United Overseas Bank Ltd *v* Bombay Talkies (S) Pte Ltd
[2015] SGHC 142

Case Number : Companies Winding Up No 138 of 2014

Decision Date : 26 May 2015

Tribunal/Court : High Court

Coram : Hoo Sheau Peng JC

Counsel Name(s) : Sim Kwan Kiat, Ang Siok Hoon, Chew Ming Hsien Rebecca (Rajah and Tann Singapore LLP) for the plaintiff; Assomull Madan D T (Assomull and Partners) for the defendant.

Parties : United Overseas Bank Limited — Bombay Talkies (S) Pte Ltd

Companies – Winding up

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 69 of 2015 was dismissed by the Court of Appeal on 27 November 2015. See [2015] SGCA 66.]

26 May 2015

Hoo Sheau Peng JC:

1 This was an application by the plaintiff, United Overseas Bank Ltd ("the Plaintiff"), to wind up the defendant, Bombay Talkies (S) Pte Ltd ("the Defendant"). The Defendant resisted the application. After hearing the parties, I ordered the Defendant to be wound up, and appointed Mr Chee Yoh Chuang and Mr Abuthair Abdul Gafoor, both of whom are approved liquidators of Stone Forest Corporate Advisory Pte Ltd, as the joint and several liquidators of the Defendant ("the Private Liquidators"). The Defendant has appealed against the decision.

2 Another winding-up application, namely Companies Winding Up No 136 of 2014 ("CWU 136/2014"), was heard together with the present application. The Plaintiff filed CWU 136/2014 against Network 2009 (S) Pte Ltd ("Network"), a company connected to the Defendant. I also made a winding-up order in respect of Network. There being no appeal from Network, the reasons provided herein are solely in respect of the Defendant.

Background

3 The Defendant was incorporated on 10 April 2002, and was in the business of amusement and recreational activities. All its shares are held by Mr Ramesh Mohandas Nagrani ("Mr Nagrani"), who is also a director of the Defendant. Mr Nagrani is also a director and the sole shareholder of Network, as well as another connected company, Mohan's Corporation Pte Ltd ("MCPL"). The Defendant, Network and MCPL (collectively referred to in this judgment as "the Debtor Companies"), were customers of the Plaintiff, to which the Plaintiff had granted banking facilities.

4 On 24 February 2014, Rajah and Tann Singapore LLP ("Rajah and Tann"), acting for the Plaintiff, served a statutory demand dated 21 February 2014 on the Defendant for the sum of $233,202.33 ("the Statutory Demand"). The Statutory Demand stated that:

> … despite repeated demands and indulgences granted by our clients [*ie*, the Plaintiff], you [*ie*,

the Defendant] have defaulted, neglected and/or failed to make payment on the sums in respect of the said banking facilities[.] …

The sum of $233,202.33, which included interest, was the sum due and owing to the Plaintiff by the Defendant as at 20 February 2014. In the Statutory Demand, the Plaintiff required the Defendant to make payment of $233,202.33 together with further contractual interest from 21 February 2014, banker's charges and all applicable charges until the date of full payment, as well as the Plaintiff's legal costs on an indemnity basis ("the SD Debt"). The Statutory Demand also provided that if payment was not made, and if the Defendant failed to secure or compound the SD Debt within 21 days after the date of the service of the Statutory Demand, the Plaintiff would commence winding-up proceedings against the Defendant.

5 Another statutory demand, also dated 21 February 2014, was served on Network for the sum of $1,140,195.60, as well as for further contractual interest, all banker's and applicable charges until the date of full payment, and legal costs on an indemnity basis. As guarantor for the debts which the Debtor Companies owed the Plaintiff, a statutory demand, also dated 21 February 2014, was served on Mr Nagrani.

6 At that time, the Debtor Companies and Mr Nagrani were represented by Mirandah Law LLP ("Mirandah Law"), and there appeared to have been on-going negotiations relating to the outstanding debts. In a letter dated 21 February 2014, Rajah and Tann referred to Mirandah Law's letter of 14 February 2014, and stated that the Plaintiff would consider any repayment proposal made only if the Plaintiff received payment of the proposed amounts. Rajah and Tann also stated that it had been instructed to serve statutory demands on the Defendant, Network and Mr Nagrani, and forwarded copies of the three statutory demands dated 21 February 2014 (see [4]–[5] above) for Mirandah Law's attention.

7 Sometime in March 2014, the Defendant issued two cheques of $15,000 and $18,000, totalling $33,000, in favour of the Plaintiff. The two cheques were dated 15 and 25 March 2014 respectively. Negotiations continued between the parties. On 30 April 2014, Rajah and Tann wrote to Mirandah Law with an interim repayment proposal, which was signed and accepted on 15 May 2014 by Mr Nagrani on behalf of the Debtor Companies ("the Repayment Agreement"). The Repayment Agreement related to the indebtedness of the Debtor Companies on a global basis.

8 The relevant portions of the Repayment Agreement read:

> 3. … [O]ur clients [*ie*, the Plaintiff] are prepared to *withhold for the time being winding up and/or bankruptcy proceedings* … subject to the following terms:
>
> …
>
> (f) Your clients shall make monthly repayments of the sum of S$33,000 from March 2014 to August 2014 to our clients, the cheques for the first such payment was received on 14 March 2014, and thereafter, payments shall be received by our clients on the last working day of each month;
>
> (g) Our clients shall be *entitled in their sole discretion* to apply the monthly payments of S$33,000 received from March 2014 to August 2014 towards the repayment and satisfaction of any of the amounts due and owing by your clients to our clients;
>
> (h) *Your clients are to submit by no later than 31 August 2014 a fresh repayment proposal in*

respect of the balance outstanding amount as at 31 August 2014 (including all accrued and accruing interest, costs and expenses incurred on a full indemnity basis) for our clients' consideration; and

(i) Notwithstanding any provisions stated herein, all interest, charges, fees and commissions continue to accrue in respect of all the banking facilities stated above until full and final settlement of all outstandings under the above banking facilities.

…

4. In the event of any failure on the part of your clients to comply with any of the terms as set out in paragraph 3 above, our clients *shall proceed to enforce their rights against your clients, including … instituting winding up and/or bankruptcy actions against your clients without further reference* to you or your clients.

[emphasis added]

9 Shortly after signing the Repayment Agreement, the Debtor Companies defaulted on their monthly repayment obligation of $33,000. Apart from the two cheques issued, set out at [7], two further cheques of $15,500 and $17,500 dated 6 and 8 May 2014 were issued by the Defendant. Out of the total sum of $66,000 paid, the Plaintiff apportioned a sum of $12,092.72 as repayment towards the Defendant's debt.

10 Following this default, on 10 July 2014, the Plaintiff filed the present application to wind up the Defendant. In the affidavit supporting the winding-up application, Mr Yang Ah Su ("Mr Yang"), an authorised officer of the Plaintiff, deposed that the Defendant was indebted to the Plaintiff for the sum of $232,828.92 ("the CWU Debt"). More than three months later, on 30 October 2014, Mr Nagrani filed an affidavit, opposing the application.

Parties' arguments

11 The substantive hearings took place on 9 February and 18 March 2015. Essentially, the Plaintiff relied on ss 254(1)(*e*) and 254(2)(*a*) of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act"). Mr Sim Kwan Kiat ("Mr Sim"), counsel for the Plaintiff, submitted as follows. The CWU Debt was due and owing by the Defendant to the Plaintiff. The Defendant did not make full payment of the SD Debt by 18 March 2014 (*ie*, 21 days after the Statutory Demand was served on the Defendant). Under the Repayment Agreement, the Plaintiff agreed to withhold winding-up proceedings against the Defendant on the condition that the Defendant settled the debt which it owed to the Plaintiff. While the Defendant made partial repayments of the SD Debt, it defaulted and remained indebted to the Plaintiff for a sum of more than $200,000. As at the date of hearings, the Defendant had not made full payment of its debt to the Plaintiff. Regardless of whether the deeming provision under s 254(2)(*a*) applied, the Defendant had been shown to be unable to pay its debts as they fell due such that the court may wind up the Defendant under s 254(1)(*e*) of the Companies Act.

12 The Defendant argued that the grounds on which the Plaintiff applied for the Defendant's winding up were flawed. Counsel for the Defendant, Mr Assomull Madan ("Mr Assomull"), raised the following main issues. Firstly, the Repayment Agreement compounded the alleged debt to the Plaintiff's reasonable satisfaction, and the Plaintiff was precluded from proceeding with the winding-up application as the Statutory Demand was no longer effective. Secondly, the Defendant disputed that the CWU Debt was due and owing to the Plaintiff. Thirdly, the Plaintiff held security in the sum of $500,000 by way of an assignment of a key person insurance policy in the name of Mr Nagrani ("the

Insurance Policy") to the Plaintiff, which exceeded the Plaintiff's alleged claim for $232,828.92. Lastly, the Defendant also alleged that there were irregularities in the winding-up application which caused it to be invalidated.

The issues

13 There were five issues to be considered, namely:

(a) whether the SD Debt was compounded to the reasonable satisfaction of the Plaintiff;

(b) whether the CWU Debt was due and owing by the Defendant to the Plaintiff;

(c) whether the Insurance Policy secured the CWU Debt;

(d) whether there were irregularities which invalidated the application; and

(e) whether the court should exercise its discretion not to wind up the Defendant.

The law

14 Before dealing with the issues, I turn to the applicable legal principles. Section 254(1)(*e*) of the Companies Act provides that the court may order the winding up of a company if the company is unable to pay its debts. Section 254(2)(*a*) then provides that:

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

15 It is settled law that a winding-up application is not an appropriate means of enforcing a disputed debt and that a winding-up court is not the best forum to decide on the merits of a commercial dispute without a proper ventilation of the evidential disputes through a trial. However, a company will not be able to defeat a winding-up application merely by alleging that a substantial and *bona fide* dispute over the debt existed (see *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") at [16]–[17]). The applicable standard of proof in showing the existence of a substantial and *bona fide* dispute is the same as the standard of proof in resisting summary judgment, *ie*, the debtor-company is required to raise triable issues in order to obtain a stay or dismissal of the winding-up application (see *Pacific Recreation* at [23]).

16 Where the creditor relies on the presumption of insolvency under s 254(2)(*a*) of the Companies Act, "strict compliance with the conditions set out therein is necessary" (*Pac-Asian Services Pte Ltd v European Asian Bank AG* [1987] SLR(R) 6 at [14]). In *Re Dayang Construction and Engineering Pte Ltd* [2002] 2 SLR(R) 197, Belinda Ang Saw Ean JC (as she was then) stated that the requirements under s 254(1)(*a*) which the creditor was to comply with were that (at [15]–[16]):

(a) the debt must be in excess of $10,000;

(b) the written demand to pay the sum due must be under the hand of the creditor or his authorised agent; and

(c) the demand has to be served on the debtor company by leaving it at its registered address.

17 In *BNP Paribas v Jurong Shipyard Pte Ltd* [2009] 2 SLR(R) 949 ("*BNP Paribas*"), the Court of Appeal considered whether it was necessary for the statutory demand to spell out whether the debtor-company had the choice of paying the sum demanded, or securing or compounding for it to the reasonable satisfaction of the creditor. The Court of Appeal did not make a decision on this matter, but observed that the statutory demand, which stated that the debtor-company would be deemed unable to pay its debts if it did not pay the sum demanded within 21 days, was "misleading" (at [14]).

18 After service of the statutory demand on the debtor-company, the debtor-company has three weeks under s 254(2)(*a*) to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor. If the debtor-company neglects to do so after expiry of that three weeks, a presumption that the debtor-company is insolvent arises, and the creditor may then present an application to wind up the company under s 254(1)(*e*) of the Companies Act.

19 The Court of Appeal stated the applicable principles as follows (*BNP Paribas* at [5]):

> … [T]o prove a deemed inability [to pay its debts] under s 254(2)(*a*) of the [Companies Act], it is necessary for the creditor to have a "due" debt, which the debtor has for three weeks neglected to pay or to secure or compound to the reasonable satisfaction of the creditor, after it has been served with a statutory notice to pay. If the creditor claims that the security is not satisfactory and is determined to issue winding-up proceedings, the debtor may then apply to court for a restraining order *so as to enable the court to determine on an objective basis what the reasonable satisfaction of the creditor should be*[.] [emphasis in original omitted; emphasis added in italics]

Therefore, in determining whether the debtor-company has secured or compounded the debt to the reasonable satisfaction of the creditor, the court is to apply an objective standard.

20 Lastly, the power of the court to wind up a company under ss 253 and 254 of the Companies Act is a discretionary one. Generally, if a company is unable or deemed unable to pay its debts, the creditor is *prima facie* entitled to a winding-up order *ex debito justitiae*. However, the court may also take into account the public interest in deciding whether a company should be wound up, especially where the company is a commercially viable one (see *BNP Paribas* at [15], [19]–[20]). With these broad principles in mind, I deal in turn with each of the issues raised by the Defendant to resist the application.

Analysis of the issues

Whether the SD Debt was compounded to the reasonable satisfaction of the Plaintiff

21 The Defendant argued that the SD Debt had been compounded when the parties entered into the Repayment Agreement, and the Defendant paid the monthly instalments. Therefore, the Defendant could not be deemed to be unable to pay its debts under s 254(2)(*a*) as the Statutory Demand had been satisfied. Mr Assomull argued that if the Plaintiff chose to take up winding-up

proceedings, it was required to issue a fresh statutory demand. He also stated that it would be a "gross injustice" to wind up the Defendant on the basis of the Statutory Demand as the Defendant was misled into believing that the Statutory Demand had been satisfied when the Repayment Agreement was entered into.

22 In response, Mr Sim denied that the SD Debt was compounded to the Plaintiff's reasonable satisfaction, and pointed out that the Plaintiff had not agreed to accept a reduced amount in satisfaction of the total amount which the Defendant owed the Plaintiff. In fact, the Repayment Agreement had expressly provided that the Plaintiff would be entitled to pursue legal action, including winding-up proceedings against the Defendant in the event of the Defendant's default. According to Mr Sim, it would set a "dangerous precedent" to allow the debtor to forestall winding-up proceedings in such circumstances.

23 Under s 245(2)(*a*) of the Companies Act, the Defendant must secure or compound for the amount of the debt three weeks after service of the statutory demand. The Statutory Demand was served on 24 February 2014, and the Defendant thus had until 18 March 2014 to secure or compound the debt to the Plaintiff's reasonable satisfaction. If the SD Debt was secured or compounded to the Plaintiff's reasonable satisfaction *within the relevant timeframe*, the Defendant would not be deemed under s 254(2)(*a*) of the Companies Act to be unable to pay its debts. However, in my view, the court may nonetheless take into account any efforts at repaying, securing or compounding for the SD Debt made after the three week timeframe in deciding whether to exercise its discretion to wind up the Defendant under the Companies Act.

24 It will be recalled that up until 18 March 2014, the parties had not yet entered into the Repayment Agreement. However, sometime in March 2014, two cheques totalling $33,000 were forwarded to the Plaintiff by the Debtor Companies. The cheques were dated 15 March 2014 (for $15,000) and 25 March 2014 (for $18,000) respectively (see [7] above). Subsequently, on 15 May 2014, the Repayment Agreement was finalised and accepted by the Defendant.

25 Therefore, strictly speaking, given that the Repayment Agreement was entered into only after the expiry of the relevant period under s 254(2)(*a*), it could not be said to have compounded the SD Debt under s 254(2)(*a*) of the Companies Act. However, as payment of $15,000 was made within the relevant period under s 254(2)(*a*), the issue was whether this payment made by the Debtor Companies constituted a compounding of the Defendant's SD Debt to the Plaintiff's reasonable satisfaction. In this regard, whether the debt was compounded to the Plaintiff's "reasonable satisfaction" was a matter for the court to determine objectively (see the Court of Appeal's judgment in *BNP Paribas* at [5] which I have cited at [19] above). This is also the position taken in Australia. In considering a provision similar to s 254(2)(*a*) of the Companies Act, the Federal Court of Australia stated (*Commonwealth Bank of Australia v Parform Pty Ltd* (1995) 13 ACLC 1309 ("*Parform*") at 1311):

> To "compound" for a debt is to accept an arrangement for payment of the amount of the debt or of a different amount. I was referred to no authority on the phrase "to the creditor's reasonable satisfaction", and my own researches have disclosed none. But I do not think the phrase is intended to enable the creditor to be the sole judge of his satisfaction. The words "to the creditor's reasonable satisfaction" seem to me to posit an objective test. In other words, where the debtor puts up a proposal which the creditor rejects, it is for the court to decide whether in rejecting it the creditor was acting reasonably in all the circumstances. If the test were wholly subjective, the legislature would have employed the phrase "to the creditor's satisfaction". …

26 The case of *Parform* is also useful for the definition of "compound" as set out therein, *viz*, to

accept an arrangement for the amount of debt or a different amount in satisfaction of the debt. The definition of this word has also been considered in two older English cases, which the Defendant cited to the court. The first case was *Pennell and others, Assignees of Bradshaw, A Bankrupt v Rhodes and another* (1846) 15 LJQB 352 which concerned bankruptcy proceedings. Under the provisions of the relevant Act, an act of bankruptcy would be prevented if the debtor secured or compounded for the amount demanded by the creditor within the appropriate time. Patteson J considered the meaning of the word "compound" thus (at 355):

> … [T]he question really turns on the word "compound." Mr. Willes says, it means not merely entering into, but completing some arrangement, by which the creditor takes a part of the debt for the whole. I do not see why the word should be so limited. I read it as meaning "arranging with creditors to their satisfaction." If therefore a debtor within the fourteen days enters into a binding arrangement for securing the debt, to the satisfaction of his creditors, although the steps to carry out and complete that arrangement are not taken till after the fourteen days have expired, I think that is a compounding within the meaning of the statute. Here, the parties did so agree: they settled and arranged the debt satisfactorily to the creditor. I conceive therefore there has been no act of bankruptcy.

27 In the second case, *The Commissioners of Church Temporalities in Ireland v Patrick Grant and Others* (1884) 10 App Cas 14, the House of Lords stated that (at 31):

> To "compound" a debt or claim, is to accept, in satisfaction of it, something less than, or something different from, that which may be claimed as of right,–generally by way of compromise or agreement.

28 From the above, a compounding for a debt to the creditor's reasonable satisfaction envisages the creditor agreeing to accept something different than what he or she could claim as of right under the debt. One example would be for the creditor to accept a lesser amount in satisfaction of the whole. However, if the creditor rejects the debtor's proposal, it is for the court to consider whether in the circumstances, the rejection was a reasonable one.

29 The facts in the present case were somewhat similar to those in *Re Ritecast (S) Pte Ltd* [1996] 1 SLR(R) 75 ("*Re Ritecast*"). In that case, after service of the statutory demand, the debtor made part payment of $40,000 for a debt of about $994,269. At the petition to wind up the debtor, the debtor argued that the part payment precluded the creditor from pursuing the winding-up application. In rejecting this contention, G P Selvam J stated (at [12]):

> At the hearing of the petition the company made two other points. The first was that after the statutory demand the company paid $40,000. This payment, said the company, precluded the petitioners from proceeding with the petition. I rejected the contention. It had no logic merit or convenience to commend itself for acceptance by the court. The debt was not in the sum of $40,000 but a much larger amount. That debt had not been paid. The company admittedly owed a large amount to the petitioners and failed to pay it even though the petitioners afforded generous indulgences to the company. Finally, if a company could stall winding-up proceedings by making token payments, it would mean that a debtor could stall winding-up proceedings indefinitely. The payment therefore did not stand in the way of an order being made.

30 While the court in *Re Ritecast* did not explicitly consider whether the payment of $40,000 amounted to a compounding of the debt, it was clear from Selvam J's judgment that the court would not have objectively considered the part payment of $40,000 to be a compounding for the debt which would have "reasonably satisfied" the creditors.

31 In my judgment, the payment of $15,000 did not constitute a compounding of the debt which would be to the Plaintiff's reasonable satisfaction. Even supposing that the Plaintiff had appropriated the payment of $15,000 in satisfaction of only the Defendant's SD Debt and not the debts of the other two Debtor Companies, this would still be merely the satisfaction of a small fraction of the amount owed by the Defendant to the Plaintiff which was in excess of $200,000. Also, up until 18 March 2014 (*ie*, the expiry of three weeks after service of the Statutory Demand), the parties had not yet entered into any definite agreement for the repayment of outstanding sums under the banking facilities. The Statutory Demand thus remained valid and the Defendant was deemed insolvent under s 254(2)(*a*) of the Companies Act.

32 However, as I have alluded to above, notwithstanding that the presumption that the Defendant was unable to pay its debts under s 254(2)(*a*) applied, the court can nevertheless take into account any further efforts at securing, compounding or repayment of the debt made after the relevant three week period in deciding whether to allow, adjourn or dismiss the winding up application under s 257(1) of the Companies Act. I will discuss this further at [53]–[65] below.

Whether the CWU Debt was due and owing by the Defendant to the Plaintiff

33 The Defendant did not dispute the quantum of the SD Debt when it entered into the Repayment Agreement with the Plaintiff. However, the Defendant raised certain issues with the CWU Debt in the present application. To recap, the CWU Debt was $232,828.92, while the SD Debt was for the sum of $233,202.33, with further contractual interests, charges and costs from 21 February 2014 to date of payment. Between 21 February 2014 to 10 July 2014 (*ie*, the date at which this application was filed by the Plaintiff), contractual interest, bank and other charges, as well as legal costs continued to accrue and amounted to $11,719.31 ("the Additional Charges"). In deriving the figure for the CWU Debt, Mr Yang explained that the Plaintiff took into account the Defendant's "partial payment of S$12,092.72", as well as the accrual of the Additional Charges. A breakdown was provided of these amounts in Mr Yang's second affidavit of 7 November 2014.

34 The Defendant disputed the CWU Debt on three grounds. Firstly, the Defendant queried the computation of the Additional Charges. Secondly, the Defendant objected to the Plaintiff's apportionment of only a portion of $66,000 (*viz*, the total amount paid by the Defendant to the Plaintiff between February to July 2014), being the sum of $12,092.72, towards repayment by the Defendant towards its debt. Thirdly, the Defendant pointed out that there was no judgment for the CWU Debt.

35 At the outset, I should highlight that the Defendant did not dispute the underlying debt due and owing under the banking facilities provided by the Plaintiff. It was manifestly clear that this was a sum of at least $200,000. In fact, as I have stated at [33], in entering into the Repayment Agreement, the Defendant did not dispute the computation of the SD Debt which was set out in the Statutory Demand.

36 Turning to the queries in relation to the computation of the Additional Charges, I was of the view that the Defendant's objections were bare and unsubstantiated. In any event, these were but minor amounts. Even if I were to discount the entire sum of $11,719.31 from the CWU Debt, the amount outstanding remained in the region of $200,000, and well in excess of $10,000.

37 Next, I turn to the contention that it was wrong for Mr Yang to state in his affidavit that the Defendant had made "partial payment of S$12,092.72" as the Defendant had in fact paid the Plaintiff a total sum of $66,000 under the Repayment Agreement. Mr Assomull argued that it was wrong for the Plaintiff to appropriate the sums which had been paid by the Defendant towards repayment of the

amounts due from the other two Debtor Companies as this was impermissible under the Companies Act. It therefore did not matter that the Repayment Agreement envisaged this possibility. Although Mr Assomull's submissions on this point were not entirely clear, I understood his submissions to mean that since the Defendant was the company which had in fact made the repayments pursuant to the Repayment Agreement, the sums repaid should be used to offset the only debt which the Defendant (as opposed to Network or MCPL) owed to the Plaintiff.

38 I did not accept Mr Assomull's submission. This was an agreement which parties had entered into with the benefit of full legal advice. In the absence of a statutory provision explicitly prohibiting such arrangements (of which Mr Assomull could point me to none), I did not find anything objectionable with para 3(g) of the Repayment Agreement (reproduced at [8] above) which expressly allowed the Plaintiff to appropriate the instalments paid to satisfy any of the amounts due and owing by the Debtor Companies. It was also not alleged that the Plaintiff had not acted *bona fide* in exercising its discretion thereunder. The Plaintiff was thus entitled to appropriate amounts in its discretion from the $66,000 paid by the Defendant to satisfy any of the outstanding debt obligations owed by each of the individual Debtor Companies. It could not be said that Mr Yang's statement in his affidavit concerning the "partial payment of S$12,092.72" was erroneous.

39 Furthermore, even if I were to accept that the full amount of $66,000 should be appropriated to offset only the Defendant's debt, there still remained more than $140,000 of the CWU Debt left unpaid. Up until the hearing before me in March 2015, it was not disputed that the Defendant had not made further repayment of this debt.

40 In *Walter Woon on Company Law* (Tan Cheng Han SC, gen ed) (Sweet & Maxwell, Rev 3rd Ed, 2009), the learned author states at para 17.42:

> The dispute must relate to liability to pay, not quantum. If the company is indebted to the creditor, it is not an answer to the application to say that the exact amount is disputed. …

In my judgment, these contentions raised by the Defendant did not raise any triable issues which showed that there was a substantial and *bona fide* dispute over the sum claimed by the Plaintiff. The Defendant was not able to, in the words of the Court of Appeal in *Pacific Recreation* at [17], stave off the Plaintiff's winding-up application merely by alleging that a substantial and *bona fide* dispute over the debt existed without more. In the present case, the case was even stronger as the Defendant had not even disputed that it owed the Plaintiff the substantial amount due under the banking facilities.

41 The Defendant's argument that the Plaintiff did not obtain a judgment for the CWU Debt also did not take the Defendant's case much further. There is no requirement under s 254 of the Companies Act that a creditor must first obtain a judgment for the amount of the debt before it is entitled to apply for winding up against the Defendant. Such a proposition would instead go against the weight of authority (see, *eg*, the case of *Pacific Recreation* where the Court of Appeal affirmed the High Court's order to wind up a company where the creditor's claim was based on a deed of indemnity and not a judgment).

Whether the Insurance Policy secured the CWU Debt

42 The Defendant also resisted this application on the ground that the Plaintiff held the Insurance Policy as security for the CWU Debt. The Defendant was the owner of the Insurance Policy under which the life assured was Mr Nagrani for the sum of $500,000. On 28 May 2012, the Defendant assigned the policy to the Plaintiff via a deed of assignment ("the Assignment Deed"). Mr Assomull

argued that as the value of the policy exceeded the debt owed to the Plaintiff, the Plaintiff could have satisfied its debt claim against the Defendant through the policy.

43 However, it was clear from the documentary evidence that the Insurance Policy had been terminated by the insurance company, Prudential Assurance Company Singapore (Pte) Ltd ("Prudential") due to non-payment of the monthly insurance premiums by the Defendant. Prudential communicated this to the Plaintiff via a notice dated 7 December 2013 ("the Lapse Notice"). It appeared that the Defendant had stopped paying the monthly insurance premiums in September 2013.

44 Mr Assomull argued that due to the assignment of the policy by the Defendant to the Plaintiff, it was the Plaintiff's duty and responsibility to ensure that the policy was renewed promptly. In this regard, he pointed to the fact that first, the Lapse Notice was sent by Prudential to the Plaintiff and not to the Defendant, and second, that the Insurance Policy was referred to in the Repayment Agreement as security for the Defendant's debt. Thus, Mr Assomull argued that the Defendant was led into believing that the policy was renewed and effective, and in any event, the Defendant was ready and willing to reinstate the policy. Clause 5.6 of the terms and conditions of the Insurance Policy provided that the policy was terminated for non-payment of premiums, the policy holder could apply within 24 months of the date of termination to reinstate the policy. In fact, Mr Assomull argued that the Plaintiff should have acted in the best interest of the Defendant by using the payments made by the Defendant in March and May 2014 to pay the outstanding premiums so as to reinstate the policy.

45 In my judgment, these arguments were completely misconceived. The terms of the Insurance Policy read together with the Assignment Deed made it clear that notwithstanding the assignment of the policy from the Defendant to the Plaintiff, the obligation to pay the premiums under the policy remained with the Defendant. Under cl 4 of the terms of the Insurance Policy, the Defendant undertook to pay the monthly insurance premiums within 30 days of the date they were due. This obligation remained with the Defendant under cl 7(b) of the Assignment Deed, which provided that:

> **7 POWERS OF THE BANK AND ASSINGOR'S CONTINUING OBLIGATIONS**
>
> Notwithstanding this Assignment or any acceptance by the Bank of any Insurance Proceeds and other moneys payable under the Insurances, the Assignor agrees and declares that:-
>
> …
>
> (b) the Assignor shall remain fully liable to, and shall observe and perform all the obligations to be performed under or arising out of the Insurances and the Bank shall have no obligation or liability of any kind whatsoever in relation thereto or for the performance or observance of any of the obligations, representations, warranties, conditions, covenants, agreements or other terms of the Insurances or be under any liability whatsoever in the event of any failure by the Assignor to perform such obligations …

46 In the Notice of Assignment of Insurance Policy which was sent by the Defendant to Prudential and received by Prudential on 15 June 2012, the Defendant unequivocally stated that "[w]e shall remain liable to perform all our obligations under the Insurance Policy and the Bank [*ie*, the Plaintiff] shall not assume any such obligation". Indeed, it appeared that the Plaintiff had dutifully paid the monthly premiums from May 2012 (after the policy was assigned to the Plaintiff) until September 2013 (when the default occurred). It was therefore disingenuous for the Defendant to pin the blame for the lapse of the Insurance Policy on the Plaintiff. If anything, the lapse further revealed that the Defendant lacked the financial ability to keep the Insurance Policy alive. Despite the Defendant's claim

that it was willing to and capable of reinstating the Insurance Policy, it did not appear to me – up until the last hearing on 18 March 2015 – that the Defendant had taken any such steps.

47 Given that the Insurance Policy had lapsed, the Defendant was not able to rely on it to argue that the Plaintiff had sufficient security to satisfy its claim. Furthermore, it was not shown to me that the surrender value of the policy was more than the amounts which the Defendant owed the Plaintiff. Rather, it appeared that the Insurance Policy had no surrender value. In these circumstances, there was no security against which the Plaintiff could enforce its claim. Thus, for the reasons given above, it was not possible for the Defendant to rely on the Insurance Policy as a ground to defeat the application.

Whether there were irregularities which invalided the application

48 The Defendant also argued that there were a number of alleged irregularities in the winding-up application. First, the Defendant submitted that the originating summons was defective insofar as the Plaintiff, by the second prayer of the originating summons, sought an order for the Official Receiver to be appointed as the Defendant's liquidator, while the consent to act as liquidators was signed by the Private Liquidators.

49 There was absolutely no merit to this submission. Under s 257(2)(*e*) of the Companies Act, the court may allow a winding-up application to be amended. This was not a valid ground to resist winding up. For completeness, I note that the Plaintiff approached the Private Liquidators after receiving a letter from the Official Receiver dated 31 July 2014 in which the Official Receiver urged the Plaintiff to approach a private liquidator, in the light of the "expertise and resources" required to manage the liquidation of companies, such as the Defendant, that dealt with copyrighted works and the licensing of such works.

50 In a similar vein, the Defendant pointed to two alleged irregularities in the affidavit of service of the winding-up application filed by Mr Abdul Rahim Bin Jamil ("Mr Abdul Rahim") on 17 July 2014 ("the Affidavit of Service"). First, the Defendant contended that the Affidavit of Service was erroneous in that the unit number of the Official Receiver was stated as #06-11 instead of #06-01. However, the parties did not dispute that the Official Receiver did in fact receive service of the documents. This was evidenced by the Official Receiver's acknowledgment on the front page of the originating summons. Importantly, no objection was raised by the Official Receiver herself. In this regard, I note that s 392(2) of the Companies Act and r 191(1) of the Companies (Winding Up) Rules (Cap 60, R 1, 2006 Rev Ed) ("CWUR") provide that proceedings under the Companies Act shall not be invalidated by formal defects or irregularities unless the defect or irregularity has caused "substantial injustice" which cannot be remedied by an order of Court. The error was merely a formal defect which did not cause any substantial injustice to the Defendant such that it would invalidate the application.

51 Second, the Defendant submitted that there was no endorsement by the Defendant or its representative on the originating summons. In response, the Plaintiff pointed to s 387 of the Companies Act, which states that:

> **Service of documents on company**
>
> **387.** A document may be served on a company by leaving it at or sending it by registered post to the registered office of the company.

As Mr Abdul Rahim was not able to find any member, officer or employee of the Defendant at the Defendant's registered office, the Plaintiff submitted that it was sufficient for the winding-up

application to be left at the Defendant's registered office. Furthermore, the Plaintiff submitted that there was no dispute that the Defendant in fact received the originating summons and supporting affidavit, and was in a position to instruct counsel.

52 I accepted the Plaintiff's submissions. It is not a requirement that there be an indorsement of receipt of the originating summons and supporting affidavit for the winding-up application before a winding-up order could be made. In fact, r 26(1) of the CWUR itself expressly allows for the winding-up application and supporting affidavit to be left at the debtor's registered office if no member, officer or employee of the company can be found there.

Whether the court should exercise its discretion not to wind up the Defendant

53 As I have stated above, the court's power to wind up a company is discretionary. The Court of Appeal in *BNP Paribas* noted at [15]–[16] that in the usual case, where a company is unable or deemed unable to pay its debts, the creditor is *prima facie* entitled to a winding-up order as a matter of right. There may, however, be exceptional cases where a court would not grant the winding-up order. Chan Sek Keong CJ stated in *BNP Paribas* (at [19]–[20]):

> Where a petition to wind up a temporarily insolvent but commercially viable company is filed, many other economic and social interests may be affected, such as those of its employees, the non-petitioning creditors, as well as the company's suppliers, customers and shareholders. These are interests that the court may legitimately take into account in deciding whether or not to wind up the company. …
>
> … Under s 257(1) of the Act, the court may adjourn the hearing of a winding-up application conditionally or unconditionally or make any interim or other order that it thinks fit. In cases where a company is temporarily insolvent but the winding-up court would *ex hypothesi* grant an adjournment under s 257(1) of the Act to allow the company time to resolve the issues at hand or to seek alternative measures, an injunction of limited duration to restrain a winding-up petition from being presented may also be justified if irreparable harm could flow from its presentation.

54 In deciding whether to wind up the Defendant, one of the matters to be considered was the Repayment Agreement and the further amounts paid pursuant to it. The Plaintiff, by para 3 of the Repayment Agreement, expressly agreed to withhold winding up proceedings subject to the terms set out therein. The terms under para 3 of the Repayment Agreement, reproduced at [8] above, required, *inter alia*, the Debtor Companies to make monthly repayments of $33,000 from March to August 2014. This was an interim arrangement, as the Debtor Companies were meant, by para 3(h) of the agreement, to put forth a fresh repayment proposal in relation to the outstanding balance amount before 31 August 2014. Paragraph 4 of the Repayment Agreement stated, *inter alia*, that the failure of the Debtor Companies to comply with the terms of the Repayment Agreement would entitle the Plaintiff to institute winding-up actions against them.

55 Given the interim nature of the arrangement, and the Plaintiff's express reservation of its rights, I was of the view that neither the mere act of *entering* into the Repayment Agreement nor the further payments made pursuant to it was sufficient basis to exercise my discretion not to wind up the Defendant. At the very least, the Defendant had to fulfil its obligations under the agreement. It was not disputed that the Debtor Companies have not complied with the terms of the Repayment Agreement.

56 Mr Assomull contended that the Plaintiff should not be allowed to enforce its strict legal rights as the Repayment Agreement was a draconian arrangement which prejudiced the Defendant in two

ways. First, the Repayment Agreement failed to state the amounts which the respective Debtor Companies owed to the Plaintiff. Second, by virtue of the fact that the Repayment Agreement treated the indebtedness of the Debtor Companies on a global basis, the Defendant – despite only owing the Plaintiff about $200,000 – was unfairly saddled with the burden of the much larger debts which Network and MCPL owed to the Plaintiff, which were in excess of $2m.

57 With respect to the first point raised, while it would have been ideal for a specific figure to be stated as the outstanding sum which the respective Debtor Companies owed to the Plaintiff, the failure to do so was not a material omission. As Mr Sim stated during oral submissions, although the Repayment Agreement did not state the full amount outstanding, this did not detract from the fact that the Defendant was liable under the banking facilities, that time was given for the Defendant and the other two Debtor Companies to make monthly instalment payments until August 2014, and to propose a further repayment proposal by 31 August 2014. To reiterate, at no time did the Defendant dispute the amount set out in the Statutory Demand. I was thus of the view that the lack of an amount stated in the Repayment Agreement did not prejudice the Defendant.

58 As for the second point, the Defendant was legally represented when the Repayment Agreement was entered into, and the parties were free to negotiate its terms. In any event, the Defendant did not show that it was capable of repaying or compounding for its *own* debt of approximately $200,000 to the Plaintiff's reasonable satisfaction. As I have stated earlier at [39], even taking the Defendant's case at its highest and accepting that the repayment of $66,000 made in March and May 2014 should have been appropriated to satisfy only the Defendant's debt, this would still have left a sum of more than $140,000 outstanding.

59 If the Defendant had shown itself able to discharge its *own* debt, then notwithstanding para 3(g) of the Repayment Agreement, it might be argued either that the court should not exercise its discretion to wind up the Defendant as it is still a commercially viable company, or that the Defendant's debt (as opposed to the debts of the other two Debtor Companies) had been satisfactorily repaid. This, however, was not the case on the facts.

60 In this regard, Mr Sim submitted that irrespective of the validity of the Statutory Demand, it was clear from the evidence that the Defendant was insolvent. Since May 2014, the Defendant had failed to pay the amounts due under the Repayment Agreement or any part of the amounts due under the banking facilities. Mr Sim argued that if a debtor was shown to be unable to pay its debts, that was in itself evidence of insolvency and there was no need for a statutory demand to be issued before the creditor could apply for a winding-up petition.

61 A number of cases were cited for this proposition (see, *eg*, *Cornhill Insurance Plc v Improvement Services Ltd and Others* [1986] 1 WLR 114 at 117 and *Re Simpson Development Investment (HK) Co Ltd* [1999] HKCU 1653). In *Taylors Industrial Flooring Ltd v M & H Plant Hire (Manchester) Ltd* [1990] BCLC 216, Dillon LJ considered the English equivalent of s 254 of the Companies Act, and stated (at 219):

> There is no requirement that a creditor must serve a statutory demand. The practice for a long time has been that the vast majority of creditors who seek to petition for the winding up of companies do not serve statutory demands. The practical reason for that is if a statutory demand is served, three weeks have to pass until a winding-up petition can be presented. If, after the petition has been presented, a winding-up order is made, the winding up is only treated as commencing at the date of the presentation of the petition; thus, if the creditor takes the course of serving a statutory demand, it would be giving the company an extra three weeks' grace in which such assets as the company may have may be dissipated in attempting to keep an

> insolvent business afloat, or may be absorbed into the security of a debenture holder bank. So there are practical reasons for not allowing extra time, particularly when commercial conditions and competition require promptness in the payment of companies' debts so that the creditor companies can manage their own cash flow and keep their own costs down.
>
> … [I]f a debt is due and an invoice sent and the debt is not disputed, then the failure of the debtor company to pay the debt is itself evidence of inability to pay. …

62 As the Statutory Demand validly raised the presumption of insolvency under s 254(2)(*a*) of the Companies Act, it was not necessary for me to arrive at a firm decision on this issue. However, the matters raised were factors that were appropriate for me to consider in deciding whether to exercise my discretion to wind up the Defendant under s 254(1)(*e*) of the Companies Act. In my judgment, the evidence clearly showed that the Defendant was unable to pay its debt which was largely undisputed, and that it in fact had not been able to comply with the terms of the Repayment Agreement, an arrangement which itself evidenced forbearance on the Plaintiff's part.

63 Lastly, Mr Assomull submitted that the Defendant is a "live" company which has been in existence for ten years. As the debt of $200,000 is not substantial by business standards, it would be draconian to make a winding-up order against the Defendant.

64 As is clear from the above, the Defendant's default on its own banking facilities began since at least February 2014, when the Statutory Demand was issued. Up till the hearing before me in March 2015, the Defendant had, *at the highest*, only made repayment of $66,000. The Defendant also failed to adhere to the Repayment Agreement or upkeep the Insurance Policy. There was really no evidence to show that the Defendant was only temporarily insolvent, but still commercially viable, or that there were other cogent public interest reasons not to wind up the Defendant.

65 Taking the matters above in totality, this was *not* an exceptional case where the court would decline to make a winding-up order.

Conclusion

66 In the circumstances, it was clear that the Defendant was unable to pay its debt to the Plaintiff. The debt was not disputed on substantial and *bona fide* grounds. The Defendant failed to satisfy, secure or compound for the debt to the Plaintiff's reasonable satisfaction. The statutory presumption under s 254(2)(*a*) of the Companies Act was validly raised and the court could order the winding up of the Defendant under s 254(1)(*e*) of the Companies Act. For all the reasons given above, I granted the application to wind up the Defendant.