IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 105

Companies Winding Up No 9 of 2018

Between

Tarkus Interiors Pte Ltd

… Plaintiff

And

The Working Capitol
(Robinson) Pte Ltd

… Defendant

GROUNDS OF DECISION

[Companies] — [Winding up]

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Tarkus Interiors Pte Ltd
v
The Working Capitol (Robinson) Pte Ltd

[2018] SGHC 105

High Court — Companies Winding Up No 9 of 2018
Valerie Thean J
2 March 2018

30 April 2018

Valerie Thean J:

1 The plaintiff in this case brought an application to wind up the defendant on the ground that it was unable to pay its debts, relying on a statutory demand served on 25 October 2017. The defendant's primary defence to this application was that the plaintiff could no longer rely upon the statutory demand in the light of an agreement subsequent to the statutory demand. On 2 March 2018, I granted the plaintiff's application. The defendant has appealed and I accordingly furnish the grounds of my decision.

Facts

2 The plaintiff, Tarkus Interiors Pte Ltd, is a company incorporated in Singapore.[1] The defendant, The Working Capitol (Robinson) Pte Ltd, was

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[1] Ong Kian Chuan's affidavit dated 16 January 2018 at para 1.

incorporated in October 2015,[2] and is in the business of, *inter alia*, commercial and industrial real estate management.[3]

3 On 18 November 2016, the defendant's project manager accepted, on behalf of the defendant, the plaintiff's offer for building and construction work to be carried at the premises of 140 Robinson Road for $7,800,000.00 ("the Construction Contract"). Pursuant to this contract, the plaintiff issued five progress payment claims, duly certified by the project consultants, to the defendant for a total sum of $7,349,758.05.[4] Four other invoices were issued for additional works, for a total of $31,899.91.[5] In all, the defendant owed the plaintiff $7,381,657.96. Of that sum, the defendant repaid $2,608,357.93 in February and March 2017.[6]

4 A meeting was held on 11 July 2017 where Mr Dennis Ong (the plaintiff's director), Mr Vincent Yeo (the plaintiff's assistant project director) and Mr Benjamin Gattie (the defendant's chief executive officer) discussed the details of these debts.[7] On 12 July 2017, Mr Gattie sent an email to Mr Yeo and Mr Ong, thanking them for meeting with him. In that email, Mr Gattie explained that the defendant had faced "significant setbacks" as a result of their main investor pulling out at the "last minute". Mr Gattie also apologised, stating that the defendant was "regrettably not in a position to make payment on [its] outstanding dues to [the plaintiff]". He however expressed optimism at finding

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2 Ong Kian Chuan's affidavit dated 16 January 2018 at p 15.

3 Benjamin Gattie's affidavit dated 23 February 2018 at para 5.

4 Ong Kian Chuan's affidavit dated 16 January 2018 at para 9.

5 Ong Kian Chuan's affidavit dated 16 January 2018 at para 10.

6 Ong Kian Chuan's affidavit dated 16 January 2018 at 134.

7 Ong Kian Chuan's affidavit dated 16 January 2018 at paras 16, 18, and p 125.

another investor for the company, stating that they would "conclude this transaction within 8 weeks". He then assured the plaintiff that the defendant was "doing everything within [its] power to make payment within the next 8 weeks". Furthermore, he requested that the plaintiff let him know "the cost of funds that may be associated with an 8 week deferment of payment".[8] The contents of the email were repeated in an undated letter sent by Mr Gattie to Mr Ong and Mr Yeo.[9]

5 On 25 August 2017, Mr Gattie sent another email to Mr Ong, Mr Yeo, amongst others, setting out a plan for debt repayment by instalments. Under the plan, the defendant would pay the plaintiff a total of $5,390,093 from September 2017 to April 2018.[10] The defendant then proceeded to make partial payment of the remaining outstanding sum *via* a cheque dated 4 September 2017, for the sum of $200,000.[11]

6 The plaintiff proceeded to serve a statutory demand for the sum of $4,573,300.03 (which excludes various retention and other sums)[12] on the defendant on 25 October 2017, pursuant to s 254(2)(*a*) of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act").

7 Notwithstanding the statutory demand, Mr Gattie and Mr Ong continued to engage over the issue of payment. On 16 November 2017, Mr Gattie and Mr Ong emailed each other in relation to giving the defendant time to pay

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8 Ong Kian Chuan's affidavit dated 16 January 2018 at para 17; pp 125-126.

9 Ong Kian Chuan's affidavit dated 16 January 2018 at para 18; p 127.

10 Ong Kian Chuan's affidavit dated 16 January 2018 at para 19; p 128.

11 Ong Kian Chuan's affidavit dated 16 January 2018 at para 19; p 130.

12 Ong Kian Chuan's affidavit dated 16 January 2018 at p 124.

$4,573,300.03, the amount demanded for in the statutory demand.[13] On 21 November 2017 the plaintiff acknowledged receipt of a cheque of $3,000,000, while asking for the remaining six cheques and warning that they would take "the necessary legal action" if the cheque for $3,000,000 did not clear by 3 January 2018.[14]

8 On 3 January 2018, however, the plaintiff received a notice of dishonour from its bank in relation to the cheque for $3,000,000 previously issued by the defendant. The reason stated was "payment stopped".[15] The plaintiff's solicitors then wrote to the defendant's solicitors, claiming that that the defendant had breached "the terms of the Settlement Agreement reached between our clients dated 21 November 2017", and stating that the plaintiff would commence winding-up proceedings pursuant to the statutory demand.[16]

Issues

9 The plaintiff relied upon the statutory demand served on 25 October 2017, and applied for the defendant to be wound up on the basis of s 254(1)(*e*) read with s 254(2)(*a*) of the Companies Act. These read as follows:

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13 Ong Kian Chuan's affidavit dated 16 January 2018 at pp 131–132.

14 Ong Kian Chuan's affidavit dated 16 January 2018 at p 133.

15 Ong Kian Chuan's affidavit dated 16 January 2018 at p 135.

16 Ong Kian Chuan's affidavit dated 16 January 2018 at pp 136–137.

> **Circumstances in which company may be wound up by Court**
>
> **254**.—(1) The Court may order the winding up if —
>
> …
>
> (*e*) the company is unable to pay its debts;
>
> …
>
> **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;

10 Resisting the winding up, the defendant raised the following defences:

(a) that the winding up was an abuse of process because the underlying debt is disputed;

(b) that the winding up was an abuse of process because the plaintiff ought to have commenced action under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOPA");

(c) that the parties had settled the matter, which agreement superseded the statutory demand; and

(d) that, rebutting the presumption created by s 254(2)(*a*), the defendant was not, in fact, insolvent.

11 Where a debtor resists a winding-up application in this way, the test in determining whether there is a substantial dispute is the same as that for resisting summary judgment; a triable issue must be raised in order to obtain a stay or dismissal of the winding-up application: see *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 at [23]). I should mention that the defendant initially applied for an adjournment to file a summons to enjoin the winding up on the basis of the defences at [10]. I explained, as did the judge who granted parties a previous adjournment, that filing a fresh application for an injunction was not necessary. The purpose of such an injunction is to forestall a winding up application where none has been filed, as such action carries the need for advertisement and may adversely affect the reputation and the business of the debtor company. It gives effect to the policy consideration that "the commercial viability of a company should not be put in jeopardy by the premature presentation of a winding-up petition against it" where there is a *bona fide* dispute over the debt: *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268 at [82]. In this case, the winding-up application having been filed, the defendant needed only to establish a triable issue in order to obtain a stay or dismissal. This it did not do, and I explain why by dealing with each of the arguments in turn below.

Was there a **bona fide** *dispute as to the underlying debt?*

12 The defendant's first two arguments raised an underlying dispute. It was common ground that if the underlying debt is disputed, a winding-up application would be an abuse of process: *BNP Paribas v Jurong Shipyard* [2009] 2 SLR(R) 949 at [7]. The defendant contended the plaintiff's work under the Construction Contract was defective, as follows:[17]

(a) The thermostats for the air-conditioner control units were installed at the wrong location.

(b) The automated lighting control system and air-conditioning system were not functional.

(c) The rubber flooring at level 16 of 140 Robinson Road was defective.

(d) The wall panels and floor of the offices at level 13 of 140 Robinson Road were infested with wood-boring beetles.

It was the defendant's case that this alleged breach would entitle it to damages or a claim for loss of value, which could be set off against the debt owing to the plaintiff.[18] For the reasons that follow, I was of the view that this dispute over the debt was neither substantial nor *bona fide*.

13 First, these allegations were raised extremely late in the day, and in all the circumstances, lacked credibility. In fact, the defendant had ceded liability on these issues on multiple prior occasions, as follows:

(a) through partial payments by the defendant of some $2,608,357.93 in February and March 2017;

(b) on 11 July 2017, during a meeting where details of payment and an instalment plan were discussed;

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17 Benjamin Gattie's affidavit dated 23 February 2018 at paras 11-12.

18 Benjamin Gattie's affidavit dated 23 February 2018 at paras 11-15.

(c) in an email dated 12 July 2017 that admitted the sum and also promised to compensate the plaintiff for its "cost of funds" for the delay;

(d) in an undated letter using the defendant's letterhead which referenced the 11 July 2017 meeting;

(e) in a 25 August 2017 email where Mr Gattie asked for an instalment plan;

(f) through another partial payment of $200,000 by a cheque dated 4 September 2017;

(g) in an email on 16 November 2017, after the statutory demand was issued;

(h) furnishing a cheque dated 4 September 2017 for $3,000,000 on 17 November 2017; and finally,

(i) the sum of $4,573,300.03 in the statutory demand was used as the basis for the instalment plan which was attached to the plaintiff's 21 November 2017 letter. The defendant did not refute the items within the instalment plan until after the commencement of the winding-up action.

14 Within the context of these multiple concessions, only one of these alleged breaches was brought to the plaintiff's attention, sometime in July 2017. This was the claim, mentioned at [12](d) above, that the wall panels and floor of the offices at level 13 of 140 Robinson Road were infested with wood boring beetles. This was not a meritorious contention because the plaintiff was not contractually required by the plaintiff to use treated wood, or to conduct pest control treatment.[19] In any event, multiple incidences admitting the debt

thereafter followed. Crucially, the consultant tasked with certifying progress payments under the Construction Contract did not indicate that there were any defects with the works.[20] It was not at all surprising that – although it underlines the tenuous nature of this defence - the defendant did not even attempt to estimate the quantum of damages that it would have been entitled to under this potential counter-claim if it were to be pursued.

Did the plaintiff need to commence action under SOPA?

15 The defendant further claimed that it was an abuse of the winding-up regime for the plaintiff to bring the present application rather than to seek an adjudication under SOPA. It submitted that the plaintiff was "seeking to enforce a disputed debt under the guise of the [d]efendant's inability to pay debts…"[21] This second contention was but a variant of the first issue. There was no triable issue in respect of the debt mentioned in the statutory demand, and because of that, there was no need for the plaintiff to commence a claim of any sort.

Was the statutory demand superseded by a settlement agreement?

16 The defendant's contention that the statutory demand had been "superseded" by a later agreement between parties was not supported by the use of specific authorities or legal arguments on the criteria or mechanics of how the statutory demand had been superseded. Counsel framed their arguments in contractual terms at the hearing. The defendant essentially contended that a new agreement had released it from the statutory demand, while the plaintiff

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19 Ong Kian Chuan's affidavit dated 28 February 2018 at paras 6–7.

20 Ong Kian Chuan's affidavit dated 28 February 2018 at para 9.

21 Benjamin Gattie's affidavit dated 23 February 2018 at para 49.

contended that either there was no such agreement or that he had reserved his rights.

17 In this context, I consider here whether, as permitted by s 254(2)(*a*) of the Companies Act, the debt had been compounded "to the reasonable satisfaction of the creditor". The Court of Appeal's guidance in *Bombay Talkies (S) Pte Ltd v UOB Ltd* [2016] 2 SLR 875 ("*Bombay Talkies*") on this issue, at [8], was as follows:

> In our judgment, to compound a debt connotes the acceptance of an alternative obligation in lieu or in satisfaction of the debt in question. To put it another way, a debt is compounded *when it is discharged or rendered unenforceable pursuant to an agreement between the debtor and the creditor*. In such circumstances, it will frequently be the case that a new obligation is created and this will be the consideration for the discharge of the original debt; but that is a separate matter which will have to be separately pursued by the creditor in the event of a breach.
>
> [emphasis added]

18 With this framework in mind, I turn to consider the correspondence. What parties have termed a "Settlement Agreement" first started with the plaintiff's email of 16 November 2017.[22] This was a response to an email from Mr Gattie. Mr Gattie's email was, in turn, a response to a letter from the plaintiff's solicitors dated 13 November 2017. Both Mr Gattie's email and the 13 November 2017 letter were not exhibited. The plaintiff's 16 November 2017 email was captioned "Counter Proposal Clarification". In that email, Mr Ong wrote:

> We refer to your email of 16 November 2017, *and note that this is an open communication.*

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22 Ong Kian Chuan's affidavit dated 16 January 2018 at p 131.

> We have made our stance clear through our solicitors, AsiaLegal's letter of 13 November 2017.
>
> The sum of SGD$4,573,300.03 is not and cannot be the full and final sum due and owing to us, as there are still unpaid invoices by TWC, and retention sums that will fall due next year.
>
> The sum of SGD$3,000,000.00 if either paid via post-dated cheque OR via cash cheque for the same, *must in both instances, be backed by a guarantor for the full sum.*
>
> After payment of the SGD$3,000,000.00, the outstanding amount of SGD $1,573,300.03, plus costs of SGD$10,000.00 and interest at the rate of 5.33% per annum from the first due date of payment of our invoices must be paid over the course of the next 6 months, ending June 2018. I.e., in equal instalments of SGD$262,216.67 plus the specified costs and interests.
>
> We have provided you with ample opportunities to settle the sum currently due and owing to us. *We will take the necessary steps we deem fit if this proposal is not accepted by you by 1800 hours today.*
>
> [emphasis added]

19 Mr Gattie replied at 7.23pm, after the stipulated time. His email[23] was captioned "Terms of counter proposal" and headed "without prejudice":

> We refer to your previous email.
>
> We accept the terms of your counter-proposal, *subject to any further payments beyond the sum of SGD $4,573,300.03 being conditional on the appropriate certification being given by the relevant consultants.*
>
> We will prepare a post-dated cheque for the sum of SGD 3,000,000.00 that you may collect tomorrow, 17 November 2017, from our office. We will subsequently make payment of the outstanding amount of SGD$1,573,300.03, plus costs of SGD$10,000.00 and interest at the rate of 5.33% per annum from the first due date of payment of the invoices over the course of the next 6 months, ending June 2018.
>
> [emphasis added]

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[23] Ong Kian Chuan's affidavit dated 16 January 2018 at p 132.

20 While Mr Gattie's response to Mr Ong's open communication email was headed "without prejudice" and was framed as an acceptance of the defendant's counter proposal, it was in fact not a matching acceptance but introduced new terms in two respects. First, no guarantor was offered for the $3,000,000 cheque as requested by Mr Ong. And second, the defendant's payment of sums beyond the amount set out in the statutory demand was subject to a condition of certification by project consultants.

21 The defendant subsequently collected a cheque for $3,000,000 from the plaintiff on 17 November 2017, and followed on with a letter in company letterhead on 21 November 2017,[24] stating:

> 1. We acknowledge receipt of the [cheque for $3,000,000.00] post-dated 31.12.2017 collected by us on Friday, 17.11.2017.
> 2. Please also issue to us post-dated cheques for each instalment amount of SGD$305,015.73 (inclusive of cost and interest) dated as follows:-
>
> a. 31.01.2018
>
> b. 28.02.2018
>
> c. 31.03.2018
>
> d. 30.04.2018
>
> e. 31.05.2018
>
> f. 30.062.018
>
> 3. The two Retention sums of SGD$390,000.00 and SGD$37,625.00 (excluding GST for both) will be invoiced when they fall due. Payment for the same to be settled by **31.07.2018 at the latest**.
> 4. We have submitted our 6th Progress claim for the sum of SGD$393,561.08 (excluding GST) to FA. We are awaiting your approval for the same.

[24] Ong Kian Chuan's affidavit dated 16 January 2018 at p 133.

> 5. We will not hesitate to take the necessary legal action against [the defendant] if [the cheque for $3,000,000.00] does not clear by **03.01.2018 at the latest**.
>
> [emphasis in original]

22 When the cheque failed to clear, the defendant's solicitors wrote to the plaintiff's solicitors on 10 January 2018,[25] in the following terms:

> 1. We refer to the above matter.
>
> 2. Your client agreed to provide our client with a post-dated cheque for the initial payment of the sum of S$3,000,000.00 pursuant to the Settlement Agreement reached between our clients dated 21 November 2017.
>
> 3. Your letter of 29 December 2017 evinced your client's intention not to be bound by the agreed settlement terms by deferring the payment of the S$3,000,000.00 to our client. Your client then unilaterally proceeded to stop payment of the post-dated cheque dated 31 December 2017 (DBS Cheque No. 300349) that was issued to our client on 17 November 2017.
>
> 4. Due to the stop payment request, your client has not paid our client the S$3,000,000.00 by 3 January 2018, in breach of the agreed settlement terms.
>
> 5. We also refer to your letter of 8 January 2018. Your clients continue to be in breach of the Settlement Agreement.
>
> 6. Our client will commence winding up proceedings pursuant to the statutory demand dated 25 October 2017.
>
> 7. All of our client's rights are expressly reserved.

23 In my judgment, the first question at hand is whether there is an agreement between parties to settle their dispute and which documents comprise that agreement. If so, a second arises: whether its terms contained a discharge of the defendant's liability. While both parties referred to their "Settlement Agreement" in their affidavits, both had a different understanding of where that

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[25] Ong Kian Chuan's affidavit dated 16 January 2018 at pp 136–137.

agreement was to be found and what were its terms. The defendant's position was that settlement was reached on 16 November 2017 by the exchange of emails. The plaintiff, on the other hand, seemed to advance three different positions as to this agreement. Firstly, its solicitors' letter of 10 January 2018 suggested that the settlement was reached on 21 November 2017, in a letter where the plaintiff had expressly reserved his rights.[26] Secondly, Mr Ong stated at paragraph 21 of his first affidavit that the plaintiff and defendant "entered into a Settlement Agreement" on 16 November 2017. Finally, at the hearing, counsel for the plaintiff contended that no agreement had been reached at all. Whether an agreement was formed and if so, the date the agreement was formed and what it contained are, however, legal issues premised upon an objective assessment of the facts and I explain below my findings on the issues.

24 Turning therefore to the first question, the Court of Appeal observed in *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332 ("*Gay Choon Ing*"), at [47], that an offer "must consist of a definite promise to be bound, provided that certain specified terms are accepted", while an acceptance is a "final and *unqualified* expression of assent to the terms of an offer" [emphasis added]. In other words, there must be a "precise correspondence between offer and acceptance", because "any qualification of the terms of the original offer renders the offeree's response a counter-offer, which destroys the original offer and simultaneously constitutes a new offer that can be either accepted or rejected by the original offeror": *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) ("*The Law of Contract*") at para 03.104.

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26 Ong Kian Chuan's affidavit dated 16 January 2018 at p 136.

25 Applying these principles, it is clear that Mr Gattie's purported acceptance on 16 November 2017 did not match the terms of Mr Ong's email. In particular, no guarantor was offered. And Mr Gattie well knew that he was still negotiating, as he headed his email "without prejudice". Thus the agreement was not concluded, as the defendant contended, with Mr Gattie's email of 16 November 2017. As for the plaintiff's position as to the agreement, its reply letter dated 21 November 2017 did not match the terms of Mr Gattie's email of 16 November 2017 either. While the 21 November 2017 letter no longer demanded a guarantor for the cheque, it contained a fresh term as to two retention sums which were to be settled by 31 July 2018. This reply therefore constituted a new offer from the defendant to the plaintiff. There is no record that this 21 November 2017 letter was accepted. The letters, therefore, do not show matching offer and acceptance. Where counter-offers are constantly made, no contract can be concluded because "each counter-offer destroys the original offer and itself constitutes a new offer": see *The Law of Contract* at para 03.107. Hence, it is not entirely clear from the correspondence that as at 21 November 2017, there was truly any settlement agreement to speak of. It could well be, however, that there was oral acceptance or acquiescence by conduct on the part of the defendant with this letter of 21 November 2017 either before or after 21 November 2017. This would explain why the plaintiff waited until 3 January 2018 after issuing the 21 November letter. And this was the position taken by the plaintiff in its letter of demand of 10 January 2018. With that possibility in mind, I turn to its terms.

26 Paragraph 5 of the 21 November 2017 letter contains an important caveat. This is that legal action would be taken if the cheque did not clear by 3 January 2018. This clearly set a condition precedent to the new agreement

taking effect, which was that the $3,000,000 cheque must clear by 3 January 2018. The effect of such a condition precedent is that the agreement would not take effect until the fulfilment of the stated condition: *Latham Scott v Credit Suisse First Boston* [2000] 2 SLR(R) 30 at [19]. Thus, any argument that the debt had been discharged and a new obligation created could only be mounted *if the $3,000,000 cheque cleared*. Since the Defendant's cheque did not clear by the stipulated date, the condition precedent was not met, and the purported agreement would not have taken effect in any case.

27 The plaintiff's position, moreover, on paragraph 5 was that it included an express reservation of its rights; thus, the letter merely granted an indulgence to the defendant to pay and was not an acceptance of the terms set out in the 16 November 2017 email. I agreed with the plaintiff, holding that on a true construction of the letter, the warning that "[w]e will not hesitate to take the necessary legal action" was sufficient to reserve the plaintiff's right to resuscitate the statutory demand. In particular, what was clear was that there was no agreement to discharge or render unenforceable the debt, as required by *Bombay Talkies* at [8].

28 I considered, in this context, the more overt references to the creditors' right to institute winding-up or bankruptcy proceedings against the defaulting debtors in the contracts in *Bombay Talkies* (at [4]) and *Ramesh Mohandas Nagrani v United Overseas Bank Ltd* [2016] 1 SLR 174 (at [38]). In the first case, the bank specifically mentioned the possibility of "instituting winding up". In the second case, which was relied upon by the plaintiff as an example where a creditor had successfully reserved his rights, the bank specifically referred to the institution of bankruptcy proceedings. While the plaintiff's letter of 21

November 2017 reserved the plaintiff's rights in more layman terms than the respective banks in the two cases, it was, to my mind, sufficient to put the point across: that the plaintiff was merely granting an indulgence to the defendant to give it time to pay, and whatever legal weaponry that was available to the plaintiff would be utilised without hesitation if the defendant were to default.

29 In coming to this conclusion, I considered the Court of Appeal's analysis of the intended effect of its decision in *Bombay Talkies* at [16] to be instructive:

> We make a further observation. The view that we have taken today will have the salutary effect of encouraging creditors who have included the necessary protective language in their agreements to afford debtors the opportunity to pay by instalments so that deserving debtors may avoid having to be wound up.

30 This rationale applies with good sense in this factual context. Winding up carries serious consequences for a debtor. A creditor who is willing to give a deserving debtor time to pay or the indulgence of payment by instalments ought not to be lightly said to have foregone his rights where he has expressly reserved these rights. Similar considerations undergird the principle applied in *Foakes v Beer* (1884) 9 App Cas 605 and *In re Selectmove Ltd* [1995] 1 WLR 474, that a promise to accept part payment cannot found a fresh contract to discharge a larger debt for want of consideration, unless the promisor receives some additional benefit. Although the Court of Appeal in *Gay Choon Ing* at [102]–[103] left open the question of the extent to which these cases are part of Singapore law, this does not detract from the point being made here. This is that indulging a debtor with more time while accepting part payment – in this case, a mere chimera of future part payment – ought not to be too easily regarded as discharging full payment.

Has the defendant shown that it was solvent?

31 Finally, a debtor may seek to rebut the presumption of insolvency under s 254(2)(*a*) of the Companies Act by showing that the company was in fact solvent: see *Export-Import Bank of India v Surya Pharmaceutical (Singapore) Pte Ltd* [2015] SGHC 258 at [14]; *Starluck Construction Pte Ltd v HSS Engineering Pte Ltd* [2013] SGHC 72 at [7] ("*Starluck Construction*").

32 The defendant sought to show that it was solvent. Mr Gattie referred to the defendant's 2017 "statement of financial position" in his affidavit,[27] which stated that its total assets exceeded its total liabilities by $2,136,017. The two-page statement exhibited in the affidavit was neither signed nor audited, and appeared to have been compiled on a Microsoft Excel spreadsheet. The plaintiff had requested for the defendant's management accounts and financial statements on 28 February 2018, without success.[28] The plaintiff also pointed out that while the renovations were recorded as assets, the liability to the plaintiff for these renovations did not appear on the spreadsheet.[29]

33 This can be contrasted with the defendant's audited financial statement dated 2 May 2017, for the financial year ending 31 December 2016.[30] The auditors stated there that the defendant's total liabilities exceeded its total assets by $635,434, and that "these events or conditions indicate that a material uncertainty exists that may cast significant doubt on the company's ability to continue as a going concern".[31]

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27 Benjamin Gattie's affidavit dated 23 February 2018 at para 26; Tab 3.

28 Plaintiff's written submissions dated 1 March 2018 at para 17.

29 Ong Kian Chuan's affidavit dated 28 February 2018 at para 33.

30 Ong Kian Chuan's affidavit dated 28 February 2018 at pp 15-38.

34 A second plank of the defendant's argument here was that it would be able to raise enough money to pay its debts through third party investment. The plaintiff's reply to these contentions was that such capital had been promised since July 2017, when parties first started negotiations over payment of the sums due but nothing has come to fruition.[32]

35 Three avenues for fresh capital were suggested by the defendant. The first concerned a Hong Kong private equity fund management company in relation to the development of the defendant's business model. Under this proposed business model, it was contemplated that four companies (TWC Op CO, TWC PropCo, TWC HOldCo and TWC Partners) would be set up as limited corporations in the Cayman Islands for the purposes of carrying out and supporting investment in "co-working properties and related capex, assets and other site-specific elements". [33]

36 Mr Gattie merely asserted in his affidavit that the investor would invest monies in TWC OpCo and TWC PropCo,[34] which were companies "anticipated to be set up as limited corporations in the Caymans Islands".[35] There was no assertion that the investor would provide funds *to the defendant*, or would honour the defendant's existing debts at time of entry. The sole document adduced in support is a term sheet. Mr Gattie stated that this was forwarded to the investor around 1 February 2018.[36] The exhibit, however, is dated 1 February

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31 Ong Kian Chuan's affidavit dated 28 February 2018 at p 18.

32 Ong Kian Chuan's affidavit dated 28 February 2018 at paras 36–37.

33 Benjamin Gattie's affidavit dated 23 February 2018 at paras 28–33.

34 Benjamin Gattie's affidavit dated 23 February 2018 at para 30.

35 Benjamin Gattie's affidavit dated 23 February 2018 at p 108.

36 Benjamin Gattie's affidavit dated 23 February 2018 at para 31.

2017. The date of the exhibit, being *February* 2017, also contradicts Mr Gattie's assertion at paragraph 28 of his affidavit that the parties have been in talks "[*s*]*ince October 2017*".

37 The second suggested source of fresh capital concerned "active discussions" between the defendant and 8M Real Estate ("8M") regarding a "potential merger". 8M is a "leading local real estate investment company that owns and manages a portfolio of high quality [Central Business District] commercial properties within Singapore". It was the defendant's case that if the potential merger took place, a new entity owned by 8M and the defendant would assume the defendant's debts and that entity would be in a better position to repay them.[37]

38 This was a bare assertion. No documents bore any reference to 8M. In *Starluck Construction*, the debtor attempted to rebut the presumption of insolvency by claiming that it could sell a factory building and a plot of land for a sum of about $10 million and $12 million in the open market. This argument was rejected by Chan Seng Onn J on the ground that it did not provide any evidence to substantiate its claims that the factory and land could be sold for the amounts asserted: *Starluck Construction* at [7]. Likewise, I was of the view that no weight should be given to the defendant's unsubstantiated assertions in this case.

39 The third suggested route for fresh capital was a sale of the defendant's business operations as a means of improving liquidity. Mr Gattie valued the defendant's business operations at around $6–10 million as at February 2018. It

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[37] Benjamin Gattie's affidavit dated 23 February 2018 at paras 34-36.

appointed Herbert Smith Freehills LLP as its agent for the intended sale and projected that the intended sale would be completed in the next three to four months.[38] Nevertheless, there was absolutely no evidence that the defendant's operations were worth around $6–10 million. The letter from Herbert Smith reflected only instructions from the defendant and was dated 23 February 2018, the date Mr Gattie's affidavit was filed. No potential investor was mentioned in Herbert Smith's letter. Nor were any letters or any documents or emails evincing interest from any investors exhibited.

40 In this case, the plaintiff first sought to use the presumption of insolvency under s 254(2)(*a*) of the Companies Act and the defendant sought to rebut it. In answering the defendant's contentions as to its solvency, the plaintiff supplied evidence that the defendant was in fact insolvent. Although the parties did not address the requirements of s 254(2)(*c*) of the Companies Act before me, the evidence suggests that the plaintiff may have been able to rely on that provision as well. On this issue, the plaintiff pointed out that two primary indicia of a company's solvency were (i) a cash flow test, the ability to meet demands for debts that have become due; and (ii) a balance sheet test, which is premised on an excess of liabilities over assets.[39] In this case both tests were met in view of the following:

(a) The defendant did not pay its debts despite several demands from the plaintiff to do so.

(b) The net liabilities of the defendant exceeded its net assets by $635,434 in the financial year ending 31 December 2016.

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38 Benjamin Gattie's affidavit dated 23 February 2018 at paras 37-43.

39 Plaintiff's written submissions dated 1 March 2018 at para 21.

(c) The prospects of fresh capital were too speculative.

41 While there is no single test for insolvency and a court must have regard to all the circumstances of the case, these factors are in line with the various criteria set out by Belinda Ang Saw Ean J in *Chip Thye Enterprises Pte Ltd (in liquidation) v Phay Gi Mo and others* [2004] 1 SLR(R) 434 at [17]; [19]; and [20]. [19] is of particular relevance to the case at hand:

> The question to ask is "when was the company unable to pay its debts as they fell due?" It is to be answered by focusing on the company's financial position taken as a whole by reference to whether a person would expect that at some point the company would be unable to meet a liability. The various tests such as quick assets test, balance sheet test or cash flow test are all different measures of solvency and depending on the facts of the case, one test or a combination of tests may or may not be found to be appropriate. A surplus or deficiency of net assets is indicative but not necessarily determinative in establishing whether or not an entity is able to pay all its debts as and when they become due and payable.

Conclusion

42 For the foregoing reasons, and upon confirmation by the Official Receiver that the papers were in order and that she had no objection to the application, the application was granted. Costs were ordered to be taxed if not agreed, and to be paid to the plaintiff out of the assets of the defendant.

Valerie Thean
Judge

Pancharatnam Jeya Putra and Shakti Krishnaveni Sadashiv (AsiaLegal LLC) for the plaintiff;
Yeo Lai Hock Nichol and Qua Bi Qi (JLC Advisors LLP) for the defendant.