who apparently prepared the June 2020 Balance Sheet, led me to seriously doubt the veracity and reliability of the June 2020 Balance Sheet. In particular, the last point at [52(c)] was significant. If the sum of $927,594.61 was regarded as a current liability, it would mean that SEPPL's total current liabilities exceeded its total current assets, assuming the other figures reflected in the June 2020 Balance Sheet were accurate. In other words, it would show that SEPPL was cash flow insolvent.[51] While there may have been a reason for labelling the sum of $927,594.61 as "Other liabilities", this was not made known to the court due to the lack of any accompanying explanation by Mr Ho, who allegedly prepared the June 2020 Balance Sheet. In these circumstances, I could only conclude that the June 2020 Balance Sheet was erroneous at best, and deliberately misleading at worst.[52]

54 Finally, apart from the figures and entries in the June 2020 Balance Sheet itself, there was also no explanation from SEPPL as to its sudden recovery

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50 Affidavit of Matthew Peloso, at p 5, Exhibit MP-1; JM Affidavit of Matthew Peloso, at para 25(a).

51 NEs, 7 September 2020, at p 13, lines 1–3.

52 NEs, 7 September 2020, at p 12, lines 21–25.

from insolvency. Comparing the June 2020 Balance Sheet to the September 2019 Balance Sheet, in less than a year, SEPPL's total liabilities (excluding contingent liabilities) had reduced from $2,021,530 to $1,214,337.48, and its fixed assets increased from zero to $934,058.77.[53] There was no explanation from Mr Peloso as to the facts giving rise to these numbers, for instance, how SEPPL managed to halve its total liabilities in such a short span of time, the nature of its fixed assets and how they had been acquired. In his five-page affidavit, Mr Peloso simply asserted that SEPPL was solvent and its "financial position [had] improved substantially".[54] SEPPL's own written submissions recognised this lack of explanation. While SEPPL's counsel submitted that SEPPL was prepared to explain how the situation had changed, this begged the question as to why no such explanation was put forth in the first place when this was a significant factor to parry off RCMA's winding-up application.[55]

55 Counsel for SEPPL also sought to explain that there were improvements from SEPPL's financial situation as at 31 July 2019 and these were due to (a) an increase in SEPPL's share capital from $45,605.99 to $366,306.99; (b) a reduction in SEPPL's accumulated losses from $1,561,799.06 to $372,237.16; and (c) SEPPL becoming more profitable than before.[56] However, there were no explanations for how such improvements came about in the first place. Further, these pertained to SEPPL's *equity*, and did not explain how its total

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53 Affidavit of Matthew Peloso, at p 5, Exhibit MP-1; JM Affidavit of Jotangia, at pp 8–9

54 Affidavit of Matthew Peloso, at paras 4–6.

55 DWS, at para 4; NEs, 7 September 2020, at p 70, lines 17–18.

56 Affidavit of Matthew Peloso, at p 5, Exhibit MP-1; JM Affidavit of Matthew Peloso, at p 64, Tab 4 of Exhibit MP-1; NEs, 7 September 2020, at p 53, lines 5–23; p 54, lines 12–27; p 54, line 30 to p 55, line 19.

liabilities decreased and its fixed *assets* increased. Most importantly, it was not for SEPPL's counsel to furnish such an explanation, which would be inadmissible as evidence from the Bar. Rather, it was for SEPPL to elaborate on via the filing of affidavits. It did not do so.

56 For these reasons, I placed little weight on the June 2020 Balance Sheet. Although it appeared to be SEPPL's most recent balance sheet, the issues raised above significantly undermined its credibility. I was therefore not persuaded by SEPPL's submission that the June 2020 Balance Sheet showed that SEPPL was solvent. Instead, I concluded from the Management Accounts and the September 2019 Balance Sheet, as well as the affidavits filed on behalf of SEPPL in its JM Application, that SEPPL was balance sheet insolvent and had been balance sheet insolvent since at least July 2019.

Conclusion on whether SEPPL was unable to pay its debts

57 For the above reasons, I concluded that SEPPL was deemed to be insolvent under s 254(2)(*a*) of the Companies Act due to its failure to satisfy the Statutory Demand. I also concluded that SEPPL was both cash flow insolvent and balance sheet insolvent. This led me to the further conclusion that SEPPL was unable to pay its debts. The evidence suggested that this had been the case since at least July 2019. In fact, one of the grounds for SEPPL's JM application was that SEPPL was or would be unable to pay its debts.[57] It was only in this present winding-up application that SEPPL made an about-turn on its financial position, based solely on the June 2020 Balance Sheet. However, I did not find the June 2020 Balance Sheet to be a reliable basis for assessing SEPPL's

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[57] JM Affidavit of Matthew Peloso, at para 23; Affidavit of David Maher, at p 99, Exhibit DM-8; PWS, at para 100.

financial situation. Rather, the documents and affidavits filed on behalf of SEPPL in its JM application suggested that it was insolvent at the time the JM application was made, and continued to be insolvent up till the hearing of the present winding-up application. If indeed SEPPL was solvent as shown by the June 2020 Balance Sheet, how was it that SEPPL could not pay the small outstanding sum of $8,973.41? Based on this, s 254(2)(*c*) of the Companies Act was also satisfied – SEPPL was proven, and thus deemed, to be unable to pay its debts within the meaning of s 254(1)(*e*) of the Companies Act.

58 Therefore, I found that SEPPL was deemed to be unable to pay its debts, by virtue of either s 254(2)(*a*) or s 254(2)(*c*) of the Companies Act, thereby satisfying the ground for winding-up under s 254(1)(*e*) of the Companies Act.

Whether it was just and equitable to wind up SEPPL

59 I turn now to RCMA's alternative ground for its winding-up application. Section 254(1)(*i*) of the Companies Act states that the court may order a winding-up if it is "of [the] opinion that it is just and equitable that the company be wound up". In *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR(R) 827, the Court of Appeal opined at [31] that "the notion of unfairness lies at the heart of the 'just and equitable' jurisdiction in s 254(1)(*i*)". As Belinda Ang Saw Ean J in *Summit Co (S) Pte Ltd v Pacific Biosciences Pte Ltd* [2006] SGHC 190 ("*Summit*") observed at [5], the objective test for unfairness is "whether a reasonable bystander observing the consequences of their conduct would regard it as having unfairly prejudiced the petitioner's interests".

60 One instance in which the court may grant a just and equitable winding-up is when there is a loss of confidence in the directors on account of their lack of probity in the conduct and management of the company affairs (see *Chong*

Choon Chai and another v Tan Gee Cheng and another [1993] 2 SLR(R) 685 at [9], citing *Loch v John Blackwood, Ltd* [1924] AC 783). However, the Court of Appeal in *Chow Kok Chuen v Chow Kwok Chi and another* [2008] 4 SLR(R) 362 held at [15] and [17] that grounds for the court to exercise its "just and equitable" jurisdiction are "not a closed list". Rather, the "concept of 'just and equitable' is a dynamic one and [the court] should not circumscribe its scope by reference to case law". In this vein, the Court of Appeal (at [14]) cited *In re Blériot Manufacturing Aircraft Company (Limited)* (1916) 32 TLR 253, where Neville J remarked at 255 that:

> The words 'just and equitable' are words of the widest significance, and do not limit the jurisdiction of the Court to any case. It is a question of fact, and each case must depend on its own circumstances.

61 RCMA submitted that given the suspicious circumstances relating to the Funds, it was just and equitable for a liquidator to be appointed over SEPPL in order to determine if there had been any misfeasance or fraudulent activity on the part of its management and pursue the appropriate action for the benefit of SEPPL's creditors.[58] In particular, it highlighted the withdrawals by Mr Peloso from the Funds and the garnishment of the Funds, which it submitted were in breach of the Injunction.

62 In response, SEPPL submitted that the alleged breaches of the Injunction were the subject of ongoing committal proceedings, and that the withdrawal of $1.5m by Mr Peloso had not been in breach of the Injunction.[59] Further, SEPPL submitted that Gill JC's findings in *Sun Electric* ([17] *supra*) regarding the impropriety of the dealings with the Funds had been made without the benefit

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58 PWS, at paras 123 and 124.

59 NEs, 7 September 2020, at p 71, lines 8–20.

of all the relevant evidence. Moreover, SEPPL was intending to set aside or vary the Mareva injunction in due course.[60]

63 Having considered the parties' submissions and the evidence, I found that the circumstances were such that it was just and equitable for SEPPL to be wound up. I also considered the findings made by Gill JC in *Sun Electric* regarding the dealings with the Funds, which eventually led him to conclude that there was a real risk of dissipation of assets by SEPPL (see *Sun Electric* at [37]).

Withdrawals from the OCBC Account

64 I turn first to the withdrawals made by Mr Peloso from the OCBC Account in apparent breach of the Injunction. I found it significant that at all times, Mr Peloso was aware that the Injunction was in force, enjoining the movement of the moneys in the OCBC Account. Therefore, the withdrawals were made with the knowledge that they were, or could be, in breach of the Injunction. In respect of the withdrawal of $1.5m made on 24 September 2018, Mr Peloso admitted in his JM Affidavit that "this sum should not have been transferred out of the OCBC Account" and "the loan to SEEAPL in September 2018 should not have been made".[61] Gill JC in *Sun Electric* made a similar observation at [25]:

> In other words, Mr Peloso was *aware* that the money should not have been withdrawn from the OCBC Account. He was conscious that removing the sum constituted a breach of the terms of the RCMA injunction. Still, he proceeded to withdraw the sum of money from the OCBC Account. Mr Peloso's justification for defying a clear court order (*ie*, the RCMA

60 DWS, at para 15.

61 JM Affidavit of Matthew Peloso, at paras 48(k) and 50.

> Injunction) was that SEEAPL 'urgently required monies to pay a contractor' and that 'the funds in SEPPL's OCBC Account were the only option available at the time'. [emphasis in original]

65 I also found it significant that large sums of money were withdrawn from the OCBC Account not once, but at least four times in the period between 24 September 2018 and 17 December 2018. These evinced a blatant disregard for the Injunction. Further, the last three withdrawals transferred all of the moneys in the OCBC Account to the DBS Account, from which they were subsequently garnished by Kashish. In other words, these transfers ultimately led to the diminishing of the Funds despite the Injunction. I turn now to the garnishment of the Funds by Kashish.

Garnishment by Kashish

66 RCMA highlighted numerous suspicious circumstances surrounding the garnishment of the DBS Account by Kashish, none of which were satisfactorily addressed by SEPPL.

67 First, Mr Peloso played a significant role in enabling Kashish to garnish the DBS Account. As I observed above, the series of events leading to the diminishing of the Funds began with Mr Peloso transferring over $6m from the OCBC Account to the DBS Account, in spite of the Injunction. Further, it was Mr Peloso who informed Kashish of the DBS Account by sending Kashish a copy of a bank statement for the DBS Account for the month of December 2018.[62] It was notable that at this time, the DBS Account contained *only* the moneys transferred from the OCBC Account (*ie*, the Funds). Despite knowing

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62 Affidavit of David Maher, at para 66(c) and Exhibit DM-17; Affidavit of Anilkumar Kakadiya filed in HC/S 74/2019, dated 13 February 2019, at paras 7 and 8.

that these moneys were subject to the Injunction, Mr Peloso nevertheless informed Kashish of these moneys and provided the relevant details of the DBS Account to Kashish.

68 Secondly, despite the significance of the Injunction to Kashish's garnishee application and *vice versa*, no attempt was made by SEPPL or Kashish to apprise the court or RCMA of such matters. Although SEPPL allegedly informed Kashish via a letter dated 3 December 2018 that the moneys were subject to an injunction order and thus "cannot be moved", there was no evidence that either SEPPL or Kashish informed the court determining the garnishee application of the same.[63] Similarly, at no point did SEPPL inform RCMA about the garnishee application or provide RCMA with a copy of the garnishee order.[64]

69 Thirdly, I also found disconcerting the ease with which the Funds were garnished from the DBS Account. The entire process took only three months between the transfer of the moneys to the DBS Account in December 2017 and the granting of the garnishee application in March 2018. Although the decision not to enter an appearance was purportedly made pursuant to advice Mr Peloso received from his solicitors,[65] I found this difficult to believe. Given SEPPL's financial situation, it was puzzling that SEPPL would simply decide not to contest a $6m claim, which was not an insignificant amount. Further, this explanation was not even provided to the court in this winding-up application.

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63 Affidavit of David Maher, at para 66(e); JM Affidavit of Matthew Peloso, at para 54.

64 Affidavit of David Maher, at para 66(e).

65 JM Affidavit of Matthew Peloso, at para 52.

It could only be found in Mr Peloso's JM Affidavit. While SEPPL's counsel sought to submit the same before me, this was again evidence from the Bar.

70 Finally, numerous inconsistencies have been highlighted by RCMA as regards the CFDs allegedly entered into between SEPPL and Kashish. These prompted serious questions regarding the authenticity of the CFD trades and Kashish's claim against RCMA, none of which were addressed by SEPPL. Some inconsistencies highlighted by RMCA were as follows:

(a) Kashish is a UAE-entity ostensibly engaged in general wholesale trade of commodities and products. As RCMA pointed out, it was "bizarre" that such a company would enter into CFDs with SEPPL in relation to wholesale electricity prices in Singapore.[66]

(b) Although SEPPL claimed that its trading losses to Kashish were incurred between 2016 and 2018, these were not reflected in SEPPL's financial statements as at 31 December 2016. The financial statements showed that SEPPL did not have any derivative financial instruments, and only suffered trading losses in respect of CFDs entered into with RCMA.[67]

(c) The prices at which the majority of the CFDs were bought and sold deviated significantly from the daily settlement prices released by the Singapore Exchange. This was unlike typical CFDs, where trades were done close to the settlement prices released.[68]

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66 Affidavit of David Maher, at paras 70(a)–(c).

67 Affidavit of David Maher, at para 70(e); pp 323 and 333, Exhibit DM-21.

68 Affidavit of David Maher, at para 71(b).

(d) The particulars provided in the quarterly statements allegedly issued under the CFDs and CFD tickets were inconsistent with the CFDs and CFD tickets themselves. Further, the quarterly statements contained information which would only have been available *after* the date on which the quarterly statements were purportedly produced, suggesting that the quarterly statements had been backdated.[69]

Conclusion on just and equitable winding-up

71 Taken in totality, the circumstances highlighted above regarding the withdrawals by Mr Peloso and the garnishment of the DBS Account were highly suspicious. They suggested that SEPPL had intentionally diverted moneys from the OCBC Account to the DBS Account in seemingly wilful breach of the Injunction. This appeared to be done in order to dissipate the moneys through a sham suit by Kashish, which was allowed in default of SEPPL's appearance and enforced by a garnishee order against the DBS Account. The undisputed outcome of this series of events was that the Funds meant to be enjoined under the Injunction for RCMA's benefit were ultimately diminished and dissipated.

72 Most importantly, none of these conclusions were challenged by SEPPL, save for its submission that they were the subject of committal proceedings and Gill JC had made his decision in *Sun Electric* ([17] *supra*) on incomplete evidence. If the evidence was indeed incomplete, SEPPL should have produced more evidence to satisfactorily explain the abovementioned suspicious circumstances. The failure to do so reinforced the conclusion that the dealings with the Funds were less than above-board.

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69 Affidavit of David Maher, at para 71(c).

73 For these reasons, I considered this a case where the lack of probity in the conduct and management of the company's affairs justified a winding-up of the company. Mr Peloso was SEPPL's sole director and played a major role in the diminishing of the Funds. Further, SEPPL's conduct in dealing with and diminishing the Funds unfairly prejudiced RCMA's interests. RCMA had secured some degree of security for itself in the form of a court-ordered Injunction, only for the Injunction to be blatantly disregarded by SEPPL. Moreover, there was also an element of subterfuge and deception involved in the diminishing of the Funds. The evidence suggested that not only did SEPPL and Kashish withhold significant information regarding the garnishee application and the Injunction from the court and RCMA, the basis of the garnishee application (*ie*, the CFD trades) were themselves a sham intended to deceive the court into allowing the garnishment of the DBS Account. This was highly egregious and extremely unfair towards RCMA. In this context, it would be just and equitable to wind up SEPPL and appoint a liquidator to investigate any alleged wrongdoing on the part of SEPPL and/or its officers, as well as take any necessary action, in the interests of all of SEPPL's creditors, including RCMA.

74 Therefore, I found that the ground for winding-up under s 254(1)(*i*) of the Companies Act had also been established, and it was just and equitable for SEPPL to be wound up.

Disputed debt

75 SEPPL submitted that the court should not exercise its power to order a winding-up because RCMA's debt of $7,466,668.01 was a disputed debt and the subject of ongoing proceedings in Suit 191. SEPPL further submitted that RCMA had an ulterior motive in filing the present winding-up application,

namely, to stifle SEPPL's counterclaim in Suit 191 and facilitate the adjudication of RCMA's claims against SEPPL through the liquidator nominated by RCMA.[70] Having considered the evidence and the parties' submissions, I rejected SEPPL's submissions.

Whether there was a substantial and bona fide dispute

76 I begin with the relevant legal principles. As the Court of Appeal observed in *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") at [16] and [17], it is axiomatic that a winding-up petition is not an appropriate means of enforcing a disputed debt, and it would be an abuse of the process of the court to allow a creditor to wind up a company on the basis of a disputed debt. However, the court must be satisfied, on the basis of the evidence before it, that there is truly a substantial and *bona fide* dispute regarding the debt. The applicable standard in this regard is the same as in a summary judgment application, *ie*, whether the company has raised triable issues (see *Pacific Recreation* at [23]). In *LKM Investment Holdings Pte Ltd v Cathay Theatres Pte Ltd* [2000] 1 SLR(R) 135, Prakash J (as she then was) cited at [20] the following passage to explain what amounts to a substantial and *bona fide* dispute:

> … [T]he dispute must be bona fide in both a subjective and an objective sense. Thus the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. …

77 In Suit 191, SEPPL disputed RCMA's debt on the basis that:[71]

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70 DWS, at paras 5 and 14.

71 SEPPL's Defence and Counterclaim (Amendment No 1) filed in HC/S 191/2018, dated 26 March 2019.

(a) RCMA was not entitled to the repayment of the prepayment loan as RCMA had discharged SEPPL from the latter's obligations to repay the prepayment loan;

(b) RCMA breached the Agreement by making unauthorised use of confidential information provided to RCMA by SEPPL, thereby entitling SEPPL to liquidated damages amounting to $1m and/or damages to be assessed; and

(c) SEPPL validly terminated the Agreement on 27 February 2018 such that the assignment of the incentive payments received by SEPPL was no longer effective.

78 While I found that these were substantial issues, I was not persuaded that SEPPL's dispute regarding RCMA's debt was a *bona fide* one. Rather, I accepted RCMA's submission that SEPPL did not have any intention of proceeding to a full trial on the merits of Suit 191.[72] This was evident from the manner in which SEPPL conducted itself in respect of Suit 191, as follows:

(a) The trial for Suit 191 had been fixed for hearing from 27 August 2019 to 30 August 2019. However, on 2 July 2019, the day that parties were expected to exchange affidavits of evidence-in-chief ("AEICs"), SEPPL's solicitors applied to discharge themselves from acting for SEPPL in Suit 191. This was notwithstanding the fact that solicitors from the same firm subsequently represented SEPPL in its JM and IJM applications in August and September 2019.

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72 PWS, at para 82.

(b) On 10 July 2019, SEPPL applied for Mr Peloso to represent SEPPL in Suit 191. This application was granted on 24 July 2019, subject to certain conditions. However, neither Mr Peloso nor SEPPL complied with these conditions. Consequently, SEPPL is currently unrepresented in Suit 191.

(c) Mr Peloso informed the learned assistant registrar during a pre-trial conference on 25 July 2019 that he required six to eight weeks to file the AEICs on behalf of SEPPL. Hence, the trial dates were vacated. However, about four weeks later, on 21 August 2019, SEPPL filed its JM application. This further delayed the hearing of the trial of Suit 191.

79 Although SEPPL's counsel contended that SEPPL had indicated to him that it would "likely appoint [him] or engage [him] to act for [SEPPL] in Suit 191",[73] and that SEPPL was intending to seek leave to amend its Defence and Counterclaim in Suit 191,[74] all of this was yet again, evidence from the Bar. There was nothing from SEPPL to explain the above circumstances suggesting that it was not genuinely intending to dispute RCMA's claim by way of a full trial in Suit 191. This was reinforced by the above conclusions regarding SEPPL's dealings with the Funds in apparent breach of the Injunction (ordered as a temporary remedy for RCMA in Suit 191), which indicated a complete disregard for the court's process. Thus, the circumstances in totality suggested to me that SEPPL was not *bona fide* in defending its dispute of RCMA's debt and pursuing its counterclaim.

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73 NEs, 7 September 2020, p 69, lines 10–13.

74 DWS, at para 12.

80 For these reasons, I did not consider that there was a substantial and *bona fide* dispute in respect of RCMA's debt of $7,466,668.01.

Whether the court should order a winding-up even if there was a substantial and bona fide dispute

81 Even if there was a substantial and *bona fide* dispute regarding RCMA's debt, I was of the view that exceptional circumstances existed justifying the winding-up of SEPPL. In this regard, several English authorities were instructive.

82 The first case was *Re Claybridge Shipping Co SA* [1997] 1 BCLC 572 ("*Claybridge*"), which concerned a disputed debt held by creditors seeking to wind up a company. In the English Court of Appeal case, Oliver LJ came to the conclusion that the disputed debt was not *bona fide* or of such substantiality to warrant the winding-up petition to be struck out. He went on to explain at 579 that the dismissal of winding-up petitions involving disputed debts was a rule of *practice*, rather than a rule of *law*:

> … [T]he refusal of the court to entertain cases where the underlying debt is said to be disputed is, in my judgment, a matter of practice only. It is not, in general, convenient that the very status of the petitioner to proceed with his petition should be fought out on a winding-up petition. But *the court must, I think, remain flexible in its approach to such cases*. There may well be cases where to compel the creditor to go off to another division of the court to establish his debt would *effectively deprive him of any remedy at all*. … The court must, I think, reserve to itself the right to determine disputes – even perhaps in some cases substantial disputes – where this can be done without undue inconvenience and where the position of the company … is such that *the likely result in effect of striking out the petition would be that the creditor, if he established his debt, would lose his remedy altogether*. [emphasis added]

83 This was approved in another English Court of Appeal decision in *Alipour v Ary and Another* [1997] 1 WLR 534, a case involving a disputed debt

of the creditor in an application to wind up a company. At 541G, 546A and 548B, Gibson LJ observed the following:

> [I]t is only a rule of practice and not one of law for the Companies Court to refuse to determine a dispute on the creditor petitioner's locus standi …
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> …
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> The position as we see it … is this. (1) A creditor's petition based on a disputed debt will normally be dismissed. (2) It will not be dismissed if the petitioning creditor has a good arguable case that he is a creditor and *the effect of dismissal would be to deprive the petitioner of a remedy or otherwise injustice would result* or for some other sufficient reason the petition should proceed. …
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> …
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> … [T]he rule of practice must … yield to the *interests of justice* when a petitioner would probably be *left without an effective remedy* if the petition were to be struck out. …
>
> [emphasis added]

84 This rule of practice was recently approved by the English High Court in *Re GBI Investments Ltd; Lacontha Foundation v GBI Investments Pte Ltd* [2010] 2 BCLC 624 ("*GBI Investments*"), where Warren J observed the following at [84] and [85]:

> 84 The law today, which I regard as clear, is that there is no absolute jurisdictional bar to a petition being allowed to proceed, or indeed the making of a winding-up order, where the debt on which the petition is founded is bona fide disputed on substantial grounds.
>
> 85 However, before the Companies Court will make a winding-up order or even allow a petition to proceed where the debt is bona fide disputed on substantial grounds, there have to be exceptional circumstances. …

85 In *GBI Investments*, Warren J held at [135] that the company should be wound up because the petitioner was a creditor in respect of its claim for damages for breach of contract, and the company was unable to pay its debt.

However, Warren J further considered at [136] that even if the debt was *bona fide* disputed on substantial grounds, he would nonetheless make a winding-up order as exceptional circumstances existed in that case. The exceptional circumstances in that case were as follows:

(a) The evidence showed that the company was clearly insolvent even if the debt were not owed to the petitioner (see *GBI Investments* at [160]).

(b) Even if the petitioner was not a creditor by reason of the disputed debt, it would still be a creditor in relation to its unpaid costs (see *GBI Investments* at [161]).

(c) No prejudice would be caused to the company if the winding-up order were made, as the company's only function was to hold certain bearer shares and it was effectively dormant (see *GBI Investments* at [162]).

(d) The petitioner would be without an adequate remedy unless a winding-up order were made. Once the provisional liquidators were discharged, the controllers of the company would be able to deal freely with the company's assets. Consequently, if and when the petitioner eventually established its claim, there would be no assets left to satisfy its claim in damages. Warren J considered this the most important factor in his analysis. While the petitioner could seek injunctive relief against the company's controllers, Warren J opined that a winding-up order would achieve better justice for the company (see *GBI Investments* at [163] and [164]).

(e) A practical advantage of winding-up was that the liquidator would be able and willing to assess the petitioner's claims and resolve any outstanding issues within the context of a winding-up.

86 The English position is that the court has the discretion to order a winding-up notwithstanding that there is a substantial and *bona fide* dispute in respect of the debt. However, this discretion should only be exercised in exceptional circumstances. In exercising this discretion, the English courts have emphasized the need to avoid injustice to the petitioner and the respondent company, in particular, by ensuring that the petitioner is not deprived of a remedy if it eventually establishes its debt against the respondent company.

87 This issue has yet to be canvassed by the Singapore courts. In my view, the English approach provides the court with the flexibility to deal with *exceptional* cases where the application of the general rule would lead to injustice. As the Court of Appeal observed in *BNP Paribas v Jurong Shipyard Pte Ltd* [2009] 2 SLR(R) 949 ("*BNP Paribas*") at [5], the court's power to order a winding-up is a discretionary one. This "discretion is a wide one and the cases interpreting it should not be allowed to fetter it by rigid rules nor detract from its generality" (see *Woon's Corporations Law* (Walter Woon gen ed) (LexisNexis, 2019) at paras 755–800). In the exercise of this discretion, the court must have regard to all the circumstances of the case and do what is just and equitable in the interest of all the parties.

88 In this case, I considered that there were exceptional circumstances justifying the winding-up of SEPPL, even if there was a substantial and *bona fide* dispute in relation to RCMA's debt. First, as in *GBI Investments*, I concluded that SEPPL was clearly insolvent, regardless of whether RCMA's disputed debt of $7,466,668.01 was taken into account (see [41] and [49]

above).[75] Whether from the perspective of the cash flow test or the balance sheet test, the evidence showed that SEPPL was in dire financial circumstances.

89 Secondly, minimal prejudice would be caused to SEPPL should a winding-up order be made.[76] In this regard, I considered that SEPPL itself had lodged JM and IJM applications just a year before, on the basis that it was insolvent and was unable to repay its debts. The outcome which SEPPL purportedly expected from its JM and IJM applications was that SEPPL would eventually wind down its business.[77] Thus, as far as SEPPL's or its related companies' reputations or businesses were concerned, there would be minimal impact given the recency of the JM application. There was also no evidence that a winding-up order would result in the drastic consequences alluded to in *BNP Paribas* at [17]–[19], *ie*, cross-defaults, pushing the business group into risk of insolvency, or serious impact on other economic and social interests.

90 Thirdly, there was a serious risk that if the winding-up application were dismissed and RCMA forced to continue with Suit 191, RCMA would eventually be left without a remedy even if it successfully proved its claim against SEPPL. A critical consideration was the fact that the Funds, which were the subject of a court-ordered Injunction, had already been completely diminished. In this regard, the diminishing of assets was no longer a mere risk – it had already eventuated in respect of most of SEPPL's assets.[78] Further, the diminishing of the Funds occurred in highly suspicious circumstances and were

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75 PWS, at para 79.

76 PWS, at para 84.

77 JM Affidavit of Matthew Peloso, at para 61.

78 NEs, 7 September 2020, at p 82, lines 14–16.

occasioned by the actions of Mr Peloso through what appeared to be multiple wilful breaches of the Injunction. Moreover, SEPPL's conduct of deliberate procrastination in Suit 191 as detailed at [78] above suggested that it had no genuine intention of going to trial to resolve RCMA's disputed debt. This only served to reinforce my concern that RCMA should not be made to go through a drawn-out and fruitless trial.

91 Finally, the corollary of winding up SEPPL was that a liquidator could be appointed over SEPPL.[79] The liquidator could conduct the relevant investigations into the dealings with the Funds and take further action, if necessary, in the interests of the creditors. Moreover, from a practical perspective, the liquidator would be able to assess the merits of SEPPL's defence and counterclaim in Suit 191, and pursue the action, negotiate with RCMA, or take further action as required. The liquidator could also assess RCMA's claims against SEPPL and determine the value to be attributed to RCMA's contingent or prospective debt.[80] Given the highly suspicious circumstances canvassed above, it was preferable for the liquidator, an officer of the court, to take over the reins of SEPPL in the abovementioned respects. For the same reason, SEPPL's submission that the liquidator's appointment would stifle SEPPL's counterclaim in Suit 191 and facilitate the adjudication of RCMA's claim against SEPPL was misplaced. Instead, the appointment of a liquidator would not only provide greater transparency for the benefit of SEPPL's creditors, it would also be to SEPPL's benefit in so far as it would be able to recover any moneys wrongfully dissipated by its previous controllers.

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79 PWS, at para 85.

80 PWS, at para 85; NEs, 7 September 2020, p 91, line 18 to p 92, line 31.

92 For the above reasons, I found that even if SEPPL had shown that there was a substantial and *bona fide* dispute in respect of RCMA's debt of $7,466,668.01, there were exceptional circumstances justifying the winding-up of SEPPL. I, therefore, considered that it was in the interests of justice for the court to exercise its discretion to wind up SEPPL, based on the grounds for winding-up which had been established.

Conclusion

93 In conclusion, I found that the grounds for winding-up under ss 254(1)(*e*) and 254(1)(*i*) of the Companies Act had been established – that SEPPL was insolvent and was unable to pay its debts and that it was just and equitable for SEPPL to be wound up. Moreover, I was of the view that SEPPL's dispute regarding RCMA's debt of $7,466,668.01 was not *bona fide*. Furthermore, even if there was a substantial and *bona fide* dispute in respect of RCMA's debt of $7,466,668.01, there were exceptional circumstances that justified the winding-up of SEPPL.

94 Therefore, I granted RCMA's application and ordered that SEPPL be wound up and a liquidator appointed over SEPPL. I further ordered costs to be fixed at $9,500 all-in to be paid to RCMA out of SEPPL's assets.

Tan Siong Thye
Judge

Mohammed Reza s/o Mohammed Riaz, Kwek Yuan Justin and Victoria Katerina Jones (JWS Asia Law Corporation) for the plaintiff;
Lim Chee San (TanLim Partnership) for the defendant;
The non-party absent.
