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

**[2023] SGHC 159**

Companies Winding Up No 121 of 2022

In the matter of Sections 124 and 125 of the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018)

And

In the matter of Singapore JHC Co Pte Ltd

Between

Founder Group (Hong Kong) Limited (in liquidation)

… *Claimant*

And

Singapore JHC Co Pte Ltd

… *Defendant*

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# GROUNDS OF DECISION

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[Insolvency Law — Winding up — Disputed debt]
[Insolvency Law — Winding up — Standing]
[Insolvency Law — Winding up — Unable to pay debts]
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[Arbitration — Agreement]

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# v
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**[2023] SGHC 159**

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Vinodh Coomaraswamy J
29 September 2022

29 May 2023

**Vinodh Coomaraswamy J:**

## Introduction

1 The claimant claims to be a creditor of the defendant. In that capacity, it presents this winding up application under the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("the Act") against the defendant on two grounds: (a) that the defendant is unable to pay its debts within the meaning of s 125(1)(*e*) of the Act; alternatively, (b) that it is just and equitable to wind the defendant up within the meaning of s 125(1)(*i*) of the Act.

2 The defendant submits that the winding up application ought to be dismissed[1] because: (a) the defendant disputes the claimant's claim to be a

[1] Claimant's Written Submissions dated 22 September 2022 ("CWS") at paras 63–64.

creditor of the defendant;[2] (b) the contracts on which the claimant relies for that claim contain arbitration agreements which, *prima facie*, are valid[3] and encompass the parties' dispute;[4] (c) the defendant is not abusing the court's process by disputing the claimant's claim;[5] and (d) that is so even though the defendant is, by disputing that claim, withdrawing the admission that it made in an audit confirmation issued to the claimant in 2019.[6]

3 I have accepted the defendant's submissions and dismissed the winding up application with costs. The claimant has appealed against my decision. I now set out the grounds for my decision.

4 All sums of money in these grounds have been expressed in millions of dollars and, where material, have been rounded off to two decimal places. All sums of money expressed in any currency other than United States dollars have been expressed in United States dollars using the equivalent figures supplied by the parties.

## The parties

5 The claimant is a company incorporated in the Hong Kong Special Administrative Region ("Hong Kong") of the People's Republic of China ("the

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2 CWS at paras 3(a) and 13(a)–(c).

3 CWS at paras 24–31.

4 CWS at paras 32–33.

5 CWS at paras 46–59.

6 CWS at paras 50–56.

PRC"). In July 2021, the claimant was placed in liquidation by a winding up order made by the Court of First Instance in Hong Kong.[7]

6 The defendant is a company incorporated in Singapore. At the material time, it was a wholesale trader in, among other things, metals and metal products.[8]

7 This application is in form a straightforward winding up application by a claimant against a defendant. But it is in substance a contest between two groups of economic and other interests that have a connection to a company known as Peking University Founder Group Company Limited ("PUFG") (see *Nuoxi Capital Limited (in liquidation in the British Virgin Islands) v Peking University Founder Group Company Limited* [2022] 2 HKC 1 and *Nuoxi Capital Limited (in liquidation in the British Virgin Islands) v Peking University Founder Group Company Limited* [2022] HKCA 1514).

8 PUFG is a company incorporated in the PRC. It is, broadly speaking, the commercial arm of Peking University.[9] PUFG is the ultimate holding company of a group of companies ("the PUFG Group"). At the material time, both the claimant and the defendant were members of the PUFG Group.[10] At that time, PUFG owned and controlled all of the shares in the claimant.[11] It also then owned and controlled 94% of the shares in the defendant through three

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7 Affidavit of Edward Simon Middleton dated 27 May 2022 ("ESM's Affidavit") at para 4.

8 ESM's Affidavit at para 7.

9 Affidavit of Li Ying dated 30 June 2022 ("LY's Affidavit") at p 68.

10 LY's Affidavit at para 6.

11 LY's Affidavit at para 7(a).

intermediate holding companies.[12] As such, PUFG ultimately owned and controlled both companies at the material time.[13]

9 PUFG is no longer the defendant's ultimate holding company. It therefore no longer owns or controls the defendant. PUFG ceased to own and control the defendant because of a reorganisation of PUFG's business arising from its actual or apprehended insolvency. In February 2020, a creditor of PUFG commenced reorganisation proceedings against it in the First Intermediate People's Court in Beijing in the PRC.[14] In May 2021, PUFG's creditors approved a plan to reorganise PUFG's business.[15] In June 2021, the PRC court sanctioned PUFG's reorganisation plan.[16] The reorganisation plan provided for a consortium of strategic investors to acquire several companies in the PUFG Group. One of those companies was the defendant's holding company. As a result of this acquisition, the defendant is today owned and controlled by the consortium, not PUFG.[17]

10 PUFG continues to be the claimant's ultimate holding company. But PUFG has ceased to control the claimant since July 2021 by reason of the winding up order (see [5] above). It is the claimant's liquidators who now control the claimant, in accordance with the insolvency law of Hong Kong. The claimant's winding up was initiated on behalf of PUFG's offshore

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12 LY's Affidavit at para 7(b); p 32.

13 LY's Affidavit at para 8.

14 LY's Affidavit at paras 11–12; p 66.

15 LY's Affidavit at para 12(e).

16 LY's Affidavit at para 12(f); p 76.

17 LY's Affidavit at para 13.

bondholders.[18] Those bondholders are aggrieved by PUFG's reorganisation because the reorganisation plan makes no provision for them.

11 This application is therefore not a straightforward winding up application by a claimant against a defendant. It is in substance a contest between (on the claimant's side) the economic and other interests of PUFG's offshore bondholders and (on the defendant's side) the economic and other interests of the consortium of strategic investors.

**The claimant's claim against the defendant**

12 For reasons I explain at [45]–[49] below, the claimant's liquidators believe that the defendant is indebted to the claimant in the sum of US$47.43m.[19] In December 2021, the liquidators issued a letter of demand to the defendant demanding that the defendant pay US$47.43m to the claimant within 14 days.[20] The defendant failed to comply with the demand.[21]

13 In February 2022, the liquidators issued a second letter of demand to the defendant. This letter demanded that the defendant pay US$47.43m to the claimant within 21 days, failing which the defendant would be presumed under s 125(2)(*a*) of the Act to be unable to pay its debts within the meaning of s 125(1)(*e*) of the Act.[22] The defendant failed to comply with this demand as well.[23]

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18 LY's Affidavit at paras 14–17.

19 ESM's Affidavit at paras 5(b) and 12; CWS at para 12; LY's Affidavit at pp 88–99.

20 ESM's Affidavit at paras 14(b), 15 and Tab 7.

21 ESM's Affidavit at para 16.

22 ESM's Affidavit at paras 17(b), 18 and Tab 8.

23 ESM's Affidavit at para 19.

14 In May 2022, the liquidators caused the claimant to present this application to wind up the defendant.

**The issues**

15 In order to secure a winding up order against the defendant, the claimant must establish the following:

(a) that it is a "creditor" of the defendant within the meaning of s 124(1)(*c*) of the Act; and

(b) either that:

(i) the defendant is unable to pay its debts within the meaning of s 125(1)(*e*) of the Act; or

(ii) it is just and equitable to wind up the defendant within the meaning of s 125(1)(*i*) of the Act.

16 I take these issues in turn.

**Creditor**

17 In this section of these grounds, I use the following words in the following senses. I use "creditor" to mean a creditor of the defendant within the meaning of s 124(1)(*c*) of the Act. I use "insolvent" and "insolvency" to mean the status of a company being unable to pay its debts within the meaning of s 125(1)(*e*) of the Act. I use "insolvency court" to mean a court that is hearing and determining a winding up application in the exercise of its insolvency jurisdiction. And I use "civil court" to mean a court that is hearing and determining a civil dispute, *ie* a *lis*, between two or more parties in the exercise of its general civil jurisdiction.

***The alternatives open to a claimant and a defendant***

18 A claimant can establish that it is a creditor of a defendant by two methods: (a) by securing and relying before the insolvency court on a binding adjudication that the defendant owes a debt to the claimant; or (b) by satisfying the insolvency court that the defendant owes a debt to the claimant. The second method is available to a claimant because there is nothing in the Act, or in the common law interpreting and applying it, that requires a claimant to secure a binding adjudication against a defendant before presenting a winding up application in which it claims to be a creditor of a defendant.

19 The claimant has presented this winding up application without securing a binding adjudication that the defendant owes a debt to the claimant. It is certainly open to a claimant to present a winding up application without an adjudication. But doing so is a high-risk strategy. If a claimant fails to establish that it is a creditor of the defendant, not only will the winding up application be dismissed with costs, it is also at risk that it will be ordered to pay those costs on the indemnity basis (*Re A Company (No. 0012209 of 1991*) [1992] 1 WLR 351 at 354, *per* Hoffman J (as he then was)).

20 Where a claimant chooses his method, a defendant may respond in one of two ways. The defendant may choose not to dispute the claimant's claim to be a creditor of the defendant. The defendant may even choose positively to admit that the claimant is a creditor of the defendant. In either event, if the court accepts that the defendant's concession is correctly made, the claimant need not go any further to establish that it is a creditor of the defendant.

21 The other way a defendant may respond is by disputing the debt on which the claimant relies. The defendant in the application before me has chosen

to respond in this way. The claimant therefore must discharge its burden of establishing that it is a creditor of the defendant.

***The court's approach***

22 Before turning to the facts of this application, it is necessary to set out the approach that an insolvency court takes to a winding up application in which: (a) seeks to establish before the insolvency court that the claimant is a creditor of the defendant without an adjudication in hand; and (b) the defendant disputes the debt on which the claimant relies.

23 There are in fact two approaches. There is a general approach which applies, as the name suggests, generally. There is also a special approach which applies only in cases where the debt that the claimant relies on arises from a contract between the claimant and the defendant which contains an arbitration agreement or where the defendant raises a cross claim arising out of such a contract.

24 I begin by outlining the general approach.

*The general approach*

25 Under the general approach, the insolvency court will consider whether the defendant disputes the debt *bona fide* and on substantial grounds. A defendant does not dispute a debt *bona fide* if, by raising the dispute, it is merely seeking to take for itself credit to which it is not entitled (*Re A Company No. 0012209 of 1991)* [1992] 1 WLR 351 ("*Re A Company No. 0012209*") at 354F). A defendant does not raise a substantial dispute if the dispute has no rational prospect of success (*Re A Company No. 0012209* at 354B).

26 In practice, what this means is that the claimant must show that there is no triable issue on the debt, applying the same test that a civil court would apply when considering whether to enter summary judgment against a defendant for the debt (*Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 at [23]; *Re A Company (No. 006685 of 1996)* [1997] BCC 830 at 837B). The insolvency court takes this approach because, if the claimant can satisfy the insolvency court that a civil court would enter summary judgment in its favour, it would be a waste of time, costs and judicial resources to dismiss the winding up application and divert the claimant to the civil court to litigate its dispute in the usual way.

27 If the insolvency court concludes that the defendant *does* dispute the debt *bona fide* and on substantial grounds, it will ordinarily decline to determine for itself the substantive legal question of whether the claimant is a creditor of the defendant. Instead, it will dismiss the winding up application and divert the parties to the civil court to litigate their dispute in the usual way.

28 The reason the insolvency court takes this approach is that it is an abuse of the court's process for a claimant to attempt to recover a debt that is disputed *bona fide* and on substantial grounds by presenting a winding up application (*Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268 ("*Metalform*") at [62], citing *Mann v Goldstein* [1968] 1 WLR 1091 ("*Mann v Goldstein*") at 1093–1094 and 1098–1099). The statutory right to invoke the insolvency court's jurisdiction has been conferred for a specific purpose (see [83] below) and the court considers it an abuse of process for a claimant to invoke it for any other purpose. The drastic legal and commercial consequences of presenting a winding up application (see [78]–[80] below) are capable of

jeopardising the commercial viability and exacerbating the financial condition of even a viable business (*Metalform* at [82]).

29 If, on the other hand, the insolvency court concludes that the defendant *does not* dispute the debt *bona fide* and on substantial grounds, the claimant will have succeeded in establishing that it is a creditor of the defendant. The court will ordinarily then go on to consider whether the claimant has established one of the grounds under s 125(1) of the Act that enlivens the insolvency court's discretion to make a winding up order and, if so, whether to exercise that discretion and make the order.

30 I say that the insolvency court will, in this situation, *ordinarily* go on to consider s 125(1) of the Act because it is equally within the court's discretion, even in this situation, to divert the parties to the civil court to litigate their dispute in the usual way. The insolvency court will do so if it concludes that it is inappropriate for the insolvency court to determine the substantive legal issue. The insolvency court may take this view either because the claimant has invoked the insolvency court's jurisdiction for a purpose other than its proper purpose or because the procedures of the insolvency court are inapt to resolve the substantive legal issue. In *Coilcolor Limited v Camtrex Limited* [2015] EWHC 3202 (Ch), Hildyard J accepted that the defendant in that case had raised disputes which, when investigated and argued more fully, could be found to lack sufficient substance to avoid summary judgment (at [43]). He nevertheless diverted the parties to the civil court to litigate their dispute in the usual way. He explained why an insolvency court diverts the parties to the civil court in this situation:

> 62. That is not of course because judges sitting in the Companies Court are in some way less able to deal with the points: there is in any event no longer any demarcation and all

> judges of the Chancery Division sit from time to time in the Companies Court. It is because the process is not apt for the adjudication of such issues, and the inference of inability to pay upon which the remedy is based is unjustified; the threat of winding up should not loom over those whose disputes are in such circumstances more appropriately resolved elsewhere, even if potentially by summary process. Put another way, in my view, a winding-up petition should not be resorted to in such circumstances by those whose objective is not in truth the class remedy which a successful winding-up petition provides but to put pressure upon a company to pay lest the provisions for the protection of the class which are triggered by the mere presentation of a petition undermine its standing and its business. ….

31 The important point to note is that diverting a claimant to the civil courts in this way is not the result of a rule of law arising from some inherent limitation in the insolvency court's power to decide for itself the substantive legal issue of whether the claimant is a creditor of the defendant. It is the result of a common law rule of practice which the insolvency courts have adopted. Lord Hoffman characterised this as a rule of practice in *Parmalat Capital Finance Ltd v Food Holdings Ltd (in liquidation)* [2008] BCC 371 ("*Parmalat*") at [9], a decision of the Privy Council on appeal from the Court of Appeal of the Cayman Islands:

> If a petitioner's debt is *bona fide* disputed on substantial grounds, the normal practice is for the court to dismiss the petition and leave the creditor first to establish his claim in an action. The main reason for this practice is the danger of abuse of the winding-up procedure. A party to a dispute should not be allowed to use the threat of a winding-up petition as a means of forcing the company to pay a *bona fide* disputed debt. This is a rule of practice rather than law and there is no doubt that the court retains a discretion to make a winding-up order even though there is a dispute: see, for example, *Brinds Ltd v Offshore Oil NL* (1986) 2 B.C.C. 98,916.
>
> [emphasis added in underlining]

32 This rule of practice rests an overriding procedural discretion that the insolvency court can exercise at any time during its consideration of the issue of whether the claimant is a creditor of the defendant. The discretion to be

exercised is whether the insolvency court will determine that issue for itself or decline to do so. Authority for this overriding procedural discretion can be found in the judgment of Gibbs J (as he then was) in *Re QBS Pty Ltd* [1967] Qd R 218 at 225. As Gibbs J said:

> It seems to me that in every case it becomes necessary for the court to exercise its discretion as to how far it will allow the question whether or not the dispute is *bona fide* to be explored. In some cases it may be very easy to decide this question on the petition and the affidavits in reply. In other cases however it may be difficult to determine whether or not the dispute is *bona fide* without determining the merits of the dispute itself. In some such cases convenience may require that the court decide the question whether or not a debt exists, but in other such cases it may appear better to allow that question to be determined in other proceedings before the petition for winding up is heard.

33 Thus, as Lord Hoffman pointed out in *Parmalat*, it is within the court's power to conclude that a defendant *does* dispute a claimant's debt *bona fide* and on substantial grounds, but to exercise its overriding procedural discretion to go on to determine that dispute in its insolvency jurisdiction rather than diverting the parties to the civil court to litigate their dispute in the usual way. This proposition is drawn from the case of *Brinds Ltd and others v Offshore Oil NL and others* (1986) 2 BCC 98916 ("*Brinds*"), the case that Lord Hoffman cited in *Parmalat*.

34 In *Brinds*, a claimant served a statutory demand on a defendant. The debt underlying the demand was subject to an agreed moratorium. When the debt was not paid within the three weeks prescribed in the demand, the claimant presented a winding up petition against the defendant. The defendant disputed, among other things, the claimant's status as a creditor of the defendant. Unusually, rather than being determined in the usual way on affidavits alone, the winding up petition was tried over four weeks. At trial, the judge received

evidence in chief from the parties' witnesses *viva voce*, with extensive cross-examination. Having heard the evidence, the judge determined that the claimant was indeed a creditor of the defendant and ordered that the defendant be wound up. The defendant appealed on the ground, among others, that the judge was wrong to determine the substantive legal question of whether the claimant was a creditor of the defendant and should instead have confined himself to deciding only whether the defendant disputed the debt *bona fide* and on substantial grounds. The intermediate appellate court in Australia dismissed the defendant's appeal. The defendant appealed to the Privy Council.

35 Lord Brightman delivered the advice of the Privy Council dismissing the defendant's appeal. He cited and applied the *dictum* of Gibbs J in *Re QBS Pty Ltd* as well as the Privy Council's own *dictum* to the same effect in *Bateman Television Ltd v Coleridge Finance Co. Ltd.* [1971] NZLR 929 at 932. He confirmed that it is well within the discretion of an insolvency court hearing a winding up application to determine for itself, not just the threshold question of whether a defendant disputes a claimant's debt *bona fide* and on substantial rounds, but also the substantive legal question of whether the claimant is a creditor of the defendant:

> It is a matter for the discretion of the judge whether a winding up order should be made on a disputed debt, and it is also a matter of discretion whether he decides the substantive question of debt or no debt.

36 It is important to note that, when an insolvency court exercises its discretion to determine for itself this substantive legal question, what it is determining is the substantive legal question of insolvency law as to whether the claimant is a creditor of the defendant within the meaning of s 124(1)(*c*) of the Act and is thereby entitled to invoke the court's insolvency jurisdiction over

the defendant. The insolvency court is not determining the substantive legal question of whether the defendant actually owes a debt to the claimant or the quantum of any such debt. Only a judgment by a civil court or a final award by an arbitral tribunal can have that effect.

37 Thus, it is entirely open to a liquidator to reject a petitioning creditor's proof of debt in whole or in part. That is so even though the insolvency court, when it made the winding up order and appointed the liquidator, must have accepted that the petitioning creditor was a creditor of the defendant, if not also a creditor of the defendant in the sum claimed. So too, if an insolvency court dismisses a winding up application because it accepts that a defendant disputes the debt *bona fide* and on substantial grounds, it is entirely possible for a civil court subsequently seised of the dispute to enter summary judgment against the defendant in favour of the claimant on the basis that none of the issues that the defendant raised is a triable issue. Equally, if a defendant has been granted unconditional leave to defend by the civil court in an ordinary action, that does not prevent the insolvency court from considering afresh for itself, if it considers it appropriate, whether the defendant disputes the debt *bona fide* and on substantial grounds (*Re Welsh Brick Industries Ltd* [1946] 2 All ER 197 at 198).

38 There is no inconsistency between any of these outcomes. The insolvency court decides the specific question of whether a claimant is a creditor of a defendant within the meaning and for the purposes of s 124(1)(*c*) of the Act. Only a civil court or an arbitral tribunal can determine that a claimant is a creditor of a defendant in a manner which binds both parties for all purposes.

*The* AnAn *approach*

39 The general approach does not apply where a claimant asserts that it is a creditor of the defendant on the basis of a debt arising from a contract containing an arbitration agreement or where the defendant raises a cross claim arising out of such a contract. In that situation, the Court of Appeal has recently formulated a different approach for an insolvency court to take (*AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 ("*AnAn*") at [56], [93]–[94] and [99]).

40 On the *AnAn* approach, the test is not whether the defendant disputes the debt or asserts a cross claim *bona fide* and on substantial grounds but whether:

(a) there is *prima facie* a valid arbitration agreement between the parties (*AnAn* at [56]);

(b) the dispute or cross claim which the defendant raises in respect of the debt *prima facie* falls within the scope of the arbitration agreement (*AnAn* at [56]); and

(c) whether, upon a consideration of factors which *do not* relate to the merits of the dispute in respect of the debt or the merits of the cross claim, the defendant is abusing the court's process by raising the dispute or cross claim (*AnAn* at [99]–[100]).

41 This *AnAn* approach is more favourable to a defendant than the general approach in four ways. First, under the *AnAn* approach, the insolvency court looks only at the validity and scope of the arbitration agreement and not at the merits of the dispute in relation to the debt or the cross claim that the defendant raises. Second, even then, the insolvency court does not attempt to reach any

conclusion on the validity and scope of the arbitration agreement. The court need only be satisfied *prima facie* that the arbitration agreement is valid and *prima facie* that it encompasses the dispute. Third, the court considers the question of whether the defendant is abusing the process of the court without considering the merits of the dispute in relation to the debt or the cross claim which the defendant raises. Finally, the rule of practice (see [31]–[35] above) in the general approach is curtailed in that the insolvency court's overriding procedural discretion will never be exercised in favour of allowing the insolvency court to decide for itself the substantive legal question of "debt or no debt" (see [35] above) for itself.

42 The Court of Appeal formulated the *AnAn* approach to achieve coherence in the law (*AnAn* at [56] and [60]). The *AnAn* approach aligns the approach that an insolvency court takes in a winding up application involving a dispute over a debt or a cross claim that is subject to an arbitration agreement with the approach that a civil court takes in litigation which involves a dispute that is subject to an arbitration agreement (*AnAn* at [61]–[65]). This approach also advances party autonomy, saves costs and achieves certainty in the law (*AnAn* at [56]). It upholds the parties' agreement to have an arbitral tribunal rather than the court decide whether, and if so to what extent, the claimant is a creditor of the defendant. Where the defendant raises a dispute in relation to the debt or advances a cross claim that is subject to an arbitration agreement, the court cannot and will not consider the merits of the issues which the defendant has raised (*AnAn* at [75]–[79] and [82]).

43 If the defendant establishes the three requirements at [40] above, the insolvency court will not make a winding up order and will either stay or dismiss the winding up application. It will dismiss the winding up application unless:

(a) there are legitimate concerns as to the solvency of the debtor company; and (b) the claimant is able to show that the debtor has raised no triable issues (*AnAn* at [111]). If the claimant can establish this, the court will stay the winding up application rather than dismissing it.

44 Having set out both the general and the *AnAn* approaches which an insolvency court will take to a winding up application based on a disputed debt, I now turn to apply that approach to the facts of this case.

***The evidence that the claimant relies on***

45 To discharge its burden of establishing that it is a creditor of the defendant, the claimant relies on four categories of evidence. The liquidators found the evidence in the first category through their review of the claimant's own documents. The evidence in the remaining three categories, in contrast, became available to the liquidators only when the defendant disclosed the evidence voluntarily either in the defendant's correspondence with the claimant following the claimant's first demand (see [12] above) or as exhibits to the defendant's affidavits opposing this winding up application.

46 The first of the four categories of evidence is an audit confirmation which the defendant issued in February 2019.[24] The audit confirmation is, in form, a letter issued by the defendant's auditors to the claimant. By the audit confirmation, the defendant's auditors informed the claimant that the defendant's books in February 2019 showed that the defendant was indebted to the claimant as at 31 December 2018 in the sum of US$47.43m. The audit confirmation then invited the claimant to sign and affix its company stamp at

[24] ESM's Affidavit at p 51.

the foot of the letter above words acknowledging that the confirmation correctly stated the balance due from the defendant to the claimant. The claimant duly signed and stamped the acknowledgment in the audit confirmation and returned it to the defendant's auditors by email in March 2019.[25]

47 The second category of evidence comprises three contracts for the sale of copper cathodes by the claimant to the defendant cif Shanghai.[26] Two of these contracts bear dates in December 2015 and one bears a date in January 2016. On their face, the contracts cover the sale and purchase of a total of 10,100mt of copper cathodes (+/- 5%) at a total price of US$47.64m. All of the contracts are governed by PRC law.

48 The third category of evidence comprises three invoices issued by the claimant to the defendant for copper cathodes under each of the contracts.[27] Each invoice is dated a few days after the contract under which it is issued. On their face, the invoices cover 10,054.93mt of copper cathodes and claim payment of a total amount of US$47.43m.

49 The final category of evidence comprises the defendant's audited financial statements for the years 2016,[28] 2017,[29] 2018,[30] 2019[31] and 2020.[32]

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25 ESM's Affidavit at para 12 and pp 49–51.

26 LY's Affidavit at pp 88–99.

27 LY's Affidavit at pp 100–102.

28 Affidavit of Chu Fai dated 14 July 2022 ("CF's Affidavit") at pp 164–189.

29 CF's Affidavit at pp 191–214.

30 CF's Affidavit at pp 216–242.

31 CF's Affidavit at pp 244–267.

32 ESM's Affidavit at pp 121–159.

These financial statements show current liabilities due to related companies ranging from a low of US$14.21m for the year ended 31 December 2020[33] to a high of US$131.42m for the year ended 31 December 2016.[34] The claimant's case is that its debt of US$47.43m is part of the sum due to related companies reflected consistently in these financial statements up to the 2020 financial statements. The defendant has not disclosed any financial statements later than its 2020 financial statements.

***The parties' cases***

50 The claimant's case is as follows.

51 The defendant has, by its audit confirmation, clearly and unequivocally admitted that it owes a debt to the claimant. It has also admitted that the quantum of that debt is US$47.43m.[35] The existence of that debt in that quantum is supported by the contracts and the invoices which the defendant itself has now voluntarily produced in this winding up application. The existence of that debt is further supported by the defendant's audited accounts for the relevant period.

52 The defendant's case in response rests on three points. First, the liquidators have not proven that the claimant ever delivered copper cathodes to the defendant.[36] Second, the claimant never delivered any copper cathodes to the defendant, both parties never intended to enforce any payment obligation arising from the contracts, and the contracts are null and void under their

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33 ESM's Affidavit at p 156.

34 CF's Affidavit at pp 171 and 198.

35 CWS at paras 12 and 45(b).

36 Defendant's Written Submissions dated 22 September 2022 ("DWS") at para 13(a).

governing law, *ie* PRC law.[37] Third, the legal effect of the audit confirmation is a matter of PRC law, and an audit confirmation does not establish a debtor's liability to a creditor under PRC law.[38]

***All of the contracts contain arbitration agreements***

53 I start by noting that all three of the contracts contain arbitration agreements. The arbitration agreements require parties to submit all disputes in connection with the contracts to the China International Economic and Trade Arbitration Commission ("CIETAC") for arbitration in Beijing:[39]

> 13. ARBITRATION
>
> The buyer and the seller agree to attempt to resolve all disputes in connection with the contract or the performance of the contract through friendly discussion. Any controversy or claim that cannot be settled amicably between the Buyer and the Seller Shall be submitted to China International Economic and Trade Arbitration Commission for arbitration which shall be conducted in Beijing in accordance with the Commission's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties.

54 Under the arbitration agreements, a condition precedent to a party's right to refer a dispute to arbitration is an attempt to resolve the dispute by "friendly discussion". I accept that that condition precedent has been satisfied. In April and May 2022, the parties undertook negotiations with a view to resolving the dispute.[40] There is, therefore, nothing to prevent either party from now lodging a notice of arbitration with CIETAC seeking to refer to arbitration the claimant's claim for US$47.43m against the defendant.

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37 DWS at para 13(b).

38 DWS at para 13(c).

39 LY's Affidavit at pp 91, 95 and 99.

40 DWS at paras 26–27; LY's Affidavit at pp 114–115.

55 As I have mentioned, the existence of an arbitration agreement between a claimant and a defendant means that the insolvency court must adopt the *AnAn* approach to determining whether a claimant is a creditor of a defendant. The defendant need satisfy only the test at [40] above. As I have mentioned, the *AnAn* approach is more favourable to a defendant than the general approach. If the defendant satisfies the test at [40] above, the winding up application ought to be dismissed unless the claimant can satisfy the requirements set out at [43] above.

*The arbitration agreements are* prima facie *valid*

56 I accept that the arbitration agreements are *prima facie* valid. The claimant submits that the defendant's own case is that the contracts are "null and void", and this necessarily means that the arbitration agreements are similarly "null and void".[41]

57 I reject the claimant's submission. The starting point in analysing this submission is the doctrine of separability (see *BCY v BCZ* [2017] 3 SLR 357 at [61]). The doctrine of separability holds that the validity of an arbitration agreement is separable from the validity of the contract containing it. The purpose of the doctrine is to prevent a party from evading an obligation to submit a dispute to arbitration by denying the existence or validity of the contract containing the arbitration agreement. Where a party alleges that a contract containing an arbitration agreement is null and void, unless and until a duly constituted arbitral tribunal has determined that the contract is in fact null and void, the arbitration agreement is *prima facie* valid and enforceable.

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[41] CWS at para 60.

58 The claimant relies on *Marty Ltd v Hualon Corp (Malaysia) Sdn Bhd (receiver and manager appointed)* [2018] 2 SLR 1207 ("*Marty*") as authority for the proposition that separability does not shield an arbitration clause from a challenge that affects the underlying contract.[42] *Marty* does not assist the claimant for two reasons. First, it is of course correct that if a contract is null and void, an arbitration agreement in that contract will in the usual case also be null and void. But the question here is whether it should be the court or a duly constituted arbitral tribunal who should decide that issue. *AnAn* is authority binding on me that, to advance party autonomy and to uphold the policy of minimal curial intervention, I should divert the parties to arbitration so that a duly constituted tribunal can decide that issue. Second, the arbitration agreement in *Marty* was invalidated because one party had committed a repudiatory breach of the arbitration agreement by commencing litigation. The counterparty accepted that repudiatory breach. The result was that both parties ceased to be bound by the arbitration agreement. *Marty* is not a case where an arbitration agreement ceased to bind the parties because the contract containing it was vitiated.

59 There is evidence before me that CIETAC accepts the foregoing analysis of the doctrine of separability and its effect on the validity of the arbitration agreements. The winding up application before me is one of two which the claimant has brought. The claimant brought the other winding up application against a company related to the defendant. Like the claimant's case against this defendant, the claimant's case against the related company rests on contracts between the claimant and the related company for the sale of copper cathodes. It is the related company's case that the counterparties to those contracts

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42 CWS at para 36.

intended that the payment obligations under the contracts should never be enforceable under PRC law.[43] Those contracts contain CIETAC arbitration agreements that are identical to the arbitration agreements in the contracts between this claimant and this defendant. The related company has lodged notices of arbitration with CIETAC referring the claimant's claims under those contracts to arbitration.[44] CIETAC has accepted the notices. As a result, the claimant withdrew its winding up application against the related company. I accept that this shows that CIETAC views the arbitration agreements between the claimant and the related company to be *prima facie* valid. I accept also that CIETAC is *prima facie* likely to take the same approach with the claimant and the defendant and is therefore *prima facie* likely to accept the defendant's notices of arbitration if the claimant and the defendant are diverted to arbitration.

*The dispute* prima facie *falls within the scope of the arbitration agreements*

60 I accept also that the defendant has established that the dispute between the parties *prima facie* falls within the scope of their arbitration agreements. The arbitration agreements are drawn in the widest of terms. They oblige both parties to submit "all disputes in connection with the contract or the performance of the contract" to arbitration, should negotiations fail.[45]

61 These words are wide enough to encompass the entirety of the defendant's case (see [52] above) and, in particular, its case that the parties entered into these contracts with no intention of enforcing the defendant's

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43 DWS at paras 29.

44 DWS at para 28–31.

45 LY's Affidavit at para 24, pp 91, 95 and 99.

payment obligation under them and that no copper cathodes were ever actually delivered to the defendant or to its order.[46]

*There is no abuse of process*

62 I do not accept that the defendant is abusing the process of the court by opposing this winding up application. First of all, the threshold for a finding of an abuse of process is high (*AnAn* at [99]). Indeed, the Court of Appeal has said that the cases in which a defendant is abusing the process of the court "will be few and far between" (*Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 ("*Vinmar Overseas*") at [131]).

63 The example given in *Vinmar Overseas* of an abusive defendant is one who has clearly admitted the claimant's claim as to both liability and quantum but who advances a dispute to the debt for no reason other than its inability to pay. The claimant submits that the defendant is abusing the process of the court by withdrawing its unqualified admission in the audit confirmation.[47] I do not accept this submission. The submission assumes that a person who makes an unqualified admission in an audit confirmation remains permanently bound by it for all purposes. That is not correct, at least in the absence of consideration.

64 It is true that an audit confirmation generally amounts to strong *prima facie* evidence of a debt. That is because an audit confirmation is, as a matter of the law of evidence, an out of court admission of a debt (*Capital Realty Pte Ltd v Chip Thye Enterprises (Pte) Ltd* [2000] 3 SLR(R) 419 at [22]–[24]). But the

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46 DWS at para 13.

47 CWS at paras 43, 46–50 and 54.

defendant's decision to withdraw its admission in this audit confirmation does not make its opposition to this winding up application an abuse of process.

65 An audit confirmation is only *prima facie* evidence of a debt, not conclusive evidence of a debt. A party who gives an audit confirmation is not precluded by any principle of procedural or substantive law from showing that the confirmation, like any other admission, was made in error. That is why a liquidator considering a proof of debt lodged by a creditor is not bound by an audit confirmation which the company may have issued to the creditor and is entitled independently to determine whether the debt exists (*Fustar Chemicals Ltd (Hong Kong) v Liquidator of Fustar Chemicals Pte Ltd* [2009] 4 SLR(R) 458 at [13]).

66 Here, the defendant seeks to withdraw its admission in the audit confirmation on the basis that it was the parties' intention that the defendant's payment obligation under the contracts should never be enforced. That is not an attractive argument for the defendant to make. But, as the defendant points out, where the parties are bound by an arbitration agreement, it is for a duly constituted arbitral tribunal, and not for the insolvency court, to determine whether the argument should be accepted or rejected.

67 The claimant relies on *Camillo Tank SS Co Ltd v Alexandria Engineering Works* (1921) 38 TLR 134 at 143. In that case, Lord Cave held that an audit confirmation is an out of court admission of a debt. But as I put to counsel for the claimant in the course of oral submissions, and as he accepted, an admission made without consideration can be withdrawn if, for example, it was made in error or fraudulently. In this case, I accept the defendant's submission that there are doubts surrounding the accuracy of the audit

confirmation.[48] In these circumstances, withdrawing the admission in the audit confirmation does not, in my view, amount to an abuse of process.

68 Further, I accept the defendant's submission that the reference to admissions in *AnAn* and *Vinmar Overseas* are references to admissions which a defendant has made in the past and which the defendant has not withdrawn at the time the winding up application is heard.[49] In its submissions on this application, the defendant does not even accept that the admissions on which the claimant relies – *ie*, the audit confirmation and the audited financial statements – actually amount to admissions.[50]

69 I also do not accept that where a debtor makes an admission and then withdraws it, that is in itself a basis for finding that the debtor's opposition to the winding up application is an abuse of process.

70 Finally, the defendant has not waived its right to refer the dispute to arbitration.[51] Even if the defendant has not referred the dispute it raises to arbitration, it is not an abuse of process for the defendant to rely on the arbitration agreement.

71 Accordingly, I find that the claimant has failed to meet the high threshold for showing that the defendant is abusing the process of the court by opposing the claimant's winding up application.

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48 DWS at para 52.

49 DWS at paras 48–49.

50 DWS at paras 56 and 59.

51 DWS at para 57.

***Dismissal or stay***

72 The next question is whether the winding up application ought to be stayed or dismissed.

*The claimant lacks standing*

73 The starting point is that no person has standing to present a winding up application unless that person is within one of the categories of persons conferred standing to do so by s 124(1) of the Act (*Mann v Goldstein* at 1094C, approved by the English Court of Appeal in *Stonegate Securities Ltd v Gregory* [1980] 3 WLR 168 at 176). If a claimant cannot establish standing, the winding up application fails *in limine* and must be dismissed.

74 I have concluded that the claimant is precluded on the *AnAn* approach from establishing before me that it is a creditor of the defendant and instead must – indeed, can only – do so through arbitration. To my mind, a claimant who is precluded by the *AnAn* approach from establishing that it is a creditor of a defendant is in the same position as a claimant who has tried and failed to establish that it is a creditor of the defendant on the ground that the defendant disputes the claimant's debt bona fide and on substantial grounds. In both situations, the claimant has failed, albeit for different reasons, to establish that it has standing to present the winding up application.

75 The claimant relies on only one ground for its standing to present this winding up application: that it is a creditor of the defendant within the meaning of s 124(1)(*c*) of the Act. Given that the claimant cannot establish standing on this ground, its application must fail *in limine* and be dismissed. If cannot even establish standing, there is no basis on which even to stay the application.

76 Dismissing the claimant's winding up application for lack of standing does not amount to elevating technicality over substance. The requirement of standing is of vital importance. Our law of insolvency allows any person who claims to be a creditor of a company to present a winding up application against the company without any need first to establish even a *prima facie* case that it is a creditor of the company (*cf* s 124(1)(*b*) read with s 124(2)(*a*) of the Act).

*The drastic legal and commercial consequences of a winding up application*

77 A person claiming to be a creditor of a company is therefore in a position to use its power to present a winding up application as a threat to secure a collateral advantage, such as payment of a debt which is disputed. This is a very powerful threat. The very act of presenting a winding up application – even if no winding up order is ever made – has drastic legal and commercial consequences for a company, its shareholders, its stakeholders and even for its other creditors. These consequences themselves can tip a solvent company into insolvency. Three examples of these drastic consequences suffice.

78 First, s 130 of the Act provides that any disposition of the property of the company, any transfer of shares in the company and any execution put in force against the company after a winding up application has been presented is void unless the court otherwise orders. This is the functional equivalent of a freezing injunction. Indeed, it is more draconian than a freezing injunction in several ways. It takes effect automatically by law as soon as a winding up application is presented. There is no need for the claimant to apply or to show that a freezing order is warranted by establishing a good arguable case against the defendant and a real risk that the defendant will dissipate its assets while the winding up application is pending. The claimant is not required to give any undertaking to compensate the company if the winding up application is

dismissed, either because it is misconceived or, worse, an abuse of the process of the court, or withdrawn. There is no exception in s 130 of the Act which permits a company to dispose of its property in the ordinary course of its business without the leave of court.

79 Second, every winding up application must be advertised. The purpose of the advertisement is to give notice to all those who do business with the company that it is subject to a winding up application. The advertisement is published in the usual course even before the company can be heard in its own defence, and without any judicial scrutiny of whether the application is even *prima facie* sustainable (see *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674 at 685 per Brett MR). The consequences of advertisement, coupled with the effect of s 130 of the Act, is that banks will withdraw or reduce lines of credit and essential and other suppliers withdrawing credit for future supplies or refusing to do business with the company altogether.

80 Third, as soon as a winding up application is presented, every repayment of the company's debts is subject to a potential challenge as an unfair preference. Even the fear of a subsequent challenge can make the company's creditors reluctant to accept repayment directly from the company.

*The requirement of standing is a safeguard against abuse*

81 The common law has therefore devised three safeguards to protect a company from the improper use of a winding up application.

82 The first safeguard is the requirement of standing. The requirement of standing establishes the necessary legal and factual connection between a particular claimant and a particular defendant which makes it appropriate even

to enliven the court's discretion under s 125(1) of the Act to make a winding up order against the defendant. It ensures that the claimant has a real interest in the winding up of the defendant and has some basis to inflict upon the company the drastic consequences that follow from simply presenting a winding up application. Standing is therefore not a technical requirement but an important safeguard against abuse.

83 The second safeguard is the procedural discretion to curb an abuse of the court's process. The purpose of the statutory right to invoke the court's insolvency jurisdiction by presenting a winding up application is to secure a class remedy on behalf of all creditors which imposes by the court's order on an insolvent company the collective statutory scheme for dealing with its debts (see [30] above). It is therefore an abuse of process to present a winding up application for any other purpose. This includes for the purpose of putting improper pressure on a defendant to pay a debt to which it has a *bona fide* and substantial defence or against which it can set up a genuine and substantial set off or other crossclaim (*Re Bayoil SA* [1999] 1 WLR 147 at 152).

84 The final safeguard is the court's jurisdiction to enjoin a person from presenting a winding up application. This jurisdiction will be exercised in relation to an application that is an abuse of process (*Mann v Goldstein*) or which is doomed to fail (*Bryanston Finance Ltd v De Vries (No. 2)* [1976] 2 WLR 41 at 52). The jurisdiction permits the court even to restrain a claimant from advertising a winding up application that has already been presented. If the court can deal with an abuse of process by dismissing a winding up application, it can equally intervene pre-emptively by injunction to stop the claimant from commencing or continuing the abuse of process.

*Discretion to say should be exercised exceptionally*

85 Once the insolvency court is satisfied that a defendant has satisfied the test at [40] above, the winding up application ought ordinarily to be dismissed. This is because a stay of a winding up application carries severe consequences for the company (*AnAn* at [103]). This is yet another safeguard at common law to prevent a company suffering the drastic legal and commercial consequences of an unwarranted presentation of a winding up application (see [78]–[80] above). The ordinary outcome is simply the natural consequence of a court finding that the claimant is not a creditor within the meaning of s 124(1)(*c*) or, at the very least, declining to make a finding as to whether the claimant is such a creditor, and diverting the parties to resolve their dispute in the usual way.

86 I therefore do not consider it harsh on the claimant that its winding up application should be dismissed instead of stayed. It is well established that, if a claimant cannot establish standing, its winding up application ought to be dismissed even if the court is satisfied, for example, that the defendant is insolvent (*Mann v Goldstein* at 1094D). It could be suggested that Lord Hoffman's dictum in *Parmalat* (see [31] above) suggests that the insolvency court has a discretion to make a winding up order even if it is satisfied that a defendant disputes a claimant's debt *bona fide* and on substantial grounds. But as my analysis of *Brinds* shows, what Lord Hoffman was referring to in *Parmalat* is a situation where an insolvency court finds that the defendant disputes a debt *bona fide* and on substantial grounds but goes on, in the exercise of its overriding procedural discretion, to determine the substantive legal issue itself rather than diverting the parties to litigation.

87 If a winding up application brought without standing ought to be dismissed regardless of actual insolvency, *a fortiori* it ought to be dismissed

when the claimant merely has "legitimate concerns" as to the solvency of the defendant (see [43] above).

88 In any event, I do not accept that the claimant has shown that there are "legitimate concerns" as to the solvency of the defendant. The claimant simply makes the point that the defendant is unable to pay its debts.[52] This is not sufficient to justify a stay. As the Court of Appeal held in *Anan*, examples of legitimate concerns include balance sheet insolvency or the fact that there are other winding up applications by other creditors. That would suggest that the defendant is relying on the arbitration agreements and the *AnAn* approach simply to delay payment of legitimate debts (at [112]).

89 To grant the claimant a stay would amount to granting a person who has failed to establish that it is a creditor of a defendant within the meaning of s 124(1)(*c*) of the Act the benefit of a freezing injunction over the defendant's assets without the claimant having to prove a good arguable case, without the claimant having to prove a risk of dissipation and without the claimant having to undertake to compensate the defendant for loss if no winding up order is ultimately made. The purpose of the insolvency court's power to stay a winding up application is not to grant a claimant the functional equivalent of a freezing injunction without the claimant satisfying the prerequisites which warrant such relief or offering the safeguards which must accompany such relief.

*The defendant disputes debt bona fide and on substantial grounds*

90 In any event, to the extent that it is necessary, I also accept that the defendant has gone beyond the *AnAn* approach to establish on the general

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[52] CWS at paras 65–71.

approach that it disputes the claimant's debt *bona fide* and on substantial grounds.

91 The defendant asserts on affidavit that the copper cathodes were never delivered.[53] The liquidators are unable to assert on affidavit that the claimant in fact delivered the copper cathodes to the defendant. The defendant's factual case is therefore unrebutted. The most the liquidators can say – and which is what they argue – is that the absence of documents proving delivery does not prove that there was in fact no delivery.[54] But the burden is on the claimant to show that there was delivery. If there was no delivery, there can be no debt. The liquidators have no personal knowledge of the formation or performance of the contracts out of which the claimant's debt allegedly arises. And they have not produced any evidence of delivery from the claimant's directors or management who do have personal knowledge. I am therefore satisfied that the defendant has raised at least a triable issue.

92 Further, the claimant failed to enforce the defendant's alleged payment obligation under the contracts for six years, from 2015 to 2021. It is significant to me that the claimant made attempts to recover this debt only after the liquidators took control of the claimant in 2021.[55] Before that, the claimant was under the control of its directors and managers from 2015 to 2021. If the contracts were genuine contracts and were actually performed, the claimant's directors and managers would have had personal knowledge of that.[56] They

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53 Defendant's Bundle of Documents dated 22 September 2022 ("DBOD") at p 500; LY's Affidavit at para 29.

54 DWS at para 41; DBOD at p 699; CF's Affidavit at para 13.

55 DWS at para 37.

56 ESM's Affidavit at para 4.

would have no reason not to take steps to recover the debt. But they failed to take any steps to recover this debt for six years. Their failure lends some credence to the defendant's submission that the parties entered into the contracts for bookkeeping purposes only, with no intention that the defendant's ostensible payment obligations to the claimant should be enforced.

93 In all the circumstances, it appears to me that there are triable issues such that the defendant would secure leave to defend in an application for summary judgment in a civil action. I therefore find that the defendant disputes the claimant's debt *bona fide* and on substantial grounds. On this ground also the winding up application ought to be dismissed.

***The safer approach***

94 The claimant could have avoided this result simply by taking the safer approach of securing and relying on a binding adjudication that the defendant owes a debt to the claimant. I begin by considering the legal effect of a judgment and then consider the legal effect of an arbitral award.

*A judgment*

95 A claimant who has in hand a judgment from a civil court of competent jurisdiction establishing that the defendant is liable to pay a sum of money to the claimant undoubtedly has standing to present a winding up application as a creditor of the defendant. That is because such a judgment has two important legal consequences.

96 First, when a court enters judgment for a sum of money in favour of one party (A) and against another party (B), the result of that judgment is to create the legal relationship of creditor and debtor between A and B. A money

judgment has that result no matter what branch of law gave rise to the claim underlying the judgment. Upon and by reason of the judgment being entered, A is a creditor of B and B is a debtor of A. That is so regardless of whether the claim underlying the judgment is a claim for compensation or other monetary relief in equity or at common law; whether it is a claim at common law in debt or sounding in damages; whether it is a claim for damages for breaching a contract or for committing a tort; whether it is a claim for a liquidated sum or for an unliquidated sum; and even if it is a liability arising under the procedural law, for example the liability of an unsuccessful claimant to pay costs to a successful defendant under a judgment. The judgment, in and of itself, confers upon A the status of a creditor as against B.

97 That result is simply the effect of the doctrine of merger. Upon judgment, the underlying claim by A against B that the judgment has vindicated merges into the judgment. The liability that results from the judgment thereafter constitutes a *debt* owed by B to A. Therefore, upon and by reason of the judgment, A becomes a creditor (a *judgment* creditor) of B and B becomes a debtor (a *judgment* debtor) of A.

98 Second, the judgment renders its subject-matter *res judicata*. That result precludes B from thereafter challenging the content of the judgment, and therefore of A's status as a creditor of B, for all legal purposes. Unless and until the judgment is set aside, B is precluded by law for all purposes from denying both that A is a creditor of B and the amount in which A is a creditor of B. These purposes include establishing A's status as a creditor of B for the purposes of having standing under s 124(1)(*c*) of the Act to bring a winding up application and thereafter, if a winding up order is made, making a claim in the proof of debt procedure.

*An arbitral award*

99 I have thus far spoken only of a money judgment of a civil court of competent jurisdiction and its effect on the issue of standing in a subsequent winding up application. But of course, a claimant can establish standing by relying on any adjudication of any tribunal which has the same legal effect as a judgment, *ie*, an adjudication that both: (a) confers upon A the status of a creditor of B regardless of the nature of the underlying claim; and (b) precludes B from challenging A's status as a creditor of B and the amount in which A is a creditor of B.

100 The paradigm example of a tribunal of that type that is not a civil court is, of course, an arbitral tribunal. And a paradigm example of an adjudication which has the same legal effect as a judgment is, of course, an arbitral award.

101 In my view, what the claimant ought to have done in the circumstances of this case was to secure an arbitral award against the defendant before invoking the jurisdiction of the court. In that sense, the claimant was the author of its own misfortune.

***Conclusion***

102 I emphasised to parties during oral submissions that I do not condone a company relying on its own wrong – or at least its own deceptive conduct in relation to its audit confirmations, its accounts and its relationship with other companies – to oppose a winding up application. It nevertheless remains the case that a winding up application seeks a class remedy which puts a company under external administration for the preservation and advancement of creditors' interests collectively. In securing that class remedy, it is absolutely fundamental that the claimant be able to establish that it is a member of that class.

103 Even if a company is hopelessly insolvent, if there is no person who has standing under s 124(1) of the Act to present a winding up application, the scheme of ss 124 and 125 of the Act is that that company remains outside the reach of the court's insolvency jurisdiction. To put it bluntly, our insolvency law does not permit corporate vigilantism.

**Grounds under s 125(1)**

104 Given that I have found that the claimant's winding up application fails *in limine* because it cannot establish that it has standing to present it, it is unnecessary to consider whether the claimant has made out any of the grounds under s 125(1) which enliven the court's discretion to make a winding up order.

105 However, in case I am wrong on the issue of standing, I go on to consider the two grounds on which the claimant relies. For the purpose of the analysis which follows, I assume contrary to my finding that the claimant has been able to establish that it is a creditor of the defendant.

106 I begin with the ground that the defendant is unable to pay its debts within the meaning of s 125(1)(*e*) of the Act.

***Unable to pay its debts***

*The test of insolvency*

107 The only statutory test of inability to pay debts which is of general application is found in s 125(2)(*c*) of the Act (*Re Ascentra Holdings, Inc (in official liquidation) and others (SPGK Pte Ltd, non-party)* [2023] SGHC 82 at [43]–[44], citing *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc and others* [2013] 1 WLR 1408 ("*BNY v Eurosail*") at [24]–[25] and [35]). The phrase "as they fall due" is implicit in this test. As Lord Walker pointed out in *BNY v Eurosail* (at [30] and [37]) the content of this test has never changed in substance even though it changed significantly in form from its original enactment in s 80(4) of the Companies Act 1862 (c 89) (UK) until it reached its final form in the Insolvency Act 1986 (c 45) (UK). The test in that final form incorporated, expressly and for the first time, the words "as they fall due" and an express provision requiring the court to take into account a company's contingent and prospective liabilities.

108 The plaintiff seeks to establish that the defendant is insolvent in two ways.

109 First, the claimant relies on the rebuttable presumption that the defendant is unable to pay its debts that arose under s 125(2)(*a*) of the Act upon the defendant's failure to comply with the claimant's statutory demand (see [13] above). The claimant can rely on this presumption only if the claimant is a "creditor" of the defendant and the defendant is "indebted" to the claimant, both

within the meaning of s 125(2)(*a*) of the Act. If either of those conditions is not satisfied, no presumption of insolvency can arise under s 125(2)(*a*).

110 In the alternative, the claimant relies on the defendant's financial statements from 2015 to 2020[57] to prove to the satisfaction of the court under s 125(2)(*c*) of the Act that the defendant is unable to pay its debts.

111 I accept the claimant's alternative submission and find that the defendant is indeed insolvent.

112 The only test for determining whether a company is insolvent for the purposes of s 125(2)(*c*) of the Act is the cash flow test. On this test, a company is insolvent if its current liabilities exceed its current assets such that it is or will, in the reasonably near future, be unable to meet all of its debts as and when they fall due. The reasonably near future for the purposes of this test is taken to be twelve months. This aligns the test for legal and commercial insolvency with the standard accounting definition of current assets and current liabilities (*Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd (formerly known as Tong Teik Pte Ltd)* [2021] 2 SLR 478 ("*Sun Electric*") at [65]–[67]).

113 The defendant's audited accounts from 2016 to 2020[58] show that its current liabilities far exceeded its current assets for all of those years. These

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57 CF's Affidavit" at pp 171, 198, 223 and 251; LY's Affidavit at p 174.

58 CF's Affidavit at pp 171, 198, 223 and 251; LY's Affidavit at p 174.

accounts also show that its accumulated losses created a substantial and structural capital deficiency which continues to the present day:

| Year ended 31 Dec | Current assets | Current liabilities | Net Profit/ (Loss) | Net capital deficiency |
|---|---|---|---|---|
| 2016[59] | US$126m | US$200m | (US$74m) | US$74m |
| 2017[60] | US$53m | US$99m | US$28m | US$47m |
| 2018[61] | US$30m | US$94m | (US$18m) | US$64m |
| 2019[62] | US$34m | US$91m | US$7.5m | US$57m |
| 2020[63] | US$38m | US$91m | US$3.7m | US$53m |

114 Throughout this period, the defendant's only assets were its current assets, and its only liabilities were its current liabilities. There is therefore no difference between the defendant's total assets or total liabilities as reflected in any given balance sheet and its current assets or current liabilities as reflected in the same balance sheet.

115 The defendant's auditors acknowledged every year from 2016 to 2020 that there was a material uncertainty casting significant doubt on the defendant's

59 CF's Affidavit at pp 171–172.

60 CF's Affidavit at pp 198–199.

61 CF's Affidavit at pp 223–224.

62 CF's Affidavit at pp 251–252.

63 LY's Affidavit at pp 174–175.

ability to continue as a going concern.[64] From 2016 to 2018, the auditors stated that they were able to conduct their audit on a going concern basis only because they assumed that the defendant would continue to receive financial support from the PUFG Group over the forthcoming 12 months and that the defendant's business operations would be profitable in the future.[65]

116 The defendant's auditors did not qualify their opinion on the defendant's financial statements for the years ended 31 December 2016, 2017 or 2018. From 2019, however, the auditors' report on the defendant's financial statements were heavily qualified.

117 For the year 2019, the auditors made two qualifications to their audit report.[66] First, they noted that they could not obtain satisfactory information and adequate assurance from the defendant about a substantial and material sum of US$27.86m recorded in the defendant's financial statements as being due to the defendant from related companies. That figure represented over 80% of the defendant's current assets as at 31 December 2019. Second, the auditors noted that the defendant's current liabilities exceeded its current assets by over US$56.91m. This indicated to the auditors that there was a material uncertainty which may cast significant doubt on the defendant's ability to continue as a going concern.[67]

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64 CF's Affidavit at pp 168, 195, 220 and 248; LY's Affidavit at p 171.

65 CF's Affidavit at pp 189, 214 and 241–242.

66 CF's Affidavit at p 248.

67 CF's Affidavit at p 248.

118 The auditors repeated these two qualifications in the defendant's audited accounts for the year ended 31 December 2020.[68] Once again, they could not obtain satisfactory information and adequate assurance from the defendant about the substantial and material sum, now US$38m, recorded in the financial statements as being due to the defendant from related companies. That figure represented almost 99% of the defendant's current assets as at 31 December 2020. Once again, the auditors noted that the defendant's current liabilities exceeded its current assets, this time by US$53m.

119 In their 2020 audit report, the auditors added the qualification for the first time that they were unable to obtain sufficient and appropriate audit evidence that the defendant's shareholder was willing to provide continuing financial support to enable the defendant to meet its liabilities as and when they fell due.[69] Without such support, the defendant would be unable to pay its debts as they fell due.

120 The defendant's audited financial statements for the year ended 31 December 2020 are dated 23 March 2021.[70] By that time, of course, PUFG was subject to the reorganisation proceedings in the PRC. The defendant is now under new ownership as a result of the reorganisation plan. There is nothing to suggest that the defendant's financial position has improved since 31 December 2020. In particular, there is nothing to suggest that the consortium of strategic investors are prepared to provide any financial support whatsoever to the defendant.

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68 LY's Affidavit at p 171.

69 LY's Affidavit at p 171.

70 LY's Affidavit at p 170.

*Conclusion on insolvency*

121 Given the state of the defendant's audited accounts, the claimant has proved to my satisfaction under s 125(2)(*c*) of the Act that the defendant is unable to pay its debts within the meaning of s 125(1)(*e*) of the Act.

122 Therefore, if the claimant had been able to establish that it is a creditor of the defendant within the meaning of s 124(1)(*c*) of the Act, I would have wound up the defendant on the ground that the defendant is unable to pay its debts.

***Just and equitable***

123 The second ground on which the claimant applies to wind up the defendant is the just and equitable ground under s 125(1)(*i*) of the Act. A creditor undoubtedly has standing to apply to wind up a company on this ground. Section 124(1)(*c*) permits a creditor to present a winding up application on any ground set out in s 125(1). This is in contrast to, for example, the Minister who can present a winding up application only on one or more of the five grounds under s 125(1) which are specified in s 124(1)(*g*) (*Grimmett, Andrew and others v HTL International Holdings Pte Ltd (under judicial management) (Phua Yong Tat and others, non-parties)* [2022] 5 SLR 991 at [38]).

124 I do not accept on that the defendant should be wound up on the just and equitable ground. The claimant relies on several cases which set out the principles on which the court will exercise its discretion to wind up a company on the just and equitable ground. But all of those are cases in which the winding

up application was presented by a shareholder or by a government authority acting in the public interest.[71]

125 In my view, a creditor who presents an application to wind up a company on the just and equitable ground is in a fundamentally different position from a shareholder who presents an application to wind up a company on the just and equitable ground. The fundamental difference is that a shareholder is a party to the company's constitution, *ie,* the statutory contract between the shareholders *inter se* and the company, and therefore has an interest recognised and protected by law in remedying any injustice or inequity in the way in which the parties to that contract perform their obligations under it. In contrast, the only interest of a creditor which the law recognises and protects as against the company is his interest in getting his debt paid in full.

126 The premise of the just and equitable ground as between shareholders is to provide a minority shareholder an exception to the *prima facie* or default rule of company law, which is that the minority must submit to the will of the majority unless otherwise provided in the company's constitution. Thus, the just and equitable ground is primarily a method by which a minority shareholder – who, for whatever reason, does not wish to bring an application under ss 216 or 216A of the Companies Act 1967 (2020 Rev Ed) – can seek a winding up order to put a permanent end to injustice or inequity in how the majority is running the company.

127 A winding up order addresses injustice and inequity because it has two important effects. First, it puts a disinterested external administrator, appointed

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71 CWS at paras 25–33 and 74.

by and answerable to the court, in control of the company. It thereby releases the minority shareholder from the self-interested will of the majority. Second, the winding up order brings an end to the company as a commercial enterprise. It thereby allows the minority shareholder to recover his capital, which would otherwise be locked in the company subject to the will of the majority, and deploy it in other investments. This is why the just and equitable ground is fault-based when invoked by a shareholder, requiring establishing unfairness, lack of probity, *etc* (*eg*, *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR(R) 827 at [31]; *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd and others and another appeal* [2019] 1 SLR 1046 at [38]). If it were otherwise, the principle of majority rule would be devoid of meaning.

128 The premise of the just and equitable ground as between a shareholder and the company has no application whatsoever as between a creditor and the company. A creditor is not a party to the company's constitution. A creditor is not subject to the default principle of majority shareholder rule. A creditor's capital is locked in the company subject to majority rule. An unpaid creditor can demand repayment of his debt any time after it falls due. And if payment is not forthcoming, an unpaid creditor can attempt to recover the debt by suit or can present a winding up application on grounds of insolvency. A creditor has no legal interest protected by law in how a solvent company is managed internally (*eg*, *Re Vangory Holdings Pty Ltd* [2015] NSWSC 1809 at [37], in the context of a contingent creditor).

129 The only interest of a creditor against a company which is recognised and protected by law is its interest in having its debts paid in full as they fall due. If a company is able to do that, the creditor has no interest recognised or recognised by law in how the company is managed internally. That is so even if

the company's business is riddled with fraud, even if the company's majority is running the company with manifest unfairness, injustice and inequity and even if the company's directors have acted with a manifest lack of probity. So too, a company may be run with absolute fairness, exceptional standards of probity and scrupulous honesty such that no shareholder could have it wound up on the just and equitable ground. But if it is unable to pay its debts as they fall due, any one of its creditors will be entitled *ex debito justitiae* to have it wound up on grounds of insolvency.

130 This is not to say that the just and equitable ground has no application to creditors. But the very different legal relationship between a creditor and the company means that what makes a winding up order "just and equitable" as between a creditor and the company is quite different from what makes a winding up order "just and equitable" as between a shareholder and the company. In my view, the core class of cases in which a winding up order would be just and equitable from a creditor's perspective would be cases in which, for some reason, the creditor is able to show that its interests as a creditor are or are likely be adversely affected but is unable to show that the company is unable to pay its debts within the meaning of s 125(2)(*c*) of the Act.

131 One example would be a company that is balance sheet insolvent in a manner which adversely affects a creditor without being cash flow insolvent. Or a company that is cash flow insolvent in a manner which adversely affects a creditor, but only if the court looks at current assets and current liabilities over a period of just beyond 12 months (*cf Sun Electric* at [50]–[69]). In both situations, the creditor will not be able to show that the company is unable to pay its debts within the meaning of s 125(2)(*c*) of the Act. In those

circumstances, a creditor may be able to show that – from the creditor's perspective – it is just and equitable to wind up the company under s 125(1)(*i*).

132 What this goes to show is that the purpose of the court's just and equitable jurisdiction is quite different when it is invoked by a shareholder and when it is invoked by a creditor. I therefore do not consider that the claimant can, in its capacity as a creditor, rely on principles drawn from cases where a shareholder secured an order to wind up a company on the just and equitable ground. It is, of course, true that the words "just and equitable" are of the "widest significance" (*Chow Kwok Chuen v Chow Kwok Chi and* another [2008] 4 SLR(R) 362 at [14], quoting *In re Blériot Manufacturing Aircraft Company (Limited)* (1916) 32 TLR 253 at 255, *per* Neville J). But, although the notion of "unfairness" is broad, it "does not give the court a license for capriciousness, and its powers should be exercised with caution" (*Phua Kiah Mai v The Kheng Chiu Tin Hou Kong and Burial Ground* [2022] SGHC 36 at [13]). So simply showing that the phrase "just and equitable" and the underlying consideration of "unfairness" are broad cannot erase the fundamental difference between the legal interests of a shareholder and the legal interests of a creditor which the law recognises and protects.

133 The claimant cites two cases in which a creditor secured a winding up order on the just and equitable ground.[72] But in my view, one authority is distinguishable and the proposition that the claimant relies in the other authority is merely *dicta*.

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72 Claimant's Bundle of Authorities dated 22 September 2022 at Tabs 23 and 28.

134 The first case is *Re Ah Yee Contractors (Pte) Ltd* [1987] SLR(R) 396. The claimant relies on this case for the proposition that a creditor with a tangible interest in the winding up of a company may secure a winding up on the just and equitable ground on the same grounds that a shareholder can rely on. But the applicant in that case was both a creditor *and* a shareholder. This case is no authority that a creditor who has a tangible interest in the winding up of a company, and nothing more, can apply to wind up the company on the just and equitable ground on the very same principles as a shareholder. In fact, much of the court's analysis in that case focused on the management of the company, which related more to the applicant's capacity as a shareholder.

135 The second case is *RCMA Asia Pte Ltd v Sun Electric Power Pte Ltd* [2020] SGHC 205. In that case, the High Court made a winding up order on the application of a creditor on two grounds: (a) that the company was unable to pay its debts; and (b) that it was just and equitable to wind up the defendant. On the latter ground, the court accepted that it was just and equitable to wind up the defendant because of a lack of probity in the conduct and management of the defendant's affairs. The court drew no distinction in that case between the principles applicable to a winding up application on the just and equitable ground brought by a shareholder and one brought by a creditor.

136 The first point I make is that the High Court's finding on the just and equitable ground was unnecessary for its decision. Indeed, on appeal, the Court of Appeal was satisfied that the company was unable to pay its debts and found it unnecessary to deal with the just and equitable ground. To that extent, the finding at first instance that it was just and equitable to wind up the company on the creditor's application because of a lack of probity in the company's management was merely *dicta*. The second point I make is that, for the reasons

I have given, there are compelling reasons of principle why the governing principles on the just and equitable ground must be different in the two classes of cases. For that reason, I would respectfully differ from the view that an unpaid creditor can present a winding up application against a company on the grounds that there is lack of probity in the conduct and management of the company's affairs.

**Conclusion**

137 For all of the foregoing reasons, I have dismissed the claimant's application to wind up the defendant on two broad grounds. First, the claimant cannot establish that it is a creditor of the defendant. That necessarily means that its application to wind up the defendant must fail on the threshold issue of standing. It is therefore irrelevant that I have found the defendant to be insolvent within the meaning of s 125(1)(*e*). And it is unnecessary to consider the just and equitable ground under s 125(1)(*i*).

138 Even if I had to consider the just and equitable ground, I consider that it is not just and equitable to wind up the defendant on any of the grounds advanced by the claimant. They are all grounds which arise from cases involving shareholders who have presented winding up applications seeking to bring an end to unfairness or a lack of probity in how a company is managed. The propositions from the cases involving creditors who appear to have succeeded on the just and equitable ground can either be distinguished or are *obiter*. Even if I were to assume that the claimant is a creditor of the defendant, none of the grounds on which the claimant relies makes it just and equitable for the claimant, as a creditor of the defendant, to secure a winding up order against the defendant.

139 I have therefore dismissed the claimant's winding up application. I have also ordered the claimant to pay to the defendant the costs of and incidental to the application, such costs fixed at $25,000 including disbursements.

Vinodh Coomaraswamy
Judge of the High Court

Sarjit Singh Gill SC, Daniel Tan, Hoang Linh Trang, Jeremy Chu and Edwin Yang (Shook Lin & Bok LLP) for the claimant;
Tan Chuan Thye SC, Sim Kwan Kiat, Mark Cheng, Timothy Ang and Tan Tian Hui (Rajah & Tann Singapore LLP) for the defendant.