IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 60

Civil Appeal No 150 of 2020

Between

Sun Electric Power Pte Limited

… *Appellant*

And

RCMA Asia Pte Ltd (formerly known as Tong Teik Pte Ltd)

… *Respondent*

In the matter of Companies Winding Up No 393 of 2019

In the matter of the Companies Act (Cap 50, 2006 Rev Ed)

And

In the matter of Sun Electric Power Pte Limited

Between

RCMA Asia Pte Ltd (formerly known as Tong Teik Pte Ltd)

… *Plaintiff*

And

Sun Electric Power Pte Limited

… *Defendant*

GROUNDS OF DECISION

[Insolvency Law] — [Winding up] — [Appeal] — [Control of conduct of appeal]
[Insolvency Law] — [Winding up] — [Test for actual insolvency] — [Whether company actually insolvent]
[Insolvency Law] — [Winding up] — [Deemed insolvency] — [Neglect to pay statutory demand]

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Sun Electric Power Pte Ltd
v
RCMA Asia Pte Ltd (formerly known as Tong Teik Pte Ltd)

[2021] SGCA 60

Court of Appeal — Civil Appeal No 150 of 2020
Sundaresh Menon CJ, Judith Prakash JCA and Steven Chong JCA
5 April 2021

10 June 2021

Judith Prakash JCA (delivering the grounds of decision of the court):

Introduction

1 On 7 September 2020, the High Court ordered that the appellant, Sun Electric Power Pte Ltd, be wound up, chiefly on the ground that it was insolvent. The appellant appealed against that decision. At the hearing of the appeal, the appellant was not able to convince us that the court below had erred in its finding of insolvency and the appeal was dismissed.

2 These grounds of decision explain the basis of the dismissal and also clarify three issues that arose in the course of the appeal: (a) who should control the conduct of an appeal against a winding up order and at whose cost; (b) which test applies for the purpose of determining insolvency under s 254(2)(*c*) of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act"); and (c) whether a company may still be deemed to be unable to pay its debts under s 254(2)(*a*)

of the Companies Act if it pays part of the statutory demand such that the remaining debt falls below the prescribed minimum quantum needed to serve the demand.

Material facts

3 The appellant was a company incorporated in Singapore that was in the business of transmitting, distributing and selling electricity. It was wholly owned by Sun Electric (Singapore) Pte Ltd ("SESPL"), which was 99.9% owned by Sun Electric Pte Ltd ("SEPL"). One Mr Matthew Peloso ("Mr Peloso") who owned 95% of SEPL's shares was the sole director of the appellant.

4 The respondent, RCMA Asia Pte Ltd, was another Singapore company which was in the business of trading in energy.

5 The appellant was a licensee and participant in a scheme, known as the "Forward Sales Contract Scheme" ("FSC Scheme"), introduced by the Energy Market Authority of Singapore ("EMAS"). Under this scheme, the appellant was required to carry out certain 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. Sometime in late 2015, the appellant and the respondent entered into an agreement for the respondent to assume the appellant's market-making obligations in exchange for a 70% share of all incentive payments received by the appellant under the FSC Scheme ("the Agreement"). From December 2015 to January 2018, the appellant paid the respondent its 70% share of the incentive payments. Thereafter, the appellant stopped all payments to the respondent.

6 On 22 February 2018, the respondent filed HC/S 191/2018 ("Suit 191") to claim from the appellant: (a) 70% of all incentive payments that the appellant may continue to receive under the FSC Scheme; and (b) repayment of an alleged loan that was granted to the appellant pursuant to the Agreement (alleged to be in the sum of $933,334.49). On the same day, the respondent applied for an interlocutory injunction against the appellant. After an *ex parte* hearing on 26 February 2018, Chua Lee Ming J granted an interim injunction in terms, restraining the appellant, its directors, officers, employees and/or agents from disposing of, dealing with or diminishing the value of the respondent's 70% share of the incentive payments, including those to be received ("RCMA Injunction"). This interim injunction was extended after a contested hearing on 11 May 2018, on the condition that the respondent meet its market-making obligations under the Agreement. Meanwhile, the appellant entered its defence in Suit 191.

7 By July 2018, the respondent had completed its market-making obligations. By August 2018, the appellant had received all remaining incentive payments in its Oversea-Chinese Banking Corporation Limited ("OCBC") account. The incentive payments (totalling $9,333,333.60) were deposited into the OCBC account by six instalment payments of $1,555,555.60 made from January to August 2018. Of this total sum, $6,533,333.52, being 70% of $9,333,333.60, was frozen on the terms of the RCMA Injunction. On the whole, the appellant had complied with the RCMA Injunction by routinely withdrawing only 30% of the incentive payments, leaving 70% in the account. However, the appellant had also made two exceptional withdrawals such that the amount remaining in the OCBC account as at November 2018 fell below the enjoined amount to around $6m.

8 Between late November and end December 2018, all remaining moneys in the OCBC account were transferred to the appellant's DBS Bank Ltd ("DBS") account, via three separate transactions ("DBS transfers"). In total, a sum of $6,091,555.39 was taken out of OCBC and placed in DBS.

9 In January 2019, a UAE-incorporated company, Kashish Worldwide FZE ("Kashish"), commenced a suit in the High Court against the appellant. It claimed $6,995,755.78 pursuant to contracts for differences allegedly executed between Kashish and the appellant. The appellant did not enter an appearance and Kashish obtained judgment in default of appearance against the appellant for the claimed sum, interest and costs.

10 In February 2019, Kashish applied to garnish the DBS account, and obtained a garnishee order for DBS to show cause. A copy of this court order was served on the appellant. In March 2019, the court granted Kashish's garnishee application and ordered DBS to disburse the funds in the DBS account to Kashish in partial satisfaction of the judgment debt owed to it by the appellant. This was duly executed by DBS. As a result, the DBS account was emptied out.

11 In August 2019, citing financial woes, the appellant applied for judicial management ("JM") and thereafter, in September 2019, it asked for an interim judicial management order ("IJM"). The respondent objected to both applications. The IJM application was dismissed in September 2019, with costs of $3,500 ordered to be paid by the appellant to the respondent. The JM application was similarly dismissed in October 2019 and the court ordered further costs of $8,000 to be paid by the appellant to the respondent. These costs amounted to $11,500 in total.

12 On 21 November 2019, the respondent's solicitors sent a statutory demand to the appellant's registered office, requiring the appellant to make payment of $11,568.88, being the amount of the costs awarded and accrued interest.

13 On 11 December 2019, the appellant's solicitors responded to the statutory demand by letter, admitting that the appellant owed the respondent $11,500 and interest thereon accruing at the rate of 5.33% per annum. The appellant proposed to make payment in instalments: 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, the respondent rejected this proposal on the same day.

14 Nevertheless, the appellant paid $3,000 into the respondent's solicitors' client account on 13 December 2019. Thereafter, no further payments were made by the appellant and the balance of $8,568.88 remained due, together with additional interest which had been accruing from 21 November 2019 (collectively "Outstanding Costs").

15 On 18 December 2019, the respondent filed HC/CWU 393/2019 ("CWU 393") seeking an order that the appellant be wound up.

CWU 393

16 CWU 393 was filed *before* the winding up provisions in the Companies Act were effectively re-enacted in the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) ("IRDA") on 30 July 2020. Section 526(1)(*f*) of the IRDA makes it clear that the relevant provisions of the

Companies Act would continue to apply to any application for winding up filed prior to 30 July 2020. Thus, this appeal concerned the provisions of the Companies Act and not those of the IRDA.

17 The respondent submitted (and the appellant did not dispute) that the respondent had standing to file CWU 393 pursuant to s 253(1)(*b*) of the Companies Act as it was a creditor of the appellant (for the Outstanding Costs) and a contingent creditor for the sum of $7,466,668.01 (being the amount it had claimed in Suit 191) (see [6] above). The High Court judge below ("the Judge") accepted this (see his judgment published as *RCMA Asia Pte Ltd v Sun Electric Power Pte Ltd (Energy Market Authority of Singapore, non-party)* [2020] SGHC 205 ("*GD*") at [23] to [24]). The only disputed issues in CWU 393 were whether any of the grounds for winding up was met and, if so, whether the court should grant the winding up order.

Respondent's submissions below

18 The respondent argued that the appellant should be wound up pursuant to s 254(1)(*e*) of the Companies Act as it was unable to pay its debts. This argument relied on two bases. The first was that the appellant should be deemed to be unable to pay its debts pursuant to s 254(2)(*a*) of the Companies Act as it had not paid the Outstanding Costs in full, despite having been served a statutory demand. Alternatively, the appellant should be deemed to be unable to pay its debts pursuant to s 254(2)(*c*) of the Companies Act as the appellant was cash flow insolvent and balance sheet insolvent.

19 The respondent argued, in the alternative, that it would be just and equitable to wind up the appellant pursuant to s 254(1)(*i*) of the Companies Act since the appellant had carried out its business in a fraudulent manner. The

appellant had dissipated the enjoined funds in breach of the RCMA Injunction, by transferring all the funds in the OCBC account to the DBS account and allowing them to be garnished by Kashish in highly suspicious circumstances. It submitted that this should be thoroughly investigated by independent liquidators.

Appellant's submissions below

20 The appellant adduced a balance sheet dated 30 June 2020 ("June 2020 Balance Sheet") which it claimed was prepared by a qualified chartered accountant, one Mr Ho Yeow Yang Edmund ("Mr Ho"), and which the appellant claimed showed that it was solvent. It conceded that while it had not explained how its financial position had improved substantially since the JM application, it was prepared to do so if required by the court. It also argued that the Outstanding Costs owed to the respondent fell below the threshold amount of $10,000 stipulated in s 254(2)(*a*) of the Companies Act. It stated that it was prepared to pay the Outstanding Costs to the respondent if this was required to avoid winding up.

21 The appellant denied that it had breached the RCMA Injunction and stated that there were ongoing committal proceedings on the issue.

22 Finally, the appellant alleged that the respondent was filing CWU 393 to stifle the appellant's counterclaim in Suit 191 and to facilitate the adjudication of its claim against the appellant by its nominated liquidator.

The Judge's decision

23 The Judge accepted all three grounds for winding up relied on by the respondent. First, he held that the appellant was deemed to be unable to repay

its debts pursuant to s 254(2)(*a*) of the Companies Act as it had not repaid the Outstanding Costs in spite of the statutory demand. Although the appellant had repaid $3,000 such that the Outstanding Costs fell below $10,000, this was not to the reasonable satisfaction of the respondent (*GD* at [33]).

24 Second, the Judge found that the appellant was unable to pay its debts pursuant to s 254(2)(*c*) of the Companies Act as the appellant was cash flow insolvent (*GD* at [38] to [41]) and balance sheet insolvent (*GD* at [42] to [49]). Third, the Judge also held that it was just and equitable to wind up the appellant (*GD* at [59] to [74]). Finally, the Judge rejected the assertion that the respondent had acted in abuse of process, or with an ulterior motive, in bringing CWU 393 (*GD* at [75] to [80]).

Parties' arguments on appeal

Appellant's arguments

25 On appeal, the appellant submitted:

(a) The Judge should not have wound up the appellant on the basis that the debt stated in the statutory demand remained partially unpaid, as the Outstanding Costs were below $10,000, and the appellant had sufficient balance in its bank account to pay the same. Further, s 254(2)(*a*) of the Companies Act is only a statutory presumption of insolvency which serves as a convenient ground to wind up a company, and not the "end all and be all".

(b) The Judge erred in finding that the appellant was actually insolvent.

(c) The Judge erred in finding that it was just and equitable to wind up the appellant.

(d) Finally, the winding up order should not be granted as the respondent had brought the winding up proceedings in order to eliminate the appellant as a competitor and to circumvent the appellant's counterclaim in Suit 191.

Respondent's arguments

26 The respondent primarily sought to affirm the Judge's findings and we consider its arguments in greater detail below. It also, however, raised the new argument that Mr Peloso and M/s TanLim Partnership, the appellant's solicitors, did not have the authority to act for the appellant in this appeal. It argued that upon a company's liquidation, its directors are *functus officio* and have no authority to give instructions on behalf of the wound-up company unless the winding up has been stayed. In the present case, while parties had obtained a conditional stay order pending this appeal, this conditional stay order had lapsed as Mr Peloso and the appellant had breached its terms. The liquidator had then resumed office and had informed the Supreme Court Registry of this. There had been no application to reinstate the stay of the winding up order.

Developments at the eleventh hour

27 Almost seven months after the notice of appeal was filed, on 1 April 2021, the very last working day prior to the appeal, the appellant's counsel, Mr Lim Chee San ("Mr Lim"), informed the court that he wished to adduce two cashier's orders at the hearing of the appeal. Both cashier's orders were dated 31 March 2021. The first cashier's order was for a sum of $8,973.41 and listed the respondent as the payee. The second cashier's order was for a sum of

$927,594.61 and listed the appellant as the payee. Apart from these details which appeared from the cashier's orders themselves, the document forwarding copies of the cashier's orders was completely devoid of any explanation, such as how these moneys had been obtained and who they were obtained from. In addition, there was no affidavit explaining the need for the court to take cognisance of these cashier's orders.

28 When we questioned Mr Lim on these points at the hearing of the appeal, he gave answers that were less than satisfactory. He informed the court that the moneys were obtained from an investor but admitted that he did not know who the investor was. He could not explain why these cashier's orders were only obtained by the appellant at the eleventh hour. He also omitted to inform the court that the investment was *conditional* on the appeal being allowed, and that if the appeal was not allowed, the investor would withdraw the investment. Mr Lim only disclosed this point when we probed him on it. Further, he could not give any good reason for the complete lack of detail in his document or for the failure of the appellant to file any affidavit. Mr Lim claimed that the appellant had only given him the cashier's orders at the last minute and also gave the excuse that he did not have time to prepare an affidavit or make a formal application.

29 While these facts may have been true, as an officer of the court, Mr Lim was expected to discharge his paramount duty to the court by apprising the court of all relevant and material details. In addition, to the extent that these eleventh-hour developments were caused by the appellant's last minute actions, the appellant's conduct was highly unsatisfactory.

30 Nevertheless, we treated Mr Lim's submissions as an oral application to adjourn the hearing to allow the appellant to file an affidavit to formally adduce the cashier's orders as evidence. The respondent took the position that the hearing should not be adjourned but should proceed as planned, and that the appeal should be decided based on the evidence before the court.

Issues

31 On the face of the respective cases filed by the parties, the issues to be determined were as follows:

(a) whether Mr Peloso and M/s TanLim Partnership were authorised to act for the appellant in the appeal;

(b) whether the Judge had erred in finding that the appellant was deemed to be unable to pay its debts pursuant to s 254(2)(*c*) of the Companies Act;

(c) whether the Judge erred in finding that the appellant was deemed to be unable to pay its debts pursuant to s 254(2)(*a*) of the Companies Act;

(d) whether the Judge had erred in finding that it was just and equitable to wind up the appellant pursuant to s 254(1)(*i*) of the Companies Act;

(e) if the answer to at least one of issue (b), (c) or (d) was no, whether the Judge had erred in exercising his discretion to wind up the appellant; and

(f) whether the respondent had brought CWU 393 with an ulterior motive.

32 On the view that we took of the matter, it was not necessary to deal with the issue in [31(d)] above and we will not say anything further about it. Further, before we could consider the remaining issues, we had to deal with the request for an adjournment made by the appellant.

Our decision

Application for adjournment

33 We rejected the appellant's application to adjourn the hearing. More than one year and three months had passed since the filing of CWU 393, which period included almost seven months since the filing of the appeal. If the alleged investor had been genuine in wanting to invest in the appellant, he could have done so within that long period. No explanation was given to us as to why these developments had only happened at the eleventh hour or why we should accept them as being other than a delay tactic. Further, while Mr Lim gave evidence from the bar that the second cashier's order showed that there was an investor who was willing to invest some $927,000 into the appellant, this explanation was too lacking in detail to warrant an adjournment. As we mentioned at [28] above, Mr Lim was unable to inform us of the identity of the investor and the conditions of the investment agreement (if any). We were not minded to grant the appellant any more time given the substantial length of time that had already passed.

34 In any case, even if the appellant filed an affidavit to adduce the two cashier's orders as evidence, this may not have changed our findings. While one of the cashier's orders was payable to the respondent and was intended to cover the Outstanding Costs, the fact remained that the funds had not been transferred to the respondent's bank account and the Outstanding Costs had not been paid.

In this respect, nothing had changed since the CWU 393 proceedings, where the appellant had informed the Judge on two separate occasions that it was prepared to pay the respondent the Outstanding Costs within a few days, but subsequently failed to make payment on either occasion. We saw no good reason to give the appellant a third chance.

35 In addition, even if there was an investment of some $927,000, that sum might not necessarily have been sufficient to prove that the appellant was solvent, given that the evidence showed that it had a deficit of over $1m as at the date of CWU 393 ([74] below).

36 We thus directed that the appeal continue and that we would decide it based on the evidence before us.

Whether Mr Peloso and M/s TanLim Partnership were authorised to act on behalf of the appellant

37 The respondent contended that Mr Peloso could not have the authority to control the conduct of the appeal by the appellant unless a stay order had been granted. We could not accept this contention. The governing principle is that a company has the right to appeal a winding up order regardless of whether a stay order is granted, and it is a necessary corollary of the company's right to appeal that its directors be allowed to control the conduct of the appeal.

38 The Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") (as in force immediately before 2 January 2021) by s 17(1)(*c*) grants the High Court jurisdiction under any written law related to companies and this of course includes the right to make orders to wind up companies under the Companies Act. Decisions of the High Court are appealable as of right to the Court of

Appeal except in defined cases where leave is required. The legislative framework makes clear that a company has the right to appeal a winding up order even without leave of court as a winding up order does not fall within the categories of matters which require leave to appeal (see ss 34(1), 34(2), 34(2A) and the Fourth and Fifth Schedule to the SCJA. This remains the case under the IRDA as s 8(1) of the IRDA provides that any order of court made under the IRDA is subject to appeal at the instance of any person aggrieved.

39 The right to appeal does not depend on whether a stay order is granted. This can be seen from the fact that the appeal is of right but a stay of execution pending appeal is not granted as of right: see O 57 r 15 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) (as in force immediately preceding 2 January 2021) ("ROC"). If a stay is a necessary requirement in order to appeal, there may be situations where the court could effectively prevent the company from appealing by refusing to grant a stay. This would circumvent the legislative framework which allows a company to appeal as of right and cannot possibly be the law.

40 The authorities also make it clear that a stay is not required in order for the company to appeal and is in fact discouraged in the situation of a winding up order. Plowman J stated in *Re A. & B.C. Chewing Gum Ltd.; Topps Chewing Gum Incorporated v Coakley and others* [1975] 1 WLR 579 ("*Chewing Gum*") at 592–593:

> … **as a matter of practice a stay is never granted** … there are very good reasons for the practice of never ordering a stay, and they are these: as soon as a winding up order has been made the Official Receiver has to ascertain first of all the assets at the date of the order; secondly, the assets at the date of the presentation of the petition …; and thirdly, the liabilities of the company at the date of the order, so that he can find out who the preferential creditors are, and also the unsecured creditors.

> **Supposing there is an appeal and the winding up order is ultimately affirmed by the Court of Appeal, and there has been a stay, his ability to discover all these things is very seriously hampered**: it makes it very difficult for him, possibly a year later, to ascertain what the position was at different times a year previously. **But assuming a stay is not granted, if the business is being carried on at a profit, as I understand this business now is, no additional harm is done by refusing a stay. … Then, if the appeal is allowed, the business is handed back as a going concern, it has not suffered any loss.** Of course, if the business can only be carried on at a loss — it should not be carried on at all.
>
> **Those, I think, are really the reasons why, in practice, a stay is not granted –a profitable business can be carried on as it was before and handed back as a going concern if the appeal is allowed.** If it is not allowed then, of course, cadit quaestio.
>
> [emphasis added]

41 *Chewing Gum* was relied on by the Malaysian High Court in *KTL Sdn Bhd v Azrahi Hotels Sdn Bhd* [2003] 3 CLJ 49, which stated that while a company has a right to appeal a winding up order, a stay pending appeal is granted only in exceptional circumstances (at 56 to 57):

> … in my judgment, [it is] beyond argument that a company which has been ordered to be wound up has the right to appeal against such an order and to make any and all applications incidental to the appeal, including an application for a stay of the winding up order. But, I must however add the caveat, that for the practical reasons advanced by Plowman J, a stay under s. 253 pending appeal should be granted only in very exceptional circumstances, where the winding-up order made is patently wrong in law (for example, the judge being clearly amiss on the law) or on fact, or was made in circumstances which has clearly occasioned a substantial miscarriage of justice.

42 The fact that a stay is usually not granted pending an appeal is also stated in *Woon's Corporations Law* (Walter Woon gen ed) (LexisNexis, 2018) at para 2551.

43 Given that a company has a right to appeal regardless of whether a stay is granted, it follows that the company's directors have the right to control the conduct of the appeal regardless of whether a stay is granted. This is because it is a necessary corollary of the company's right to appeal that its directors control the conduct of the appeal in the same way that they had control of the defence to the winding up application at first instance. It would be illogical to entrust the conduct of the appeal to the liquidator because the very object of the appeal is to revoke the winding up order and discharge the liquidator, causing the liquidator to lose his position and remuneration if the appeal succeeds (see s 268(3) of the Companies Act).

44 The respondent adduced no direct authority to support its proposition. Instead, the respondent merely relied on the general proposition that upon a company's liquidation, the directors are *functus officio* and that it is the liquidator who takes charge of the company's affairs. However, we do not think that this general proposition extends to the conduct of the appeal. While the directors may be *functus officio* in relation to running the business of the company, they still retain the power to control the conduct of the appeal. If the respondent's contention is taken to its logical conclusion, the directors of the company would not even have the authority to apply for a stay of execution on behalf of the company since it is the liquidator who is in charge of the company's affairs. This cannot be right.

45 Finally, while the respondent relied on s 262(3) of the Companies Act (now s 133 of the IRDA) which provides that no action or proceeding shall be proceeded with or commenced against the company except with the leave of court, we do not think that this provision applies to an appeal against the winding up order, which is available to the company as of right.

46 We thus dismissed the respondent's arguments on this point. While the conduct of the appeal by Mr Peloso and M/s TanLim Partnership was in order, this had an impact on the costs of the same. The further, and in our view, more significant question was who should pay the costs of an appeal against a winding up order. We are of the view that it is impermissible for the directors and/or shareholders to whittle down the company's funds to pursue an unmeritorious appeal when these funds should be reserved for payment to the creditors. To address this concern, we set out two general rules.

47 First, the directors and/or shareholders controlling the conduct of the appeal should expect to pay any costs incurred by the company in prosecuting the appeal out of their own pockets, instead of using the funds of the company. In practice, where a stay order is not granted, they should be *unable* to use the funds of the company because the liquidator should have custody and control of all of the company's property (see s 269(1) of the Companies Act). Where a stay order is granted, they may, practically, be able to use the funds of the company, but should be prepared to pay it back to the company if the appeal fails. Section 259 of the Companies Act makes clear that any disposition of the company's property made after the commencement of the winding up application is void unless the court orders otherwise. We agree with the High Court's decision in *Centaurea International Pte Ltd (in liquidation) v Citus Trading Pte Ltd* [2017] 3 SLR 513 ("*Centaurea*") that the purpose of this section is to prevent the dissipation of assets to procure so far as practicable the rateable payment of the unsecured creditors' claims (at [24]). The crucial question in determining whether a transaction will be validated is whether there were special circumstances making such a course desirable in the interests of the unsecured creditors as a body (*Centaurea* at [34] and [48]). In our view, the use of the company's assets to bring an unmeritorious winding up appeal would

dissipate the company's assets to the detriment of the unsecured creditors and would not be desirable in the interests of the unsecured creditors. Such transactions should thus, in general, *not* be validated and should remain void. The liquidator may thus bring actions against the directors and/or shareholders to recover the funds that they had used in prosecuting the unmeritorious appeal. The court may also order the directors and/or shareholders to pay these costs back to the company pursuant to O 59 r 2(2) of the ROC (see [48] below). That said, if the appeal succeeds, the directors and/or shareholders can reclaim from the company the funds that they had expended from their own pockets in prosecuting the appeal.

48 Second, the directors and/or shareholders controlling the conduct of the appeal should also expect to be personally responsible for the payment of any party and party costs awarded in favour of the respondent if the appeal fails. Order 59 r 2(2) of the ROC grants the court the power to order costs against a non-party to the proceedings if certain conditions are met:

> (a) First, it must be just to do so in all the circumstances of the case (*DB Trustees (Hong Kong) Ltd v Consult Asia Pte Ltd and another appeal* [2010] 3 SLR 542 ("*DB Trustees*") at [29]). This is assessed by having regard to a variety of factors, in particular, considerable weight should be placed on whether there is a close connection between the non-party and the proceedings (*DB Trustees* at [36]). This can be demonstrated in many ways, including by the fact that the non-party funds or controls the proceedings with the intention to benefit from it, or by the fact that the non-party initiated the proceedings (*DB Trustees* at [30] to [34]). Considerable weight should also be placed on whether the non-party caused the incurring of costs (*DB Trustees* at [35]). While

bad faith and impropriety on the part of the non-party are important considerations, they are not necessary requirements (*SIC College of Business and Technology Pte Ltd v Yeo Poh Siah and others* [2016] 2 SLR 118 ("*SIC College*") at [93]). Different considerations may apply where a company is forced to defend a claim as compared to a case where it is a claimant (*SIC College* at [103]).

(b) Second, while it is not an indispensable requirement that a non-party must be given prior warning before an adverse order for costs is made against him, it is essential that the non-party be accorded due process and that his views adequately considered before such an order is made (*DB Trustees* at [47]).

49 In our view, these conditions are met in an unmeritorious appeal against a winding up order brought and controlled by the company's directors and/or shareholders. The directors and/or shareholders have a close connection to the appeal as they initiate, conduct, control, and fund the appeal. They also cause the respondent (and possibly the company) to incur costs because if they had not brought the appeal, such costs would not have been incurred. Considering these factors, it would in general be just to impose party and party costs personally on the directors and/or shareholders in the event that the appeal fails. In order to fulfill the requirement of due process, the directors and/or shareholders can be given liberty to apply to seek an indemnity from the company.

Section 254(2)(c) of the Companies Act

50 We now turn to discuss whether the Judge erred in finding that as at the date of the hearing, the appellant had to be deemed to be unable to pay its debts pursuant to s 254(2)(*c*) of the Companies Act.

Legal principles

51 Section 254(2)(*c*) of the Companies Act provides that a company shall be deemed to be unable to pay its debts if:

> (*c*) it 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.

52 The Judge held that s 254(2)(*c*) involves a holistic and commercial inquiry into whether it is expected that at some point, the company would be unable to meet a liability. This could involve the application of one or more of several tests, depending on the circumstances of each case (*Seah Chee Wan and another v Connectus Group Pte Ltd* [2019] SGHC 226 at [63]; *Chip Thye Enterprises Pte Ltd (in liquidation) v Phay Gi Mo and others* [2004] 1 SLR(R) 434 at [19] to [20]). On the facts, the Judge relied on *both* the cash flow and balance sheet tests in reaching his conclusion. He did not state that either was conclusive (*GD* at [35] to [57]).

53 The respondent urged us to depart from the Judge's position, and to find that the cash flow and balance sheet tests are disjunctive, such that the appellant would be found to be unable to pay its debts as long as it was proven insolvent on *either* test. The respondent also argued that the cash flow test should be the dominant test and that if this test was satisfied, the company should be deemed

as being unable to pay its debts regardless of whether the balance sheet test was satisfied. The respondent relied on the cases of *Living the Link Pte Ltd (in creditors' voluntary liquidation) and others v Tan Lay Tin Tina and others* [2016] 3 SLR 621 ("*Living the Link*") at [26] to [28]; *Tam Chee Chong and another v DBS Bank Ltd* [2011] 2 SLR 310 ("*Tam Chee Chong*") at [62]; and *Kon Yin Tong and another v Leow Boon Cher* and others [2011] SGHC 228 ("*Kon Yin Tong*") at [33].

54 The appellant did not take a clear stand in its written submissions as to which test should apply, but argued at the oral hearing that it was balance sheet solvent (thus implying that the balance sheet test should apply).

55 In our view, the respondent's reliance on *Living the Link* and *Tam Chee Chong* was misplaced ([53] above). These cases were not directly relevant as they dealt with s 100(4) of the Bankruptcy Act (Cap 20, 2009 Rev Ed) ("Bankruptcy Act") (now repealed by the IRDA) and not s 254(2)(*c*) of the Companies Act. There are material differences between the phrasing of the two provisions.

56 That said, we agree with the respondent that the cash flow test should be the sole and determinative test under s 254(2)(*c*) of the Companies Act.

57 First, the plain words of the provision do not envisage two or more different tests being applied but imply only a single test, namely, whether "it is proved to the satisfaction of the Court that the company is unable to pay its debts". In contrast, where Parliament intended to have separate insolvency tests, it has explicitly stated so in the statute. For example, s 100(4) of the Bankruptcy Act explicitly distinguished the cash flow and balance sheet tests as follows:

> (4) For the purposes of subsection (2), an individual shall be insolvent if —
>
> > (*a*) he is unable to pay his debts as they fall due; or
> >
> > (*b*) the value of his assets is less than the amount of his liabilities, taking into account his contingent and prospective liabilities.

58 The fact that no such distinction is made in the plain words of s 254(2)(*c*) of the Companies Act supports the inference that the legislature intended only a single test for s 254(2)(*c*).

59 Second, this interpretation is supported by United Kingdom ("UK") case law. Up until 1985, the cases applying the UK equivalent of s 254(2)(*c*) of the Companies Act did not distinguish between the cash flow and balance sheet tests but instead only applied a single test (see *Re Cheyne Finance plc (in receivership)* [2008] 2 All ER 987 ("*Cheyne*") at [34] to [36]; and Meng Seng Wee, "Taking Stock of the Insolvency Tests in Section 254 of the Companies Act" (2011) SJLS 486 ("*Meng Seng Wee*") at p 489). As of 1985, the UK equivalent of s 254(2)(*c*) of the Companies Act was s 518(*e*) of the Companies Act 1985 (c 6) (UK). The two provisions were *in pari materia*. The UK courts interpreted s 518 as requiring a single test of commercial insolvency, which assesses the company's present capacity to meet its liabilities as and when they became due (*Cheyne* at [34] to [35]). Under this commercial insolvency test, the court is allowed to consider the company's contingent and prospective liabilities, and not merely current liabilities, as these would affect whether the company could pay its debts as and when they became due. However, this was different from a balance sheet test (*Cheyne* at [35]), as we explain further below at [62].

60 The UK practice of applying a single test only changed with the enactment of s 123 of the Insolvency Act 1986 (c 45) (UK) ("UK Insolvency Act") which provided, *inter alia*, that a company would be deemed unable to pay its debts if "it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due" (s 123(1)(*e*)) *or* "it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities" (s 123(2)). It is clear that s 123(1)(*e*) refers to a cash flow test and s 123(2) refers to a balance sheet test. It was only after this legislative amendment that the UK had two separate insolvency tests (*Cheyne* at [36]).

61 Since 254(2)(*c*) of the Companies Act is *in pari materia* with s 518, the UK cases on s 518 support the proposition that a single test, the commercial insolvency test, should be the applicable test under s 254(2)(*c*).

62 Thirdly, the single test intended by s 254(2)(*c*) of the Companies Act is not the balance sheet test. The balance sheet test compares a company's total assets with its total liabilities. However, this ratio has no direct correlation with whether a company "*is* unable to pay its debts" [emphasis added]. For example, a company may have total liabilities that exceed its total assets by ten times, but these liabilities may only materialise in a hundred years, which means that the company will be able to pay its debts for the next hundred years (if nothing changes). Conversely, a company may have total assets which are ten times the total liabilities but these assets may all be illiquid and only realisable in a hundred years, whereas the liabilities may all be current. This means that the company may not be able to pay its debts for the next hundred years. As can be seen from these two contrasting examples, it is not the total asset to total liability ratio which determines a company's present ability to pay its debts. Instead, this

is determined by the liquidity of the assets and when the debts fall due. The total assets and liabilities of a company are only relevant in so far as they shed light on the quantum of debts which will soon be due and the quantum of assets which may be realised in the near future. Parliament thus could not have intended the balance sheet test as the test for s 254(2)(*c*) as it is not a good indicator of the company's present ability to pay its debts.

63 This point is supported by the fact that where the legislature intended to incorporate a balance sheet test, it has done so in no uncertain terms (see s 123(2) of the UK Insolvency Act and s 100(4)(*b*) of the Bankruptcy Act cited above). The fact that this was *not* done in s 254(2)(*c*) suggests that it was not intended.

64 In addition, *Meng Seng Wee* at p 488 points out that *Re Great Eastern Hotel (Pte) Ltd* [1988] 2 SLR(R) 276 ("*Great Eastern*") was the first local case to take the view that both the balance sheet and cash flow tests are applicable under s 254(2)(*c*) of the Companies Act, even though the first iteration of what later became s 254(2)(*c*) had been enacted in Singapore more than 30 years previously, in 1955. Prior to *Great Eastern*, the cases expressed the view that only a cash flow test should be applied to s 254(2)(*c*) (*Meng Seng Wee* at p 488). In our view, with respect, the case law took a wrong turn in 1988.

65 We thus hold that the cash flow test is the sole applicable test under s 254(2)(*c*) of the Companies Act. For clarity, the cash flow test assesses whether the company's current assets exceed its current liabilities such that it is able to meet all debts as and when they fall due. We agree with Mr Lim that "current assets" and "current liabilities" refer to assets which will be realisable

and debts which will fall due within a 12-month timeframe, as this is the standard accounting definition for those terms.

66 In this respect, it may be helpful for us to clarify certain imprecise terms used in the cases. In *Great Eastern*, it was held that cash flow insolvency is established if a debtor ***demands*** payment of debt which is ***due***, but the company is unable to pay the debt out of its liquid resources which are ***immediately*** available (at [71]; see also *Living the Link* at [27]; *Tam Chee Chong* at [58]). With respect, we think that the terms emphasised in bold were imprecise, as the cash flow test does not require the debts to be already due or demanded, nor does it require the assets to be immediately available. Instead, the correct terminology, as stated in *Kon Yin Tong*, is whether the company's assets "were ***realisable within a timeframe*** that would allow each of the debts to be paid as and when it became payable" [emphasis added] (at [37(b)]), and whether the liquidity problem "can be cured in the ***reasonably near future***" [emphasis added] (at [38]). The court should also consider debts which may not have been demanded, and which may not even be due (*Kon Yin Tong* at [38]):

> It should also be noted that the court adopts a commercial rather than a technical view of insolvency. Thus, while the phrase 'is unable' might be thought to refer to the inability at the relevant time to pay debts which have then fallen due, its conjunction with the phrase 'as they fall due' **indicates a continuous succession of debts rather than a calculation of debts existing on any particular day.** The essential question is whether the company's financial position is such that it can continue in business and still pay its way. The court therefore has to consider whether any liquidity problem the company may have is purely temporary and can be cured in the reasonably near future. Further, the court may also have regard to **claims falling due in the near future** and to the likely availability of funds to meet such future claims and the company's existing debts.
>
> [emphasis in original omitted; emphasis added in bold]

67 It is necessary to have a flexible timeframe in mind when assessing the current assets and liabilities of a company because a consideration of only present debts and assets could potentially lead to absurd outcomes. For example, a company may have a debt of $10,000 today, but may be due to receive an incoming payment of $1m tomorrow. It would be unfair and illogical to wind up the company on the basis that it could not pay its debts today when it would be more than able to do so tomorrow. Conversely, a company may have $10,000 in hand and no debts due today, but if the company would be due to pay a prospective debt of $10m tomorrow, one can hardly say that it is cash flow solvent. These two contrasting examples show that the timeframe should not be set too rigidly, but should be sufficiently flexible to take into account debt and income which would be due in the reasonably near future to avoid absurd and illogical outcomes.

68 Further, it is not realistic to expect a company to liquidate its assets immediately (*ie*, instantaneously). Companies need time to realise even the most liquid assets. For example, administrative procedures must be complied with in order to withdraw cash from the bank, and time is also needed to sell public shares on the stock market. A flexible timeframe would better account for these practical difficulties. At the same time, the court should also factor in the amount of time that has passed since the commencement of the winding up application to see if the company has already been given enough time to realise its liquid assets. In addition, a flexible timeframe allows the court to consider prospective or contingent liabilities which will fall due in the near future and is thus consistent with the plain wording of s 254(2)(*c*) of the Companies Act which stipulates that the court *shall* consider contingent and prospective liabilities.

69 Finally, we set out a non-exhaustive list of factors which should be considered under the cash flow test, many of which were also stated in *Kon Yin Tong* at [37] to [38]. The court should consider:

(a) the quantum of all debts which are due or will be due in the reasonably near future;

(b) whether payment is being demanded or is likely to be demanded for those debts;

(c) whether the company has failed to pay any of its debts, the quantum of such debt, and for how long the company has failed to pay it;

(d) the length of time which has passed since the commencement of the winding up proceedings;

(e) the value of the company's current assets and assets which will be realisable in the reasonably near future;

(f) the state of the company's business, in order to determine its expected net cash flow from the business by deducting from projected future sales the cash expenses which would be necessary to generate those sales;

(g) any other income or payment which the company may receive in the reasonably near future; and

(h) arrangements between the company and prospective lenders, such as its bankers and shareholders, in order to determine whether any shortfall in liquid and realisable assets and cash flow could be made up by borrowings which would be repayable at a time later than the debts.

Application to the facts

70 We now turn to apply the cash flow test to the facts of the present appeal. The Judge held that the appellant was insolvent for the following reasons (*GD* at [38] to [49]):

(a) Mr Peloso had admitted in an affidavit filed for the appellant's JM application ("the JM affidavit") that the appellant was cash flow insolvent as of 31 July 2019. This was supported by the appellant's unaudited management accounts as at 31 July 2019. While this had been the appellant's financial position in *October 2019* (at the time of the hearing of the JM application), this state of insolvency was likely to have continued until the time of the CWU 393 hearing (in *September 2020*). In particular, this was shown by the fact that the appellant had failed to settle the costs demanded in full within the 21-day period of the statutory demand. Further, even the lower amount of the Outstanding Costs ($8,568.88) remained unpaid for almost nine months between 13 December 2019 and the hearing date on 7 September 2020.

(b) The appellant's balance sheets for 31 July 2019 and 30 September 2019 showed a discouraging state of affairs in relation to balance sheet solvency. This was likely to have continued until the hearing of CWU 393. Mr Peloso had testified that the appellant's operations had been loss-making for seven months prior to 31 July 2019. Further, according to the cash flow forecast produced by the appellant's independent financial advisor (Mr Jotangia Paresh Tribhovan

("Mr Tribhovan")), the appellant would continue to be balance sheet insolvent until at least 12 April 2020. This position was unlikely to have changed significantly from then up to the hearing of CWU 393, given the economic impact of the COVID-19 pandemic.

71 On appeal, the appellant disagreed with the findings of the Judge, arguing that the June 2020 Balance Sheet showed that the appellant was cash flow solvent.

72 The respondent mainly rehashed the Judge's reasons, but also raised the additional point that the appellant had failed to adduce any management accounts to show its cash flow in 2020. The respondent therefore contended that an adverse inference should be drawn against the appellant. The respondent also argued that the June 2020 Balance Sheet did not show cash flow solvency since it only provided a snapshot of the appellant's assets and liabilities. In addition, the respondent pointed out various other flaws with the June 2020 Balance Sheet and Mr Ho's affidavit.

73 We agreed with the Judge that the appellant was cash flow insolvent. The appellant's balance sheet as at 30 September 2019 showed that its current liabilities ($1,702,982) exceeded its current assets ($377,342) by about $1.33m. It also showed that its total liabilities, whether excluding contingent liabilities ($2,021,530) or including contingent liabilities ($10,263,369), exceeded its total assets ($377,342) by at least $1.64m. Further, Mr Peloso testified in the JM affidavit that as at 31 July 2019, the appellant's total cash and current assets amounted to $287,295.29 whereas its total current liabilities amounted to $1,845,662.12.

74 These deficiencies were likely to have continued up till the date of the winding up hearing on 7 September 2020 for the following reasons. First, the projected profit from September 2019 to April 2020 was sorely insufficient to cover the deficiency. Mr Tribhovan had provided a cash flow forecast projecting that the funds in the appellant's bank account would reach $216,708 in the week of 12 April 2020. This would have been an increase of about $188,686 from the amount in the bank account as at 30 September 2019 ($28,022). Mr Peloso provided a more optimistic forecast which projected that the funds would reach $449,064 in the week of 12 April 2020. We preferred Mr Tribhovan's cash flow forecast to Mr Peloso's cash flow forecast as Mr Tribhovan was an independent financial advisor and was likely to be more objective than Mr Peloso. Mr Tribhovan had also pointed out various problems with Mr Peloso's forecast which explained his own more conservative estimate. In any case, regardless of whose forecast we accepted, the projected increase was still sorely insufficient to meet the deficiency of over $1m. It was unlikely that this position had changed drastically between April 2020 and the time of the winding up hearing in September 2020. In any event, no evidence of any such change had been adduced.

75 Secondly, the appellant had been loss-making for seven months leading up to 31 July 2019 and no credible evidence was provided to show that this position had changed drastically thereafter in the period leading up to 30 September 2019 or thereafter. The fact that the appellant had been loss-making for those seven months was conceded by Mr Peloso in his JM affidavit. It is also shown by a profit and loss statement for those seven months which showed a net loss of $352,672.00. In addition, as stated earlier, the Outstanding Costs had not been paid by the date of the winding up hearing in September 2020 (*GD* at [40]). They had not been settled even by the date of the appeal

hearing. While the appellant tried to rely on the June 2020 Balance Sheet ([20] above) to argue that its financial position had changed, we agreed with the Judge that the June 2020 Balance Sheet should not be relied upon. The Judge did not rely on the June 2020 Balance Sheet as its provenance was unclear and there was no explanation of what information had been relied on in its preparation. He found this to be of concern in light of several inaccuracies in the balance sheet (*GD* at [51] and [53]). He was also concerned by the lack of explanation for the appellant's alleged sudden recovery from insolvency. While Mr Lim had tried to explain this from the bar, his explanation was hearsay and was unsupported by affidavit evidence from a person with direct knowledge of the matter. The Judge thus rejected it (*GD* at [54] to [56]).

76 There was no basis on which to upset the Judge's findings. The June 2020 Balance Sheet was a single-page exhibit attached to Mr Peloso's seven-paragraph affidavit. The affidavit contained absolutely no supporting documents or reasons to explain the significant improvement in the appellant's purported financial position.

77 During the hearing, the appellant tried to rely on an affidavit by Mr Ho which the appellant claimed supported the figures in the June 2020 Balance Sheet. However, this reference was impermissible because this court in a paper hearing had already rejected the appellant's application to adduce Mr Ho's affidavit in CA/SUM 134/2020 on the basis that the affidavit was not credible. This was because Mr Ho's affidavit contained bare assertions and simply described the differences between the June 2020 Balance Sheet and the September 2019 Balance Sheet. It contained no supporting documents and did not explain or prove those differences. Accordingly, the affidavit provided no

assistance in relation to the problems that the Judge had been concerned about. Nor could it offer any assistance to this court.

78 The appellant also argued that it was a viable company which earned a revenue of about $1m in 2019, and adduced evidence to support the assertion that its gross profit was expected to increase by at least $400,000 per year. This increase was expected because SEPL had obtained a license from Jurong Town Corporation ("JTC") to install solar panels on the roofs of various JTC properties to generate solar power; these solar panels would be owned by Sun Electric Energy Assets Pte Ltd ("SEEAPL") , and the appellant had an exclusive agreement with SEEAPL to "take up" 100% of the electricity generated, to on-sell to retail customers.

79 In our view, these submissions were misleading. As the respondent rightly pointed out, the appellant's profit and loss statement for FY 2019 showed that it had a net loss of about $450,000. The revenue of about $1m was insufficient to cover the costs of sales and the total operating expenses which far exceeded it. Even assuming that the appellant's *gross* profit increased by about $400,000, there would still be a *net* loss.

80 Further, the appellant's projected increase in gross profit was not fully credible. The agreement between SEEAPL and the appellant was not adduced in full to allow us to verify the accuracy of this assertion. It was also unclear from Mr Peloso's affidavit how the figure of $400,000 was derived. The affidavit stated:

> … **the expected additional gross profit per year** from the sale of the electricity generated is S$403,102 (S$197,748 divided by 2.6 million MW as shown in [Tab 6], multiplied by 5.3 million MW as shown in [Tab 6]) …

[emphasis in original]

81 The figures of 2.6m MW and 5.3m MW were, however, not found anywhere in Tab 6 of Mr Peloso's affidavit. In addition, while there was *prima facie* evidence that the appellant may have obtained increased electricity *supply* from the solar panels, this did not necessarily translate to increased *sales* or increased *profit*.

82 Finally, the appellant argued that the only creditor that had brought the winding up application was the respondent, and even so only for a meagre confirmed debt of around $9,000 which it could pay immediately. It argued that this showed that it was not cash flow insolvent. The bank records adduced by the appellant also suggested that it was capable of paying this sum immediately (at least as at November 2020).

83 As we stated above, however, the fact remained that the Outstanding Costs had not been paid up to the hearing of the appeal. While we did not know of any other creditor who had brought proceedings, the court had evidence that the appellant's current liabilities exceeded its current assets, and this was sufficient to make the finding of insolvency. It was incumbent on the appellant to refute this, for example, by adducing evidence of deferred payment plans to prove that the current liabilities had been deferred for later payment or had been compounded. The appellant failed to do so. Further, the appellant only had itself to blame for not paying the Outstanding Costs even though it had more than sufficient time to do so. While the appellant insisted that there was sufficient money in its account to pay the Outstanding Costs, its actions in paying only enough to reduce the balance of the debt below $10,000 and its failure thereafter to pay a single cent more, spoke more eloquently as to the state of its finances.

Hence, we affirmed the Judge's decision that s 254(2)(*c*) of the Companies Act had been satisfied.

Discretion to wind up the company

84 We were also of the view that the Judge did not err in exercising his discretion to wind up the appellant. Section 254(1)(*e*) of the Companies Act makes it clear that the court has such a discretion and is not mandated to order a winding up even if the company is unable to pay its debts. However, where a company is unable or deemed to be unable to pay its debts, the creditor is *prima facie* entitled to a winding up order *ex debito justitiae* (*BNP Paribas v Jurong Shipyard Pte Ltd* [2009] 2 SLR(R) 949 ("*BNP*") at [15]).

85 That said, there are exceptions to this general rule and in exercising its discretion, the court should consider factors such as the viability of the company, and the economic and social interests of the company's employees, suppliers, shareholders, non-petitioning creditors, customers and other companies in the group enterprise (*BNP* at [16] to [20]). There were no strong countervailing factors in the present case. For instance, there were no creditors who filed applications to oppose a winding up. The respondent also pointed out that EMAS had been a non-party to CWU 393 but did not step in to intervene, which suggested that the winding up of the appellant did not have adverse consequences on the broader energy retail market.

86 Mr Peloso asserted that if the appellant was wound up, the appellant's retail electricity license would be revoked and this might cause JTC's agreement with SEPL to be terminated. This assertion was not proven. We could not find any clause in the contract between JTC and SEPL which required the appellant to be the retailer of the electricity generated from the solar panels. In any event,

if there was a possibility of such a dire eventuality occurring, SEPL would surely have forestalled it by paying off the Outstanding Costs before the hearing up of CWU 393.

87 Finally, while Mr Peloso also raised other alleged consequences such as loss of future profits, termination of contracts and revocation of licenses, and penalties for non-performance, these were the natural and ordinary consequences of any winding up, and did not provide sufficient basis on which to reverse the winding up order. It is well established that an appeal against the exercise of a judge's discretion will not be entertained unless it is shown that he exercised his discretion under a mistake of law, in disregard of principle, under a misapprehension as to the facts, or that he took account of irrelevant matters, or the decision reached was outside the generous ambit within which a reasonable disagreement is possible (*Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 1 SLR(R) 1053 at [34]).

88 In the circumstances, we agreed with the Judge that the appellant should be wound up, and we therefore dismissed the appeal.

Section 254(2)(a) of the Companies Act

89 In light of the above findings, it was not strictly necessary for us to decide whether the alternative ground under s 254(2)(*a*) of the Companies Act was made out. However, since parties had made arguments on this point and as this raised a novel question of law, we set out our observations for completeness.

90 Section 254(2)(*a*) of the Companies Act deems a company 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;

91 The provision establishes that where a creditor has served on the company a statutory demand for a debt exceeding $10,000, the company will be deemed as unable to pay its debts if it ***neglects to***: (a) pay the sum; (b) secure the sum; **<u>or</u>** (c) compound the sum, within the period of three weeks from the service of the demand. The period of three weeks is an important component of the provision and we will hereafter refer to it as "the prescribed period". It is only when the prescribed period has passed without the debtor company satisfying any of the three limbs, that the creditor can use the service of the statutory demand as a ground for filing a winding-up application against the company.

92 We begin by highlighting two issues with the drafting of this provision. First, it seems to us that the word "or" appearing before "compound for it …" may lead to some confusion. Its use may seem to indicate that the three limbs it qualifies are disjunctive such that the company will be deemed to be unable to pay its debts if it merely neglects to satisfy one of the three limbs. It is, however, plain to us that the intention was that the limbs be considered conjunctively so that the company will *not* be deemed to be unable to pay its debts as long as it has been able to satisfy one of the limbs. It is clear that this must be what is meant, as a disjunctive reading leads to an absurd result.

93 Second, there are conflicting views as to whether the qualifier ("to the reasonable satisfaction of the creditor") applies to all three limbs or only the

second and third limbs. It must apply to the third limb as the third limb immediately precedes the qualifier. It must also apply to the second limb as the second limb ends with the phrase "secure or", and the noun which the second limb is acting upon ("it") only appears after the word "compound", which shows that the second and third limbs must be read together as part of the same clause. It is, however, unclear if the qualifier acts on the first limb. While the first limb could read as a standalone clause without the qualifier, the sentence would also be grammatically correct if the qualifier is read as applying to the first limb. This court in *Bombay Talkies (S) Pte Ltd v United Overseas Bank Limited* [2015] SGCA 66 at [6] expressed the view that the qualifier did not act on the first limb. In contrast, the Judge took the view that the qualifier does act on the first limb, as can be seen from his finding that: "[the appellant] only paid $3,000 at the end of the three weeks … [a]lthough the debt … fell to $8,612.40 … it was not to the reasonable satisfaction of [the respondent]" (*GD* at [33]). Likewise, the respondent is of the view that the qualifier applies to the first limb.

94 We reiterate the view expressed in *Bombay Talkies* that the qualifier does not apply to the first limb, as this is the more natural reading of the provision. The noun ("the sum") separates the first limb from the second and third limbs, whereas the second and third limbs are not separated by any noun, and instead, both act on the same noun ("it"). This being the case, the qualifier which only comes *after* the noun ("it") should likewise be read as only applying to the second and third limbs. If legislature had intended the qualifier to also apply to the first limb, they would have drafted the provision such that all three verbs acted on the same noun, such as: "neglect to pay, secure or compound the sum to the reasonable satisfaction of the creditor". Further, as we explain below, the test for the first limb is *not* whether the debtor pays an amount to the

reasonable satisfaction of the creditor, but whether the debtor pays an amount such that the debt falls below the stipulated threshold figure of $10,000.

95 In the present case, the appellant had neither secured nor compounded the sum. While the appellant had proposed an instalment payment plan, this was rejected by the respondent and did not discharge the debt (see definition of "compound" set out in *Bombay Talkies* at [8]). However, the appellant had paid the debt in part such that the Outstanding Costs fell below $10,000. This raised the question of whether a company which pays the statutory demand in part such that the remaining sum falls below the stated limit can be considered to have "neglected to pay the sum". This question can be further divided into two situations: first, where the partial payment was made *within* the prescribed period; and second, where the partial payment was only made *after* that period.

96 It is necessary to refer to legislative material to ascertain the proper meaning of s 254(2)(*a*) of the Companies Act (see *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [54]). The statute is ambiguous as to whether a company which pays the sum in part such that the remaining sum falls below the stated limit can be said to have "neglected" to pay the sum, as it had in fact partially paid the sum. This requirement may have been intentionally phrased in the negative such that it does not positively require the appellant to "pay the sum *in full*". In addition, interpreting the provision to mean that the company will be deemed to be unable to pay its debts unless the *entire* sum is paid up, could potentially lead to manifestly absurd results. The first absurdity is this. If a creditor serves a statutory demand on a company for $9,999, the company will not be deemed to be unable to pay its debts even if the company neglects to pay a single cent. In contrast, if a creditor serves a statutory demand for $10,000 and the company pays $9,999.99, the company would still be deemed to be unable

to pay its debts even though it only owes one cent. This is illogical and cannot be what was intended. There is a second absurdity. Imagine Company A owes $9,999 and has no current assets, while Company B owes $10,000 and has current assets of $1. No statutory demand can be issued against Company A. On the other hand, a statutory demand can be issued against Company B, and thereafter, it will only be able to pay $1 and reduce its debt to $9,999. The position of Company A thus becomes exactly the same as Company B, and it seems inconsistent that Company B would be deemed to be unable to pay its debts under s 254(2)(*a*) whereas Company A would not. It does not seem likely that such an incoherent result was Parliament's intention.

97 We therefore turn to look at the legislative materials. The legislative history of the provision supports the view that the company will not be deemed to be unable to pay its debts as long as the remaining debt falls below $10,000 during the prescribed period. Over the years Parliament has increased the threshold figure stipulated in s 254(2)(*a*) of the Companies Act. This provision was originally enacted in Singapore as s 167(1) of the Companies Ordinance (Cap 174, 1955 Rev Ed) where the stipulated minimum quantum was $500. The quantum was increased to $2,000 in 1987 (see s 71(*g*) of the Companies (Amendment) Act 1987 (Act 13 of 1987)) and to $10,000 in 1999 (see s 11(*b*) of the Bankruptcy (Amendment) Act 1999 (Act 37 of 1999)). The minimum quantum has since been further increased to $15,000 by s 125(2)(*a*) of the IRDA.

98 The only logical inference which can be drawn from these successive and continual increments is that Parliament did not want companies to be deemed to be unable to pay their debts if the outstanding debt was too low in the light of current economic conditions and inflationary trends.

99 This view is also supported by various ministerial statements. In the Second Reading of the Bankruptcy (Amendment) Bill (Bill No 26/1999), the Minister of State for Law (Associate Professor Ho Peng Kee) ("Prof Ho") who was moving the bill to increase the minimum stipulated quantum in s 254(2)(*a*) of the Companies Act described the quantum of $10,000 as a "debt limit" and equated it to the debt limit for bankruptcy proceedings ((*Singapore Parliamentary Debates, Official Report* (18 August 1999) vol 70 ("*Second Reading*").

100 Prof Ho's reference to the "debt limit" in bankruptcy proceedings was a reference to s 61(1)(*a*) of the Bankruptcy Act (Cap 20, 1996 Rev Ed) which previously provided that:

> **Grounds of bankruptcy petition**
>
> **61.**—(1) No bankruptcy petition shall be presented to the court in respect of any debt or debts unless at the time the petition is presented —
>
> > (*a*) the amount of the debt, or the aggregate amount of the debts, is not less than $2,000;
> >
> > …

101 The sum of $2,000 was increased to $10,000 in July 1999 via s 2 of the Bankruptcy (Variation of Minimum Amount of Debt for Petition for Bankruptcy) Order 1999 (S 301/1999), as mentioned by Prof Ho. His description of the stipulated quantum in s 254(2)(*a*) of the Companies Act as a "debt limit" is significant because the effect of the debt limit in bankruptcy proceedings is to prevent a bankruptcy petition from being brought against an individual unless the amount of the debt exceeds the debt limit. Hence, when Prof Ho refers to the minimum quantum in s 254(2)(*a*) as a "debt limit", it can be inferred that he intended that a company should not be deemed to be unable

to pay its debts unless the debt exceeded the minimum quantum at the time the application was brought. In the present context, the equivalent time would be, at the least, the expiry of the prescribed period.

102 Finally, Prof Ho also stated that the increment of the debt limit in s 254(2)(*a*) of the Companies Act was to "strike a proper balance between the interests of debtors and creditors" (*Second Reading* at col 2187). This shows that the higher debt limit was intended to offer greater protection to the debtor company while also balancing the interests of creditors. It can be inferred from this that the debt limit of $10,000 was intended to be a form of safe harbour, so that as long as a company's debt did not exceed $10,000, it should not be deemed to be unable to pay its debts. Consistent with this intention, Parliament must also have intended that if a company pays up a debt in part upon service of the statutory demand such that it falls below $10,000, it should not be deemed to be unable to pay its debts.

103 Accordingly, in our opinion, a company that pays the debt demanded in a statutory demand in part *within the prescribed period* such that the remaining amount payable falls below $10,000 should not be deemed to be unable to pay its debts pursuant to s 254(2)(*a*) of the Companies Act .

104 This brings us to the second question, namely, whether a company will still be deemed to be unable to pay its debts if it pays part of the debt *after* the expiry of the prescribed period, such that the remaining sum falls below $10,000. Unfortunately, neither party submitted on this issue, nor did the Judge deal with it. The Judge appears to have thought, mistakenly, that the $3,000 had been paid "at the end of the three weeks" (*GD* at [33]). It is clear from counting the dates that the $3,000 was in fact only paid *after* the end of the three weeks,

on the 22nd day from the date of service of the statutory demand (13 December 2019 is 22 days from 21 November 2019). Given that this second question was not argued before us, we do not propose to discuss it in detail. We observe, however, that once the prescribed period has passed without satisfaction of any of the three limbs by the debtor company, the creditor would have acquired the right to apply for the winding-up of the company on the basis that it is unable to pay its debts due to the deeming effect of s 254(2)(*a*) of the Companies Act. If the right is then exercised by the creditor and at that point the debtor company makes a part payment to bring the debt below the threshold amount, some might consider that such action should be disregarded as an insufficient rebuttal to the deeming effect of s 254(2)(*a*). Afterall, the threshold quantum is relatively low so a payment that simply brings the debt below $10,000 (or $15,000 now) would immediately prompt the question why the debt had not been settled in full.

105 There are conflicting case authorities on the issue of the effect of the deeming provision after the prescribed period. The cases fall into three categories. The first category of cases holds that the effect of the deeming provision is only to deem the company to be unable to pay its debts *at the point of the expiry of the prescribed period, and not at the time of the winding up hearing*. The court must draw an inference from the fact that the company was unable to pay its debts at the point of the expiry of the prescribed period that the company is also unable to pay its debts at the point of the winding up hearing. This inference can be rebutted if the company makes full payment between the date of the expiry of the prescribed period and the date of the winding up hearing. This inference will also be weakened as the period between the date of the expiry of the prescribed period and the date of the winding up hearing lengthens: see *Deputy Commissioner of Taxation v CYE International Pty Ltd*

(No 2) (1985) 10 ACLR 305; and *Re G Stonehenge Constructions Pty Ltd and the Companies Act* (1978) 3 ACLR 941.

106 The second category of cases holds that the effect of the deeming provision is to deem the company to be unable to pay its debts at the point of the expiry of the prescribed period, but this would continue until the winding up hearing unless payment is made: *Club Marconi of Boosley Park Social Recreation Sporting Centre Ltd v Rennat Construction Pty Ltd* (1980) 4 ACLR 883.

107 The third category of cases holds that the effect of the deeming provision is to deem the company to be unable to pay its debts at the time of the winding up hearing, regardless of whether the debt had been paid off subsequent to the expiry of the prescribed period: *DCT v Guy Holdings Pty Ltd* (1994) 14 ACSR 580.

108 We note that if the position in the third category is adopted even full payment would not stave off winding up, much less partial payment. The other two categories give effect to full payment and it would seem therefore that partial payment would be insufficient. We reserve our decision on this issue to another case where it is fully argued before us. We therefore come to no conclusion on whether the appellant could have been wound up pursuant to s 254(2)(*a*) of the Companies Act.

Ulterior motive

109 Finally, we considered that the appellant had not proved its assertion that the respondent had brought CWU 393 with an ulterior motive. The appellant's

submission on this point was only a few lines long and was nothing more than a bare assertion.

Conclusion

110 We dismissed the appeal on the basis that the appellant was cash flow insolvent, and that the Judge did not err in winding it up pursuant to s 254(1)(*e*) read with s 254(2)(*c*) of the Companies Act. At the conclusion of the appeal, we heard parties' submissions on whether we should order the director of the appellant to be personally liable for party and party costs in favour of the respondent. We were persuaded that we should do so, for the reasons stated at [46] to [49] above. Mr Lim informed us that he had been instructed by Mr Peloso alone on the conduct of the appeal. Therefore, we ordered Mr Peloso to pay $50,000 to the respondent, (inclusive of disbursements) as the costs of the appeal. To be fair to Mr Peloso, we granted him liberty to apply, seeing as he had not had a chance to be heard on this matter.

Sundaresh Menon
Chief Justice

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Lim Chee San (TanLim Partnership) for the appellant;
Lee Wei Han Shaun and Low Zhe Ning
(Bird & Bird ATMD LLP) for the respondent.