IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 69

Civil Appeal No 121 of 2018

Between

Yashwant Bajaj

… *Appellant*

And

Toru Ueda

… *Respondent*

In the matter of Originating Summons (Bankruptcy) No 47 of 2018

In the matter of the Bankruptcy Act (Cap 20)

And

In the matter of Rule 97 of the Bankruptcy Rules (Cap 20)

Between

Yashwant Bajaj

… *Plaintiff*

And

Toru Ueda

… *Defendant*

Version No 1: 27 Oct 2020 (22:41 hrs)

GROUNDS OF DECISION

[Insolvency Law] — [Bankruptcy] — [Statutory demand]

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Yashwant Bajaj
v
Toru Ueda

[2019] SGCA 69

Court of Appeal — Civil Appeal No 121 of 2018
Judith Prakash JA, Chao Hick Tin SJ and Quentin Loh J
18 July 2019

18 November 2019

Chao Hick Tin SJ (delivering the grounds of decision of the court):

Introduction

1 The appeal concerned the question of whether a statutory demand should be set aside on the ground that the debts which formed the subject matter of the statutory demand had not accrued as of the date of that demand. The debts allegedly arose out of a report by an independent accountant whom the parties had appointed pursuant to a settlement agreement to resolve their dispute. The parties had tasked the independent accountant to calculate and populate certain values to reach a final sum to be paid by one party to the other. However, in his report, the independent accountant *qualified* the values he reached, stating that the values were subject to adjustments. The qualified character of these values led to the central issue in this appeal: whether these values were valid for the purposes of the parties' settlement agreement such that debts based on these values had accrued.

2 At the conclusion of the oral hearing before us, we could not agree with the decision of the judge below ("the Judge") when she held that the statutory demand was correctly issued. Accordingly, we allowed the appeal and set aside the statutory demand. We now give the reasons for our decision.

Facts

Background to the dispute

3 The appellant, Yashwant Bajaj ("Mr Bajaj") and the respondent, Toru Ueda ("Mr Ueda") were partners in a fund management business. They were the sole directors and equal shareholders of Hachiman Capital Management ("HCM"), incorporated in the Cayman Islands, which managed a hedge fund in Japan, known as the Hachiman Japan Fund ("the Fund"). From 2004 to 2009, Mr Bajaj and Mr Ueda managed the Fund from Japan. From 2009 to 2011, they managed the Fund in Singapore, and for that purpose, they incorporated in Singapore Hachiman Capital Management Private Limited ("HCM Singapore"), a wholly-owned subsidiary of HCM.

4 Mr Bajaj and Mr Ueda were also directors and equal shareholders in TY Advisors, which was incorporated in the Cayman Islands. From 2004 to 2009, when the Fund was managed in Japan, the business activities were conducted through TY Advisors Japan, a branch of TY Advisors registered in Japan. TY Advisors Japan provided sub-advisory services to HCM to run the Fund.

5 Tricor Singapore Pte Ltd ("Tricor"), an unrelated company, provided services, including book keeping and running a trust account, for HCM Singapore. Kaneyama & Associates ("Kaneyama"), also an unrelated company, handled the financial records of TY Advisors Japan and managed a trust account for it.

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6 In September 2010, the parties decided to close the business of the Fund, and they entered into an agreement on the division of the business assets. Unfortunately, they could not agree on some subsequent transactions and business decisions as well as the nature and scope of their agreement. In the midst of the dispute, Mr Bajaj resigned as a director of the TY entities in March 2011 and also resigned as a director of the HCM entities in May 2011.

The Settlement Agreement

7 In March 2013, Mr Ueda commenced a suit against Mr Bajaj and Mr Bajaj in turn filed a counterclaim. Eventually, the parties brought the litigation to an end by entering into a settlement agreement on 19 August 2014 (the "Settlement Agreement"). By the Settlement Agreement, the parties agreed that a neutral evaluation of the assets by an independent accountant ("the assessor") be undertaken. It was also agreed that the assessor's calculations would be final and binding. The important terms of the Settlement Agreement were the following:

> 1. The parties are to jointly appoint an Independent Accountant to calculate and populate the entries in the enclosed Tables X and Y;
>
> 2. The Settlement Amount is to be calculated as follows with reference to the enclosed Tables X and Y:
>
> a. Add the amounts at (i) Table X(E)(4) and (ii) Table Y(E)(8); and
>
> b. Divide the above sum [at 2(a)] by 2;
>
> …
>
> 6. All costs, fees and expenses of the Independent Accountant are to be borne by the parties equally, whether appointed by the parties or by SMC. SMC's fees for appointing the Independent Accountant (if any) shall also be borne by the parties equally;
>
> …

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> 8. All parties will take all necessary steps to procure that the parties and the Independent Accountant are to be given free and unfettered access to all documents of Hachiman Capital Management and all related entities for the purposes of [1] above;
>
> 9. The Independent Accountant's calculations shall be final and binding on both parties;
>
> 10. The Defendant is to pay the Plaintiff USD50,000;
>
> …
>
> 15. Parties undertake to take all reasonable endeavours to give effect to and implement the terms of this Settlement Agreement;
>
> 16. Parties undertake to return before Mr George Lim SC [*ie*, the mediator] for further mediation to resolve any disputes or issues arising out of the performance of this Settlement Agreement;
>
> …

8 It was clear from the wording of the Settlement Agreement that the assessor was directed to calculate the value of each party's share of HCM as at the end of 2011 on the sub-portfolio basis (Table X) and on the 50/50 basis (Table Y). Tables X and Y were included in the Settlement Agreement. The tables included inputs such as the Net Asset Value ("NAV") of HCM as at 31 December 2010, the trading loss and the effect of certain specified transactions, to arrive at the final position at the end of 2011. The settlement amount was to be the value of Mr Bajaj's share of HCM at the end of 2011, taken to be the average of the value of his share based on the sub-portfolio basis and the value based on the 50/50 basis ("the Settlement Amount"). The Settlement Agreement provided that if the Settlement Amount was a negative sum, Mr Bajaj was to make payment of the sum to Mr Ueda, and *vice versa* if the Settlement Amount was a positive sum.

9 On 4 November 2014, the parties signed a neutral evaluation agreement (the "Neutral Evaluation Agreement"), by which they consented to the

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appointment of Mr Sajjad Akhtar as the "Neutral" to provide the required neutral evaluation service. It was not disputed that this amounted to appointing Mr Akhtar as the assessor under the Settlement Agreement. The parties agreed to a "Documents-only Neutral Evaluation" to be governed by the Singapore Mediation Centre ("SMC") Neutral Evaluation Rules (the "Evaluation Rules").

The neutral evaluation process

10 The assessor only managed to finish his evaluation report (the "Evaluation Report") in November 2017. An amendment was released on 14 March 2018 to correct a typographical error. Evidently, there was a very long delay in the neutral evaluation process, and this delay was due mostly, if not entirely, to Mr Bajaj's conduct. As counsel for Mr Bajaj, Mr Jaikanth Shankar, acknowledged on appeal, his client could have behaved better. The delay was traced by the assessor in Annexure 1 to the Evaluation Report.

11 The case statements of the parties were submitted to the assessor in January 2015 and the replies were submitted by early February 2015. Mr Ueda submitted documents comprising various transaction records, bank statements from 2011 and management accounts provided by Tricor. In view of the complexity surrounding the submission of the documents, the assessor arranged a clarification hearing in April 2015. Mr Ueda duly attended the hearing but Mr Bajaj did not show up. Mr Bajaj claimed that he was overseas and did not receive any email notification, even though he had earlier agreed to the hearing date. The assessor expressed doubts about the genuineness of his claims. That was the beginning of Mr Bajaj's delaying tactics.

12 The assessor attempted to arrange a separate meeting with Mr Bajaj, and this attempt lasted from April to October 2015 because of Mr Bajaj's various

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delays in responding. The assessor emailed the parties in October 2015 indicating that given the lack of response from Mr Bajaj and his refusal to provide reasonable alternative dates to attend a clarification hearing, he would issue his opinion on the documents submitted to date. Mr Bajaj was quick to lodge his objection the next day, stating that he would not accept the opinion without being given a chance to be heard. In subsequent emails, he alleged that the assessor was biased, and declined to accept him as the assessor on the ground that he was allegedly not given an opportunity by the assessor to be heard. The assessor attempted again to schedule a hearing for Mr Bajaj, but again to no avail. Mr Bajaj continued alleging bias on the part of the assessor. On 16 November 2015, the assessor gave Mr Bajaj a final opportunity to be heard before the assessor issued his report. Instead, Mr Bajaj proposed that the assessor be replaced or the matter be referred back to the mediator. However, the SMC and Mr Ueda rejected his proposals.

13 Mr Bajaj finally attended the clarification hearing on 25 November 2015. He raised queries in relation to the accounts and documents submitted by Mr Ueda and also added that he had no access to the documents of HCM as they were in the possession and control of Mr Ueda. At this point, and for the first time, Mr Bajaj expressed a concern that the accounting records did not reflect a loan given by HCM to TY Advisors Japan. In his affidavit filed in the court below, Mr Bajaj explained that 50 million Yen was transferred from HCM to TY Advisors Japan, out of which 35 million Yen should still be in the accounts of TY Advisors Japan after part of the loan was used for the latter's liquidation. Mr Bajaj wanted an account of this 35 million Yen and specifically queried whether it was transferred back to HCM. To address the concerns, in January 2016, the assessor visited Tricor and performed a limited review of the documents of HCM. He reported back to the parties in February 2016, and

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provided a detailed breakdown of the loan from HCM to TY Advisors Japan and the repayment thereof.

14 Mr Bajaj remained unhappy with his lack of access to the documents. He wanted to communicate with Mr Kaneyama (of Kaneyama) in connection with TY Advisors Japan to obtain confirmation of an account of transactions resulting in balances due from TY Advisors to HCM. The parties continued to argue over email until Mr Ueda finally relented and agreed to provide access to Mr Bajaj in respect of the requested documents. In June 2016, Mr Ueda authorised Tricor and Mr Kaneyama to release the relevant documents to Mr Bajaj. Tricor forwarded the requested documents to Mr Bajaj in August 2016. Mr Bajaj said that he never received any response from Mr Kaneyama.

15 Mr Bajaj then insisted that he wanted to see the original documents from Cayman National Bank. However, Mr Ueda explained that he did not have any original bank statements. It was also undisputed that the bank account was dormant and needed to be reactivated before the original statements could be retrieved. In September 2016, the SMC attempted to arrange a meeting between the assessor and the parties, but without success. In November 2016, the SMC again attempted to arrange a meeting between the assessor, the mediator and the parties. Mr Bajaj refused to attend the meeting unless he received the documents kept with Kaneyama and the Cayman National Bank. In the same email, Mr Bajaj also raised a new issue for the first time: he alleged that HCM Singapore was wound up by Mr Ueda in 2014 without his consent and that funds in HCM Singapore were sequestered by Mr Ueda through the winding up (the "Winding Up Issues"). Mr Bajaj continued to make these allegations against Mr Ueda over the next few months.

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16 From December 2016 to April 2017, Mr Bajaj continued to pursue his points of contention, namely access to documents from Cayman National Bank and Mr Kaneyama, and the Winding Up Issues. Mr Ueda rebutted the Winding Up Issues while acknowledging that Mr Bajaj was free to present his allegations in an appropriate forum.

17 In May 2017, the assessor suggested that the parties return to mediation. Mr Ueda was not agreeable to mediation, while this time, Mr Bajaj agreed to go back to mediation because in his view, no assessment could be made based on the false data submitted by Mr Ueda. Mr Bajaj listed various issues of contention in support of his claim that the data was false. In response to those contentions, the assessor replied, stating that the only relevant dispute was with regard to a sum of approximately 4.9 million Yen in the funds of TY Advisors that was allegedly not accounted for, and that the Winding Up Issues were irrelevant to his scope of work because the winding up occurred after 2011.

18 Mr Ueda responded to the dispute over the 4.9 million Yen held in the funds of TY Advisors, and explained that there was no need to account for the sum in HCM's accounts because TY Advisors was neither a parent company nor a subsidiary of HCM. Subsequently, the assessor wrote to Tricor for the transactions between HCM and TY Advisors. Tricor confirmed that it did not have any agreement or invoices in support. The assessor duly informed the parties of this.

19 Although the assessor explained again to the parties that the Winding Up Issues were outside the scope of his terms of reference, Mr Bajaj continued to allege that the data in the hands of the assessor was false and wanted to contact the mediator on the Winding Up Issues. The assessor did not hear further from Mr Bajaj on any discussion he had with the mediator. Thus, he decided to

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issue "a qualified opinion". Mr Ueda paid Mr Bajaj's share of the fees in order to procure the release of the Evaluation Report.

The Evaluation Report

20 The Evaluation Report was at the crux of the current appeal. Mr Bajaj's position was that because the valuations in the Evaluation Report were qualified, there was no accrued debt which he had to pay to Mr Ueda.

21 The assessor noted in the Evaluation Report that it was unfortunate that the important matter of the underlying documentation was not addressed in the Settlement Agreement. After setting out the long-drawn process of the evaluation, he opined that it was "apparent that any further attempts to get Parties' agreement on the underlying documents and Financial Statements to be used by NE [*ie*, the assessor] for populating Table X and Table Y [were] futile", and the "only possible alternative [was] for the Parties to jointly appoint an Independent Auditor to audit the Financial Statements of HCM". Thus, he proceeded "to prepare [his] report with appropriate qualifications as per Rule 10.5 of SMC's Neutral Evaluation Rules".

22 More pertinently, the assessor stated that he was "*unable to wholly carry out the terms of reference of [his] appointment*" [emphasis added], due to the various disagreements between the parties. While Mr Ueda presented the NAV as extracted from the accounts prepared by Tricor, Mr Bajaj refused to accept the NAV on the ground that he had been denied access to the underlying source documents and information. The assessor stated that this was "a fundamental issue which Parties should have dealt with either a) prior to entering into the Settlement Agreement, or b) by providing a procedure in the Settlement Agreement as to how the NAV at end 2010 was to be determined". The assessor

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was of the view that it was not his role to perform an audit of HCM in order to derive the NAV as at 31 December 2010 or for the year ended 31 December 2011, especially because Tables X and Y in the Settlement Agreement stated that audited accounts of HCM were excluded from the documents the assessor would have access to.

23 In the course of the evaluation process, the assessor stated that he had "considered issuing an opinion on the basis of documents submitted by Mr. Ueda alone (as previously pointed out, Mr. Bajaj [had] not submitted any documents); but to do so would be inconsistent with the principle of natural justice". He opined that in order to enable the Settlement Agreement to be implemented, the parties "must adopt either of the following": (a) take the dispute back to mediation to come to an agreement on the issue of the documents to be used to determine the NAV and the Settlement Amount; or (b) appoint an independent auditor to perform an audit of the financial statements of HCM for 2010 and 2011.

24 The assessor then proceeded to give his qualified opinion as follows:

> **D. QUALIFIED OPINION IN ACCORDANCE WITH RULE 10.5 6 OF THE NEUTRAL EVALUATION RULES**
>
> 31. Based on the case statement and underlying documents submitted by Mr. Ueda, Tables X and Y of the Settlement Agreement, populated as required under clause 1 of the [Settlement Agreement], are attached herewith as Annexures 3 and 4. The settlement amount as stated in both Annexures 3 and 4 amounts to $226,481.92 payable by Mr. Bajaj to Mr. Ueda. ***However, these numbers are subject to adjustments for the reasons described in Paragraph 29 above.*** Accordingly, the NAV as at 31 December 2011 as well as the settlement amount of S$226,481.92 are ***subject to changes depending on adjustments that may result from***:
>
> > a) Parties reaching agreement on disputed items described in paragraph 29 (and others, if any) through mediation; or,

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> b) Parties agreeing to resolve the disputed items by appointing an independent auditor to perform an audit of the financial statements of HCM for the periods ended 31 December 2010 and 31 December 2011.
>
> [original emphasis omitted; emphasis added in bold italics]

25 Subsequently, an amendment was released in March 2018 to correct "the typographical error in the Currency of settlement amount". In doing so, a few changes in wording were also made to para 31 of the Evaluation Report. The amended paragraph read as follows (the changes in wording are underlined):

> *Based on the case statement and underlying documents submitted by Mr. Ueda, Tables X and Y of the Settlement Agreement, populated as required under clause 1 of the [Settlement Agreement], are attached herewith as Annexures 3 and 4. The settlement amount as stated in both Annexures 3 and 4 amounts to* ***US****$226,481.92 payable by Mr. Bajaj to Mr. Ueda. However, the numbers submitted by Mr. Ueda are not accepted by Mr. Bajaj for the reasons described in Paragraph 29 above. Accordingly, the figures derived for the NAV as at 31 December 2011 are subject to changes depending on adjustments that may result from:*
>
> > *a) Parties reaching agreement on disputed items described in paragraph 29 (and others, if any) through mediation; or,*
> >
> > *b) Parties agreeing to resolve the disputed items by appointing an independent auditor to perform an audit of the financial statements of HCM for the periods ended 31 December 2010 and 31 December 2011.*
>
> The amendment is underlined and in bold.
>
> [original emphasis in italics and underlined bold italics; emphases added in underline]

26 Counsel for Mr Bajaj and Mr Ueda did not place any emphasis on the changes in the wording made in the amendment. The changes in the wording were inconsequential because they did not change the meaning of para 31 of the Evaluation Report.

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The Statutory Demand

27 Following the issuance of the Evaluation Report, Mr Ueda's solicitors wrote to Mr Bajaj on 9 April 2018 demanding payment of sums due under the Settlement Agreement. Mr Bajaj ignored the demand. Accordingly, on 17 April 2018, Mr Ueda served a statutory demand (the "Statutory Demand") on Mr Bajaj demanding payment of the following debts:

(a) debt of US$50,000 pursuant to cl 10 of the Settlement Agreement (the "Clause 10 Sum");

(b) Settlement Amount of US$226,481.92 pursuant to cl 3 of the Settlement Agreement; and

(c) Mr Bajaj's share of the fees under cl 6 of the Settlement Agreement, being S$32,399.60 (the "Clause 6 Sum").

The proceedings below

28 Mr Bajaj applied to set aside the Statutory Demand in Originating Summons (Bankruptcy) No 47 of 2018. The proceedings were first heard by an Assistant Registrar, who dismissed Mr Bajaj's application on 13 July 2018. On appeal to the High Court in Registrar's Appeal No 177 of 2018, the Judge upheld the Assistant Registrar's decision and dismissed the appeal.

The parties' arguments below

29 Mr Bajaj sought to set aside the Statutory Demand on the basis of r 98(2)(*a*) and r 98(2)(*b*) of the Bankruptcy Rules (Cap 20, R 1, 2006 Rev Ed) ("Bankruptcy Rules"). He argued that the debts in the Statutory Demand were substantially disputed by him or alternatively, he had a valid counterclaim, set-off or cross demand that exceeded the value of the demanded sums. His counsel

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contended that the following gave rise to triable issues (*Yashwant Bajaj v Toru Ueda* [2018] SGHC 229 at [51], [58] and [85]):

(a) Mr Ueda had breached cl 8 of the Settlement Agreement (on disclosure obligation) in the neutral evaluation process, which disentitled him from deriving any benefit from the Settlement Agreement.

(b) The opinion given by the assessor was qualified, and was not final and binding.

(c) The proper course would be to return to mediation under cl 16 of the Settlement Agreement.

(d) The Clause 10 Sum was not due as it was conditional on the Settlement Amount being made final and binding.

(e) The Clause 6 Sum was not due.

Counsel for Mr Bajaj moreover argued that because the legal effect of the words of the Settlement Agreement was disputed by the parties, there was a question of law and hence a genuine triable issue.

30 Mr Bajaj also contended that he had a valid cross claim in the form of an action in fraud or oppression based on the alleged non-repayment of the loan given by HCM to TY Advisors Japan, the alleged failure to account for monies in the TY entities prior to their liquidation and the Winding Up Issues (*Yashwant Bajaj v Toru Ueda* [2018] SGHC 229 at [89]).

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Decision below

31 The Judge's decision in Registrar's Appeal No 177 of 2018 can be found at *Yashwant Bajaj v Toru Ueda* [2018] SGHC 229 (the "GD").

32 The Judge held that to set aside a statutory demand on the basis of r 98(2)(*a*) and r 98(2)(*b*), the debtor must show that there is a "genuine triable issue" (para 144(3) of the Supreme Court Practice Directions) in relation to either a valid counterclaim, set-off or cross demand (r 98(2)(*a*)) or a dispute over the debt on substantial grounds (r 98(2)(*b*)) (GD at [49]). The mere fact that a question of law has been raised by the debtor cannot and should not automatically result in the setting aside of a statutory demand; a court exercising bankruptcy jurisdiction may legitimately determine questions of law (GD at [54]).

33 On the allegation that Mr Ueda failed to disclose documents, the Judge held that Mr Ueda had sufficiently discharged his obligations in submitting his case statement and the documents contained therein. His obligations were limited in scope to documents relevant for the purpose of calculating and populating Tables X and Y. The assessor was satisfied, as early as October 2015 when he wrote to the parties indicating that he would issue an opinion if Mr Bajaj refused to facilitate the scheduling of a meeting, that the documents available were sufficient (GD at [60]). The Judge also found that Mr Ueda had authorised Kaneyama to release relevant documents to Mr Bajaj. In any case, the assessor went further and reviewed the records at Tricor's offices in relation to the allegation about the loan made to TY Advisors Japan. There was no merit in Mr Bajaj's contention about the loan (GD at [61]).

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34 The Judge held that Mr Bajaj's behaviour in the course of the evaluation process was squarely in breach of his duty to cooperate which was expressly required of him in cl 15 of the Settlement Agreement (GD at [66]). Mr Bajaj's delay in raising his concerns and his insistence on the production of documents that he knew were not within Mr Ueda's power, control or possession, resulted in the qualification of the assessor's report. Mr Bajaj "may not be allowed the benefit of his own misconduct" (GD at [67]).

35 The Judge was of the opinion that the assessor's qualifications did not render the Evaluation Report and the Settlement Amount calculated invalid (GD at [71]). She reasoned that where an expert's terms of reference had not been breached, the situations where an expert determination could be challenged were very narrow, and limited to errors that appeared on the face of the expert's report (GD at [72] and [73]). The Judge found that the assessor had complied with his terms of reference (GD at [75]). Although the assessor appeared to think that he did not wholly carry out the terms of reference, it did not matter because only his "*calculations* are binding on the parties" and the "scope of [his] remit did not extend to ruling on the legal effect of his award" (GD at [77]). The Judge relied on the nature of the evaluation being a documents-only evaluation to support her finding that the assessor's role was intended to be narrow in scope; the evaluation was intended to be a confined process concluding with an efficient expert calculation (GD at [78]).

36 The Judge then turned to consider cl 16 of the Settlement Agreement, which stated that parties were to return to mediation to resolve any disputes or issues. The Judge held that, reading cl 16 with cl 15, if a particular request to refer a dispute to mediation was not part of a reasonable endeavour to give effect to and implement the terms of the Settlement Agreement, the request would fall outside the scope of cl 16. Clause 16 was not applicable to Mr Bajaj's attempt

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to return to mediation because it was an unreasonable attempt to stymie the implementation of the Settlement Agreement (GD at [83] and [84]).

37 On the Clause 10 Sum, the Judge held that on the face of the Settlement Agreement, the event that triggered the obligation to pay the debt was the release of the Evaluation Report and there was nothing to suggest that the Settlement Amount affected in any way the obligation to pay the sum (GD at [87]). On the Clause 6 Sum, the Judge held that once the fees and expenses arose, Mr Bajaj's share was due (GD at [88]).

38 As to Mr Bajaj's alleged cross claim, the Judge held that there was no basis for the contentions of fraud, and there was no assertion made as to how the label of "oppression" grounded a claim (GD at [89] and [90]). The Evaluation Report made clear that the assessor had investigated the claim on the loan from HCM to TY Advisors Japan and he was satisfied with the manner in which the loan was dealt with (GD at [91]).

39 Lastly, the Judge decided not to grant a conditional setting aside of the Statutory Demand, because this was not a case where the dispute was incapable of resolution through affidavit evidence alone because of equivocal documentary evidence (GD at [93] and [94]).

Issues on appeal

40 The central issue in this appeal was whether the Statutory Demand should be set aside. On appeal, Mr Bajaj agreed that the Clause 6 Sum should be paid, and stated that he had paid it before the appeal hearing. He argued, however, that the Settlement Amount and the Clause 10 Sum were not crystallised and/or accrued debts. In this respect, the following questions had to be considered to determine whether the Statutory Demand should be set aside:

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(a) whether the Settlement Amount had accrued as a debt, and in this regard, the following sub-issues arose for consideration:

(i) whether the assessor had abided by the terms of reference, and linked to this was the question of whether qualified calculations could amount to a debt; and

(ii) the legal effect of Mr Bajaj's behaviour on the outcome of the neutral evaluation process;

(b) whether the Clause 10 Sum had accrued as a debt.

41 Before we turn to these respective issues, we set out the applicable law on statutory demand.

The law on statutory demand

42 Where a party becomes liable to pay a fixed sum of money under a contract, the other party can sue in debt for payment of that sum based on the contractual obligation undertaken: *Chitty on Contracts* (H G Beale gen ed) (Sweet & Maxwell, 33rd Ed, 2018) at para 27-002. To pursue payment of the debt, another avenue open to the other party is to issue a statutory demand for the sum. In the present case, Mr Ueda took the latter course and sought to enforce the payment of the Settlement Amount and the Clause 10 Sum as debts via the Statutory Demand sent to Mr Bajaj, based on the contractual obligations in the Settlement Agreement. In response, Mr Bajaj applied to set aside the Statutory Demand.

43 Rule 97(1) of the Bankruptcy Rules allows a debtor to apply to court to set aside the statutory demand that he has received on any of the grounds set out in r 98. Rule 98 states:

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> **Hearing of application to set aside statutory demand**
>
> **98.**—(1) On the hearing of the application, the court may either summarily determine the application or adjourn it, giving such directions as it thinks appropriate.
>
> (2) The court shall set aside the statutory demand if —
>
> (*a*) the debtor appears to have a valid counterclaim, set-off or cross demand … ;
>
> (*b*) the debt is disputed on grounds which appear to the court to be substantial;
>
> (*c*) …
>
> (*d*) rule 94 has not been complied with; or
>
> (*e*) the court is satisfied, on other grounds, that the demand ought to be set aside.
>
> …

44 Rule 94 states:

> **Form and contents of statutory demand**
>
> **94.**—(1) A statutory demand shall be in Form 1 and shall be dated and signed by the creditor himself or by a person authorised to make the demand on the creditor's behalf.
>
> (2) The statutory demand shall state the actual amount of the debt that has accrued as of the date of the demand.
>
> …

45 Paragraph 144(3) of the Supreme Court Practice Directions provides that where the debtor disputes the debt (not being a debt subject to a judgment or order), the court "will *normally* set aside the statutory demand if, in its opinion, on the evidence there is a *genuine triable issue*" [emphasis added].

46 If the debtor disputes the claim in the statutory demand and that dispute appears to the court to be substantial, the bankruptcy court is obliged to set aside the statutory demand (*Wong Kwei Cheong v ABN-AMRO Bank NV* [2002] 2 SLR(R) 31 ("*Wong Kwei Cheong*") at [3]). The High Court in *Wong Kwei*

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Cheong further explained that it is not the function of the bankruptcy court, at the hearing of an application to set aside a statutory demand, to conduct a full hearing of the dispute and adjudicate on the merits of the creditor's claim (at [3]). With regard to the difference in phrasing in r 98(2)(*b*) of the Bankruptcy Rules and in para 144(3) of the Supreme Court Practice Directions, the court opined that it could be that the two phrases "in effect mean the same thing" but the phrasing in r 98(2)(*b*) should be preferred (at [7]) .

47 This court clarified the relevant test in *Mohd Zain bin Abdullah v Chimbusco International Petroleum (Singapore) Pte Ltd and another appeal* [2014] 2 SLR 446 ("*Mohd Zain*"). While *Mohd Zain* was concerned with the issue of staying of bankruptcy proceedings, and not squarely with the issue of setting aside a statutory demand, the court nevertheless made the following pronouncement:

> 29 This suggests that the court is not *obliged* to set aside a statutory demand where there is a genuine triable issue [referring to para 144(3) of the Supreme Court Practice Directions]. It will only *normally* do so. It follows, therefore, that the criterion of 'grounds which appear to the court to be substantial' under r 98(2)(*b*) constitutes a higher threshold. …
>
> 30 … The court must examine *all the facts* to ascertain whether the 'genuine triable issue' test in para 144 of the Practice Directions is satisfied. The upshot of this is that the court will only set aside a statutory demand (and thereby require a creditor to initiate a civil suit if he wishes to pursue the claimed debt further) where the debtor is able to adduce evidence on affidavit that raises a triable issue.
>
> [emphasis in original]

48 In *Ang Ai Tee v Resource Credit Pte Ltd* [2017] 5 SLR 402, where the issue of setting aside a statutory demand arose, the High Court held that the requirement of "substantial" grounds in r 98(2)(*b*) goes beyond the standard of a mere triable issue for the purposes of a summary judgment application (at [29]).

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49 While it is not the role of this court to conduct a full hearing of the dispute and adjudicate on the merits of the creditor's claim (*Wong Kwei Cheong* at [3]), we agreed with the Judge that the court could legitimately decide on questions of law in an application to set aside a statutory demand in appropriate instances. The mere fact that a legal issue is raised should not automatically establish "substantial" grounds justifying the setting aside of a statutory demand.

50 In this appeal, counsel for Mr Bajaj sought to persuade this court that the Statutory Demand should be set aside on the grounds that the Settlement Amount was unenforceable (because the assessor acted outside his terms of reference and the Settlement Amount was qualified) and the Clause 10 Sum had yet to crystallise. In this regard, Mr Bajaj relied on r 94(2) and r 98(2), specifically rr 98(2)(*d*) and 98(2)(*e*), of the Bankruptcy Rules. Relying on r 98(2)(*d*), it was argued that the Statutory Demand did not state the "actual amount of the debt that [had] accrued as of the date of the demand", falling foul of r 94(2). In this regard, counsel relied on *LKM Investment Holdings Pte Ltd v Cathay Theatres Pte Ltd* [2000] 1 SLR(R) 135 ("*LKM Investment*"), where Judith Prakash J (as she then was) held that the statutory demand made under s 254(2)(*a*) of the Companies Act (Cap 50, 1994 Rev Ed) was invalid because it was made in respect of a debt that had not accrued as of that date (at [15]).

51 Counsel for Mr Ueda took issue with Mr Bajaj changing the sub-rules in r 98(2) which he relied upon on appeal from those he had relied upon in the court below. He claimed that Mr Bajaj's challenge was "made on the basis of a new question of law", and accused him of changing his tactics in order to circumvent the requirement under rr 98(2)(*a*) and 98(2)(*b*) to show that there was a genuine triable issue. He further argued that r 98(2)(*d*) did not apply because it only allowed procedural or technical reasons to be raised with regard

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to non-compliance with r 94 (*Wheeler, Mark v Standard Chartered Bank (Singapore) Limited* [2018] SGHC 205 at [20]). The ground Mr Bajaj was pursuing was not a procedural one.

52 Counsel for Mr Bajaj explained that the point that the Settlement Amount and the Clause 10 Sum were not crystallised and/or accrued debts had been made in the court below. But for the avoidance of doubt, he sought leave to argue that the Settlement Amount and the Clause 10 Sum were not crystallised and/or accrued debts.

53 We found the objection raised by counsel for Mr Ueda to be inconsequential because Mr Bajaj relied on r 94(2) in general; furthermore, Mr Bajaj relied on r 98(2)(*e*) in particular, which is a catch-all provision. The change in the sub-rules relied on was also unimportant as the points Mr Bajaj raised on appeal had been argued in the court below. Nevertheless, we agreed with counsel for Mr Ueda that the points raised by Mr Bajaj to set aside the Statutory Demand fell to be examined under r 98(2)(*b*) of the Bankruptcy Rules because Mr Bajaj was disputing the existence of the debts. The dispute was not about the failure to state the actual amount of the debt accrued – the dispute did not relate to the form and content of the statutory demand under r 94 – but it was about the existence of the debt itself. *LKM Investment* did not advance Mr Bajaj's position, for the issue of the applicability of the sub-rules of r 98(2) did not arise in that decision. In fact, counsel for Mr Bajaj also brought up r 98(2)(*b*) as a ground for setting aside the Statutory Demand in his written submissions. All the points raised by counsel for Mr Bajaj were geared towards r 98(2)(*b*). Thus we saw no need to grant leave for him to make submissions based on r 98(2)(*d*). We considered the matter on the basis of whether the points raised by counsel for Mr Bajaj were sufficient to satisfy r 98(2)(*b*). Under r 98(2)(*b*), Mr Bajaj had to show that there were *substantial grounds for disputing the debts*.

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Issue 1: whether the Settlement Amount had accrued as a debt

Parties' submissions

54 Counsel for Mr Bajaj, Mr Jaikanth Shankar, put his arguments simply: the Settlement Amount in the Evaluation Report was not "final" for the purposes of the Settlement Agreement since the assessor specifically contemplated a review of the sum. Thus, the Judge erred in holding that the assessor had complied with his terms of reference. Mr Shankar drew our attention to the English cases of *Shorrock Ltd & Anor v Meggitt plc* [1991] BCC 471 ("*Shorrock*") and *Khaled El Bishlawi and another v Minrealm Limited and others* [2012] EWHC 343 ("*Khaled*"), for the proposition that a qualified expert determination was not effective. We note that these cases were not placed before the Judge for her consideration. Mr Shankar also averred that a party's behaviour in the evaluation process was irrelevant to the question of whether a debt had accrued.

55 On the contrary, counsel for Mr Ueda, Mr Jeremy Leong, agreed fully with the Judge's decision. He averred that the assessor was able to carry out his terms of reference. He emphasised that the assessor's remit was to carry out a documents-only evaluation and calculate the Settlement Amount. In fact, the assessor's view of his role was to complete Tables X and Y and derive the final position. Mr Leong further agreed with the Judge that Mr Bajaj could not take advantage of his own breach of contract. But for the difficulties caused by Mr Bajaj, the assessor would not have had any issues in issuing an unqualified report.

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(i) Whether the assessor abided by the terms of reference

56 The question of whether the Settlement Amount that the assessor arrived at was an accrued debt in turn depended on whether he had abided by his terms of reference, and this was a matter of contractual interpretation of the Settlement Agreement and the other terms agreed between the parties. Where parties opt for an expert determination, the law is clear that if the expert has not complied with the terms of his appointment, the expert's decision can be reviewed, even if parties have agreed that the decision is to be final (*Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR(R) 634 ("*Evergreat*") at [41]; *Geowin Construction Pte Ltd (in liquidation) v Management Corporation Strata Title Plan No 1256* [2007] 1 SLR(R) 1004 at [19]). The construction of the terms of reference, governed by the well-established principles of contractual interpretation, is a matter for the court to decide. Where the court finds that the expert did not comply with the parties' agreement, his or her determination would not be valid and enforceable (see for example *Sofia Shafi v Alexandra Rutherford* [2014] EWCA Civ 1186).

57 The Judge found that the assessor had complied with the terms of reference. She reasoned that the assessor's role was "merely to 'calculate and populate' the entries [in Tables X and Y]", and he did so, arriving at a sum which was characterised by the Settlement Agreement as "final and binding" (GD at [76]). With respect, we could not agree. Let us explain.

58 We start by setting out the terms of reference for the assessor's determination in the present case. They were found in the Settlement Agreement, the Neutral Evaluation Agreement, and the Evaluation Rules. The important clauses and rules were the following:

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(a) Clause 1 of the Settlement Agreement: the assessor was to "calculate and populate" the entries in Tables X and Y;

(b) Clause 2 of the Settlement Agreement: the Settlement Amount was to be "calculated" with reference to the values in Tables X and Y;

(c) Clause 9 of the Settlement Agreement: the assessor's calculations were to be "final and binding" on both parties;

(d) Clause 2.5 of the Neutral Evaluation Agreement: the opinion provided by the assessor was to be binding;

(e) Clause 2.6 of the Neutral Evaluation Agreement: the neutral evaluation was to be a documents-only neutral evaluation governed by the Evaluation Rules;

(f) Rule 10.1 of the Evaluation Rules: the assessor was to express an opinion based on the case statements and documents submitted without further hearings or meetings in a documents-only evaluation, and there were to be no evaluation sessions, but the assessor could raise queries and/or seek clarification on the points raised in the case statements; and

(g) Rule 11.3 of the Evaluation Rules: the comments made and opinions expressed by the assessor were to be read subject to the constraints under which the evaluation was conducted.

59 The central characteristic of the Settlement Amount reached by the assessor, which gave rise to the present dispute between the parties, was that the assessor specifically *contemplated a review of the sum*. In the Evaluation Report, the assessor stated that the numbers he populated in Tables X and Y

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"[were] subject to adjustments", and the Settlement Amount was "subject to changes depending on adjustments" (see [24] above). In this regard, while the assessor had submitted a set of values in Tables X and Y, and reached a sum as the Settlement Amount for the purpose of the Settlement Agreement, the values in Tables X and Y and the sum were clearly ***qualified***. The question is whether the assessor had calculated and populated Tables X and Y, and reached a Settlement Amount that was "final and binding".

60 The parties tasked the assessor to calculate the Settlement Amount by calculating and populating the values in Tables X and Y. In this regard, the assessor was given latitude to determine the values in Tables X and Y, based on his expertise and exercise of professional judgment. This was the position which both Mr Bajaj and Mr Ueda essentially converged on. However, the latitude given to the assessor did *not* envisage the possibility of calculating and populating numbers that the assessor himself said were subject to adjustments. To "calculate and populate" must necessarily mean to *determine* values with certainty. It means that the assessor had to reach a set of values for Tables X and Y that was definite and settled, incorporating his professional expertise. This construction is further buttressed by the word "final" in cl 9 of the Settlement Agreement, which meant that the decision was not to be subject to review (Clive Freedman & James Farrell, *Kendall on Expert Determination* (Sweet & Maxwell, 5th Ed, 2014) at para 7.8-2). There needed to be a *determination* of the calculations that was definite and settled, and in turn, a *determination* of the Settlement Amount that was certain and not subject to review. The requirement of a determination of a final Settlement Amount is consonant with the objective intention of the parties in entering into the Settlement Agreement in the first place – to resolve completely the dispute

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between them by appointing an independent accountant to determine the values they were unable to agree on.

61 Looking at the wording of the terms of reference as encapsulated in the Neutral Evaluation Agreement and the Evaluation Rules, we also did *not* find any indication of any objective intention of the parties to accept a *qualified* set of calculations as "final". We looked at r 10.5(a) of the Evaluation Rules in particular because the assessor expressly stated that his qualified opinion was given in accordance with that rule. Rule 10.5(a) states that the Neutral "*may qualify the opinion to explain the constraints under which the opinion was rendered*" [emphasis added], where the opinion is given based solely on the submissions and evidence available. This occurs when the Neutral was of the view that further investigations should be conducted but the parties did not agree to commission such an investigation.

62 On the face of r 10.5(a) of the Evaluation Rules, it did not apply to the evaluation between the parties, which was a documents-only evaluation, because it only applies to neutral evaluations with evaluation sessions. It is stated in r 10.5 that any investigation conducted by the Neutral will "form part of the Evaluation Session(s)". Evaluation sessions do not apply to a documents-only evaluation, for which the Evaluation Rules dictates that there is to be no evaluation session, although the Neutral can raise queries and/or seek clarification on the points raised in the parties' case statements (r 10.1). In any case, r 10.5(a) permits a qualification in the sense of an explanation of the constraints under which the opinion is rendered. It does not permit a Neutral to relegate his task by stating that he is unable to come to any final number, *ie*, a determination.

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63 Mr Leong placed great emphasis on the point that the qualifications in the Evaluation Report had not prevented the assessor from carrying out his terms of reference, as the qualifications did not contain any statement that suggested he was unable to populate Tables X and Y and to calculate the Settlement Amount. We did not see much force in this argument as it begged the question as to whether values reached by the assessor that were qualified still fell within the terms of reference. Mr Leong also argued that the comments of the assessor on the legal effect of his Evaluation Report, including his view that additional steps needed to be taken by the parties to resolve their dispute on the documents, were irrelevant to the court's contractual construction. While we agreed that what an independent expert says in his evaluation report cannot affect how a court should construe a contractual term, what he says is relevant for the court to determine whether his conclusions are within his terms of reference and in turn whether those conclusions should be given legal effect.

64 Mr Leong further submitted that the assessor could make a determination based purely on the documents submitted by Mr Ueda, emphasising that the assessor's remit was to carry out a documents-only neutral evaluation. He pointed out that the assessor had sent an email in October 2015 to the parties, in which the assessor stated that he would be compelled to proceed with issuing his opinion on the basis of the documents submitted to date (see [12] above). Moreover, Mr Leong averred that Mr Bajaj had agreed to a documents-only neutral evaluation, despite being aware that he did not have any documents. While these points were valid, they did not greatly assist in determining the critical question of whether the assessor had made a final determination or award. What was important for deciding whether the values arrived at in the Evaluation Report came within the Settlement Agreement was to look at what the assessor actually said or did. When he released his Evaluation

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Report, the assessor did not make a finding that he could rely wholly on the documents submitted by Mr Ueda. On the contrary, he was troubled by the lack of an agreed set of financial statements that he could refer to for the purposes of deriving the NAV as at end 2010 as well as determining the net profit or loss for the year ended 31 December 2011. He used the documents submitted by Mr Ueda for the values in Tables X and Y, but went on to qualify those values by stating in clear terms that they were "subject to changes depending on adjustments" that might arise from parties reaching an agreement on the disputed documents or parties agreeing to resolve their dispute over the documents by appointing an independent auditor to perform an audit of the financial statements of HCM for the periods ended 31 December 2010 and 31 December 2011. We ought to mention that Mr Bajaj only started to dispute the documents submitted by Mr Ueda after the assessor had sent out his email to the parties in October 2015.

65 Based on our construction of the assessor's terms of reference, the values in Tables X and Y stated by the assessor in the Evaluation Report were not calculations and populations falling under cl 1 of the Settlement Agreement, because the values were subject to adjustments. The Settlement Amount that the assessor stated was likewise not a calculation under the Settlement Agreement. In the light of what was expressly stated in the Evaluation Report, in our opinion, the values given and the Settlement Amount arrived at by the assessor were nothing more than tentative figures. He clearly had in mind that the figures might have to be adjusted. They were not final. Accordingly, they were uncertain and thus not valid for the purposes of the Settlement Agreement. It would be different if the assessor had only stated that "based on the documents submitted to me, which regrettably did not include any from Mr Bajaj as he refused to do so, I determine that …".

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66 In coming to our decision, we found the cases of *Shorrock* and *Khaled*, brought to our attention by Mr Shankar, to be particularly instructive. The case of *Shorrock* concerned an agreement regarding the sale of a company, consideration for which was to be adjusted by reference to an amount known as the "October net deficit". The parties agreed for joint auditors of the company to give a certificate of the October net deficit. The joint auditors released a certificate which stated (*Shorrock* at 473):

> In accordance with the requirements of cl. 8 of the agreement … we confirm that the October net deficit, … amounted to £1,954,224.
>
> We draw attention to our audit report dated 10 May 1989 on these financial statements in which we stated that we were unable to determine the adequacy or otherwise of a provision of £730,800 in respect of potential legal claims against the company.

67 Fox LJ, in delivering the judgment with which Staughton LJ and Sir Roger Ormrod agreed, opined that certifying "involves an expression of certainty" as the "person giving the certificate is required to express his assurance or satisfaction as to the existence of the state of affairs which is certified" (*Shorrock* at 474). Thus, he held that the consequence of the statement of the joint auditors "was that their attempt to certify was not really possible" and they "could not certify a sum when they were not satisfied as to one of the constituents of the sum" (at 475). He reasoned that the joint auditors were entitled to accept, if they thought fit, the directors' assessment of the value of the legal claims but they did not do so. Instead, the joint auditors simply said that they could not reach a conclusion upon the matter. It was open to the auditors to certify that the October net deficit was £1,954,224 or refuse to certify if they felt they were unable to do so. However, it was not open to them to state a sum and then go on to say in effect they were not sure if that sum was correct, for that "defeats the whole purpose of requiring a certificate, since it destroys

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the certainty which the parties required by providing for a certificate" (at 475). Fox LJ concluded that the statement was not a certificate of the amount of the October net deficit.

68 Fox LJ's reasoning in *Shorrock* was based on a construction of the agreement between the parties, *ie*, on what the parties meant by a "certificate". In our view, the reasoning there was applicable to the facts of the present case. The parties, in reaching the Settlement Agreement, were seeking for an expert determination of the entries in Tables X and Y and the ultimate Settlement Amount. *They intended the assessor to determine a sum that was certain, to definitively conclude the dispute between them.* However, and unfortunately, what the assessor gave them were figures that were uncertain because they were subject to review. It was open to the assessor to base his values entirely on Mr Ueda's submitted documents to reach a final determination, but he did not do so. He simply stated that the values, including the Settlement Amount, were subject to adjustments.

69 The reasoning in the case of *Khaled* was similarly applicable to the present facts. In that case, a valuer was appointed by the parties as an expert to value the shares to be transacted between them and determine the appropriate "adjustment amount" as defined in the parties' agreement. The price to be paid for the shares was to be reduced by the adjustment amount, if any, as determined by the valuer. The valuer valued the shares at £175,000 and calculated the total amount due from the purchasers to the seller. However, in his valuation, the valuer stated that "[a]ny valuation … [was] subject to the possible need to increase that valuation as a result of the Hereford House and Shelton House projects". There was an issue as to whether the company had an interest in the Hereford House project and another issue as to whether there was an understatement of profits for the Shelton House project. The valuer also stated

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that he was unable to reach a determination as to the adjustment amount because there was a dispute as to the beneficial ownership of Hereford House. He maintained that he could not make a final determination until such time as the beneficial ownership had been agreed between the parties (*Khaled* at [7] and [8]). The English High Court held that on a true construction of the contract between the parties, the adjustment amount had to be determined before the contract could be completed (at [16]). The High Court also held that the valuation of the shares in itself was "not final" and could not be given effect, because the valuer felt unable to determine the values as a result of his doubts about the correct treatment of the Hereford House and Shelton House projects (at [20]).

70 In the same vein, in the present case, the assessor *expressly qualified* the values he had reached in the Evaluation Report because he was unable to reach unqualified values due to the dispute between the parties over the underlying documents. The Settlement Amount was said to be *subject to adjustments*, and was therefore *not* final. Mr Leong argued that *Shorrock* and *Khaled* should be distinguished because the experts in those cases felt that they were unable to make a determination, but the assessor in the present case was able to make a determination based solely on the documents submitted by Mr Ueda (see [64] above). As we have explained, the assessor felt unable to do so, and did not in fact make a definitive determination of the values in Tables X and Y and of the Settlement Amount. Instead, he gave figures which were undoubtedly tentative. We were unable to agree with Mr Leong that the present case could really be distinguished from those two cases.

71 Lastly, we refer to the English High Court case of *Minster Trust Ltd v Traps Tractors Ltd* [1954] 1 WLR 963 ("*Minster Trust*"). There it was held that ambiguous statements did not qualify as certificates, based on contractual

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construction. The facts there involved a contract of sale between the parties, which provided that the machines to be sold were to be supplied with a "Hunt Engineering Certificate" verifying that they had been fully reconditioned to their satisfaction. The actual reports from Hunt Engineering which were supplied were headed "Inspection report" and stated that the machinery units were "accepted as reconditioned to the required standards". Devlin J held that the reports were not in compliance with the contract because they did not certify that the machines were fully reconditioned to the satisfaction of Hunt Engineering. Devlin J held that on any view, the language used in the reports was ambiguous (at 982). Devlin J reasoned that if the document was looked upon in its character of a final determination upon the quality of the goods, it was important that it was unambiguous (at 983). Thus, the reports were not certificates within the terms of the contract (at 984). Analogously, in the present case, it was important that the values in the Evaluation Report were certain and definite, bearing in mind that the object of the Settlement Agreement was to obtain a final resolution of the dispute between the parties. However, the valuations in the Evaluation Report were not definite and certain. They were not determinations falling within the terms of the Settlement Agreement.

72 For the reasons above, we held that the values given by the assessor and the Settlement Amount determined by the assessor were not in accordance with the terms of the Settlement Agreement. Therefore no sums were due from Mr Bajaj to Mr Ueda and in turn Mr Ueda was not entitled to issue the Statutory Demand. In the result, the Statutory Demand had to be set aside and we had so ordered. The present circumstances not only fell within r 98(2)(*b*) of the Bankruptcy Rules, they also fell within r 98(2)(*e*) because no debt was in fact due from Mr Bajaj to Mr Ueda.

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(ii) The legal effect of Mr Bajaj's behaviour in the neutral evaluation process

73 The Judge took a very dim view of Mr Bajaj's behaviour and held that he had breached the duty to cooperate which was expressly set out in cl 15 of the Settlement Agreement. Mr Bajaj's delaying tactics during the neutral evaluation process were well documented in the Evaluation Report. While the Judge's finding of fact on Mr Bajaj's behaviour could not be faulted, with respect, we could not agree with her reasoning that Mr Bajaj's breach of the duty to cooperate was sufficient to deal with the application of cl 9 (that the assessor's calculations "shall be final and binding") and cl 16 (on further mediation to resolve disputes) of the Settlement Agreement. Mr Bajaj's bad behaviour could not convert an invalid determination into a valid determination. We nevertheless showed our disapproval of such conduct in the order on costs (see [83] below).

74 In coming to her conclusion, the Judge relied wholly on the principle that a party in default under a contract cannot take advantage of his own breach to gain a benefit or evade his contractual obligation (GD at [65]). This principle was applied by V K Rajah J in *Evergreat*, where he held that the plaintiff could not complain that the independent assessor had failed to assess its claim and defence, when it had distanced itself from the evaluation process and disregarded the process entirely (at [53]). That case involved parties in a construction dispute who appointed an independent assessor as an expert to assess their claims. The plaintiff attempted to set aside the independent assessor's award on the ground that the independent assessor had failed to assess the liability of the parties according to the terms of reference, improperly disregarded its claim and defence to counterclaim, and failed to articulate his reasons for the award (*Evergreat* at [18]). Rajah J found that the independent

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assessor did not breach the terms of his appointment, that there was no requirement to give reasons, and gave short shrift to the contention that the independent assessor failed to consider the plaintiff's pleadings since they were struck out due to the plaintiff's own fault. The plaintiff, apart from filing its claim and its response to the counterclaim, wholly failed to respond to the independent assessor's directions. The independent assessor had issued a directive to the plaintiff that its claim and defence to counterclaim would be struck off if it did not comply. The plaintiff ignored the directive. The independent assessor made a final plea to the plaintiff for documents, which was ignored again. Thereafter, the independent assessor issued his award on the basis of the evidence submitted by the defendant.

75 Rajah J set out the criteria for the application of the principle at [52] of *Evergreat*:

> In order to invoke this principle it must be shown that the contractual right or benefit that a party is asserting or claiming is a direct result of that party's prior breach of contract. The relevant breach, the factual consequences flowing from the breach and the advantage the contract breaker is seeking to raise must be identified. …

76 Recrafting the Judge's reasoning based on *Evergreat*, Mr Leong's argument went as follows: (a) Mr Bajaj was relying on the qualifications in the Evaluation Report to argue that the Settlement Amount could not be a debt; (b) it was Mr Bajaj's fault that the values in the Evaluation Report were qualified; and (c) Mr Bajaj could not gain advantage from his own fault. In support of the Judge's reasoning, Mr Leong further pointed out that the assessor had stated in the Evaluation Report that there was no agreed set of documents for him to perform his calculations and Mr Bajaj refused to acknowledge Mr Ueda's documents as acceptable. It was apparent from this, Mr Leong argued, that the

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qualifications in the Evaluation Report were a direct result of Mr Bajaj's conduct.

77 We were of the view that the contractual benefit that Mr Bajaj was asserting was *not* a direct result of his breach of his duty to cooperate. Ultimately, *it was the assessor's decision* to give a qualified opinion, presumably because he felt that he was unable to rely wholly and solely on the documents submitted by Mr Ueda. He could have very well given an unqualified determination based on the documents submitted by Mr Ueda.

78 This led us to the crucial difference between *Evergreat* and the present case: the award in *Evergreat* was not qualified by the independent assessor in any way (*Evergreat* at [16]), but the assessor in the present case stated in no uncertain terms that the values in Tables X and Y he found were "subject to adjustments" and that the Settlement Amount was also "subject to changes". The qualification of values gave rise to a question which did not involve the principle that a party could not take advantage of its own breach of contract: the question was whether the values as given (with the qualifications) fell within the terms of the Settlement Agreement so as to form the basis of a debt owing from Mr Bajaj to Mr Ueda. Giving the values with the qualifications was entirely an act of the assessor. While Mr Bajaj had breached his duty to cooperate, the breach could not and had not prevented the assessor from making a definite determination as indicated in [65] above. As Mr Shankar had explained, a party's refusal to cooperate could entitle the other party to sue the defaulting party for breach of contract or to seek an order of court compelling the defaulting party to comply with the expert's directions, or it could amount to a repudiation of the agreement. However, such a breach of contract could not render valid an otherwise uncertain debt so as to enable the alleged creditor to issue a statutory demand in respect thereof.

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Issue 2: whether the Clause 10 Sum had accrued as a debt

79 Mr Bajaj argued that the Clause 10 Sum had likewise not been accrued as a debt. This was because, Mr Shankar explained, the parties envisaged that the Clause 10 Sum would be tied to the Settlement Amount such that there would only be one consolidated net payment between the parties. Since the Settlement Amount had not been determined, the Clause 10 Sum had also not accrued. In this regard, Mr Shankar relied on cll 14 and 17 of the Settlement Agreement:

> 14. This Settlement Agreement represents a full and final settlement and/or compromise of all disputes and/or claims whatsoever arising out of or in connection with Suit 205 of 2013, [HCM], [the Fund], [HCM Singapore], TY Advisers, TY Advisers Japan or otherwise;
>
> …
>
> 17. All payments arising from this Settlement Agreement are to be made in the following manner from the date of the Independent Accountant's report:-
>
> > a. In the event that payment is to be made by the Defendant, the same is to be made by equal installments over a period of 30 months on the first business day of each month and the first instalment payment is to be due no earlier than 1 November 2014;
> >
> > b. In the event that payment is to be made by the Plaintiff, the same is to be made by equal installments over a period of 6 months on the first business day of each month;
> >
> > c. The first installment payment by the paying party is to be paid one month after the date of issue of the Independent Accountant's report or on 1 November 2014 whichever is later;
> >
> > d. If any installment payment is not made by the first business day of each month by the paying party to the receiving party, the paying party has a further 7 days, or any further time period so agreed by the parties to effect payment, failing which, the sum of the remaining installment payments will become immediately due and payable;

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…

80 On his part, Mr Leong agreed with the Judge's decision that the Clause 10 Sum was not tied to the Settlement Amount. He pointed out that the debt was set out in a separate clause in the Settlement Agreement, similar to the Clause 6 Sum.

81 We agreed with Mr Shankar that there were substantial grounds to dispute the Clause 10 Sum as a debt already due from Mr Bajaj to Mr Ueda. From the opening words of cl 17, there was much force in Mr Shankar's reading of that clause, *ie*, that the Clause 10 Sum was tied to the Settlement Amount such that one total final amount was to be paid by the paying party. Indeed, there was a related way of looking at this issue, which was that the Clause 10 Sum was not due yet because there was no "Independent Accountant's report". Clause 17 specifically stated that "[a]ll payments arising from this Settlement Agreement ... *from the date of the Independent Accountant's report*" [emphasis added]. Consistent with our finding that the values stated in the Evaluation Report were not calculations falling within the terms of the Settlement Agreement, the Evaluation Report itself similarly could not be considered the "Independent Accountant's report" under the Settlement Agreement. Given that there was yet a report falling within the Settlement Agreement at the time of the appeal, the payments under the Settlement Agreement, including specifically the Clause 10 Sum, were not due.

82 Mr Leong argued that it was inconsistent for Mr Bajaj to accept the sum under cl 6 as being due and yet resist the accruement of the sum under cl 10 of the Settlement Agreement. In response, Mr Shankar explained that the Clause 10 Sum was different from the Clause 6 Sum, because the latter did not arise from the Settlement Agreement – it concerned the costs, fees and expenses of

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the assessor and the SMC. In our view, it was abundantly clear that cl 17 related to payments as between the parties whereas payments due to the assessor and the SMC were governed by cl 6, and that the latter payments were not tied to cl 17. The positions were therefore distinct. Moreover, cl 6 did not specify the time period within which payment should be made to the assessor and the SMC. Accordingly, as a matter of construction, the times at which the payments to the SMC and the assessor under cl 6 were due would have no connection to the time stipulated under cl 17 because the terms regarding the monies to be paid to those third parties would naturally be dictated by the contracts or agreements with those parties. In the present case, Mr Ueda paid the full amount of the fees due to the assessor to obtain the Evaluation Report. Now Mr Bajaj had decided to reimburse his share of the assessor's fee to Mr Ueda. We could not see any inconsistency.

Conclusion

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83 For the reasons above, we held that there were substantial grounds to dispute the Settlement Amount and the Clause 10 Sum as debts. Indeed, no debt was due as at the date of the appeal. Thus, we set aside the Statutory Demand. To show our disapproval of the conduct of Mr Bajaj, we ordered that there would be no order as to costs here or below. The security deposit was to be released to Mr Bajaj.

Judith Prakash	Chao Hick Tin	Quentin Loh
Judge of Appeal	Senior Judge	Judge

Jaikanth Shankar, Tan Ruo Yu, Darren Low Jun Jie and Yee Guang Yi (Davinder Singh Chambers LLC) for the appellant;
Jeremy Leong Zhi Jia and Mohamed Najib Bin Mohamed Yunos (Acton Law LLC) for the respondent.

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