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

[2022] SGHC 210

Originating Summons No 66 of 2022

Between

Fastfreight Pte Ltd

… *Plaintiff*

And

Bulk Trident Shipping Ltd

… *Defendant*

JUDGMENT

[Insolvency Law — Winding up]
[Civil Procedure — Injunctions]
[Arbitration — Enforcement]

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Fastfreight Pte Ltd
v
Bulk Trident Shipping Ltd

[2022] SGHC 210

General Division of the High Court — Originating Summons No 66 of 2022
Ang Cheng Hock J
7 April, 27 May, 4 August 2022

31 August 2022 Judgment reserved.

Ang Cheng Hock J:

1 The dispute between the plaintiff and defendant in these proceedings arises in the context of an ongoing arbitration between the parties that is taking place in London.

2 By HC/OS 66/2022 ("OS 66/2022"), the plaintiff seeks an injunction to restrain the defendant from presenting a winding-up application against the plaintiff (the "injunction"). The defendant had issued a written demand dated 30 December 2021 pursuant to s 125(2)(*a*) of the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) (the "statutory demand").[1] This was a demand for, *inter alia*, the sum of US$2,147,717.79 that it was awarded (the "PFA Sum") under a partial final award dated 20 December 2021 issued in the

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[1] Shingade Ajay Babu's Affidavit dated 24 February 2022 ("Shingade Ajay Babu's 1st Affidavit") at pages 73–74.

ongoing arbitration in London between the parties (the "PFA").[2] On 21 January 2022, the plaintiff applied for an interim injunction to restrain the defendant from taking any steps to commence winding-up proceedings against it: HC/SUM 289/2022 ("SUM 289/2022"). At the hearing of SUM 289/2022, the defendant undertook not to take any steps to commence winding-up proceedings against the plaintiff pending the outcome of the hearing for a final injunction in OS 66/2022, and so no order was made on SUM 289/2022.[3]

Background

The Charterparty

3 The plaintiff is a charterer incorporated in Singapore. It is a vessel operator which works with clients and ship owners to provide freight solutions.[4] The defendant is a company incorporated in Liberia.[5] It is the registered owner of the "ANNA-DOROTHEA" (the "Vessel").[6]

4 The plaintiff and defendant entered into a time charterparty (the "Charterparty") by way of a fixture recap dated 13 April 2021 (the "Recap") for the carriage of bulk cargo from India to China by the Vessel.[7] The Charterparty dated 18 September 2020 incorporated terms of a *pro forma* New York Produce

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2 Shingade Ajay Babu's 1st Affidavit at pages 101–110.

3 Minute Sheet for the hearing on 21 January 2022 at pages 1–2.

4 Govind Kumar Gautam's Affidavit dated 19 May 2022 ("Govind Kumar Gautam's Affidavit") at page 18.

5 Syed Asad Raza Naqvi's Affidavit dated 13 January 2022 ("Syed Asad Raza Naqvi's ADM 103/2021 Affidavit") at page 178.

6 Syed Asad Raza Naqvi's ADM 103/2021 Affidavit at para 5.

7 Shingade Ajay Babu's 1st Affidavit at para 4 and pages 32–36.

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Exchange ("NYPE") 1993 charter (the "NYPE Form").[8] The NYPE Form was amended by the terms of the Recap, which included certain additional clauses (the "Additional Clauses").[9] The Charterparty contained an arbitration agreement pursuant to clause 22 of the Recap[10] and clause 45 of the NYPE Form.[11] The arbitration agreement provided for disputes arising out of the Charterparty to be arbitrated in London and for English law to be the governing law.[12]

5 At around the same time, the plaintiff entered into a voyage charterparty (the "Sub-Charterparty") with Shyam Metalics and Energy Ltd (the "sub-charterer") by way of a Fixture Note dated 12 April 2021.[13] Under the terms of the Sub-Charterparty, the plaintiff was under an obligation to ensure that the Vessel would "… proceed to the discharging port(s) … and there deliver the cargo".[14]

The dispute, the PFA and the appeal before the English courts

6 A dispute arose in relation to, *inter alia*, the non-payment of hire from the plaintiff to the defendant.[15] Pursuant to the Charterparty, the defendant delivered the Vessel to the plaintiff on or around 13 April 2021,[16] for a time

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8 Shingade Ajay Babu's 1st Affidavit at para 4 and pages 37–58.

9 Shingade Ajay Babu's 1st Affidavit at pages 59–71.

10 Shingade Ajay Babu's 1st Affidavit at page 34.

11 Shingade Ajay Babu's 1st Affidavit at pages 52–53.

12 Shingade Ajay Babu's 1st Affidavit at pages 34 and 52–53.

13 Syed Asad Raza Naqvi's ADM 103/2021 Affidavit at para 8 and pages 92–126.

14 Syed Asad Raza Naqvi's ADM 103/2021 Affidavit at page 101.

15 Shingade Ajay Babu's 1st Affidavit at para 7.

16 Syed Asad Raza Naqvi's ADM 103/2021 Affidavit at para 16.

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charter trip with a duration of about 25 to 30 days (without guarantee).[17] Cargo was loaded at a port in India on 19 April 2021 and bills of lading were issued in respect of the cargo, naming the sub-charterer as the shipper.[18] The plaintiff then ordered the Vessel to proceed to Lanqiao, China, to discharge the cargo.[19] The Vessel arrived off the port of Lanqiao on or around 4 May 2021.[20] Three members of the Vessel's crew tested positive for COVID-19 and the Vessel was consequently not allowed to berth at the Lanqiao port.[21] The defendant had provided a guarantee in the Recap that, at the time of delivery of the cargo, the crew onboard the Vessel would be free from "coronavirus disease".[22] The sub-charterer proposed that the Vessel be diverted to another port in Rizhao for the cargo to be discharged. This was conveyed by the plaintiff to the defendant on 6 May 2021 via e-mail.[23] On 12 May 2021, the defendant requested payment of hire, rejecting the plaintiff's position that no hire was due.[24] The defendant then sailed the Vessel out to international waters on two occasions and turned off her automatic identification system, leaving the Vessel there for weeks.[25] Subsequently on 28 August 2021, the defendant sailed the Vessel to Rizhao without the plaintiff's consent, pursuant to a settlement agreement between the defendant with the receivers of the cargo. There, the cargo was discharged.[26]

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17 Shingade Ajay Babu's 1st Affidavit at page 37.

18 Syed Asad Raza Naqvi's ADM 103/2021 Affidavit at paras 17–18.

19 Syed Asad Raza Naqvi's ADM 103/2021 Affidavit at para 20.

20 Syed Asad Raza Naqvi's ADM 103/2021 Affidavit at paras 20–21.

21 Syed Asad Raza Naqvi's ADM 103/2021 Affidavit at paras 22–25.

22 Syed Asad Raza Naqvi's ADM 103/2021 Affidavit at page 55.

23 Syed Asad Raza Naqvi's ADM 103/2021 Affidavit at para 26.

24 Syed Asad Raza Naqvi's ADM 103/2021 Affidavit at para 27.

25 Syed Asad Raza Naqvi's ADM 103/2021 Affidavit at para 31.

26 Syed Asad Raza Naqvi's ADM 103/2021 Affidavit at para 32.

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7 The defendant commenced arbitration in London against the plaintiff (the "London arbitration").[27] The defendant made various claims against the plaintiff in relation to alleged breaches under the Charterparty, including a claim for unpaid hire in the sum of US$2,147,717.79 for the period of 4 May 2021 to 28 August 2021.[28] The plaintiff raised a counterclaim against the defendant totalling US$7,661,844.39 for damages derived from (a) the loss and damage claimed by the sub-charterer against the plaintiff; (b) the amount of demurrage which would have fallen due to the plaintiff under the Sub-Charterparty if not for the defendant's alleged breaches of the Charterparty; and (c) overpaid hire.[29] I pause to note that the sum representing the plaintiff's counterclaim was inconsistently stated in the plaintiff's written submissions and the affidavit filed by the plaintiff's Syed Asad Raza Naqvi in support of OS 66/2022.[30] Syed Asad Raza Naqvi's affidavit did not exhibit the documents in support of the sum, but it referenced his affidavit filed in support of HC/ADM 103/2021 ("ADM 103/2021"), which were proceedings brought by the plaintiff to arrest the Vessel in Singapore (see [18] below). In this judgment, I have referred to the sums in the documentary evidence contained in Syed Asad Raza Naqvi's ADM 103/2021 affidavit of 13 January 2022.[31]

8 Shortly after the commencement of the London arbitration, the defendant applied for a partial final award for the unpaid hire which, as already

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27 Shingade Ajay Babu's 1st Affidavit at para 7; Syed Asad Raza Naqvi's ADM 103/2021 Affidavit at para 11.

28 Shingade Ajay Babu's 1st Affidavit at para 7.

29 Syed Asad Raza Naqvi's ADM 103 Affidavit at para 39 and pages 191–195.

30 Syed Asad Raza Naqvi's Affidavit dated 11 April 2022 ("Syed Asad Raza Naqvi's 1st Affidavit") at para 14; Plaintiff's Written Submissions dated 5 April 2022 ("PWS") at para 28.

31 Syed Asad Raza Naqvi's ADM 103 Affidavit at pages 188–210.

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mentioned (at [7]), was for a sum of US$2,147,717.79.[32] The defendant's application was premised on its construction of clause 11 of the NYPE Form, which states:[33]

> … Notwithstanding of the terms and provisions hereof no deductions from hire may be made for any reason under Clause 17 or otherwise (whether/or alleged off-hire underperformance, overconsumption or any other cause whatsoever) without the express written agreement of [the defendant] at [the defendant's] discretion. [The plaintiff is] entitled to deduct value of estimated Bunker on redelivery. Deduction from the hire are never allowed except for estimated bunker on redelivery. Any fuel consumed is due once consumed.

9 The defendant took the view that, in view of clause 11, the parties had effectively agreed to a "pay now, argue later" regime in respect of charter hire.[34]

10 The plaintiff contested the application. In the plaintiff's view, no hire even fell due to begin with because the Vessel was off-hire and, as such, clause 11 was inapplicable.[35] As earlier mentioned (at [6]), three members of the Vessel's crew tested positive for COVID-19 before the Vessel arrived at the Lanqiao port, and consequently, she was not allowed to berth at the port to discharge the cargo.[36] The plaintiff claims that the defendant was in breach of its guarantee that, on delivery and upon reaching the first load port, the Vessel's crew was to be free of COVID-19.[37] The guarantee in clause 32 of the Recap provides:[38]

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32 Shingade Ajay Babu's 1st Affidavit at para 7.

33 Shingade Ajay Babu's 1st Affidavit at page 42.

34 Shingade Ajay Babu's 1st Affidavit at para 9.

35 PWS at para 28.4; Minute Sheet for the hearing on 27 May 2022 at page 1.

36 Syed Asad Raza Naqvi's ADM 103/2021 Affidavit at para 14.1.1.

37 Syed Asad Raza Naqvi's ADM 103/2021 Affidavit at para 14.3.

38 Syed Asad Raza Naqvi's ADM 103/2021 Affidavit at page 55.

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> OWNERS GUARANTEE THAT AT THE TIME OF DELIVERY AND UPON REACHING FIRST LOADPORT CREW ON BOARD THE VESSEL IS FREE FROM CORONAVIRUS DISEASE AND THE OWNERS/CREW SHALL ENDEAVOR TO TAKE SUCH REASONABLE MEASURES IN RELATION TO THE DISEASE AS MAY FROM TIME TO TIME BE RECOMMENDED BY THE WORLD HEALTH ORGANIZATION.

11 The plaintiff also argues that the Vessel was off-hire in view of clause 17 of the NYPE Form and clause 67 of the Additional Clauses.[39] Clause 17 of the NYPE Form provides:[40]

> *In the event of loss of time from deficiency and/or default and/or strike of officers or crew,* or deficiency of stores, fire, breakdown of, or damages to hull, machinery or equipment, grounding, detention by the arrest of the Vessel, (unless such arrest is caused by events for which the Charterers, their servants, agents or subcontractors are responsible), … *the payment of hire and overtime, if any, shall cease for the time thereby lost. Should the Vessel deviate or put back during a voyage, contrary to the orders or directions of the Charterers,* for any reason other than accident to the cargo or where permitted in lines 257 to 258 hereunder, *the hire is to be suspended from the time of her deviating or putting back until she is again in the same or equidistant position from the destination and the voyage resumed therefrom.* … [emphasis added]

12 Clause 67 of the Additional Clauses provides:[41]

> … in the event any member of the crew or persons (except those on charterers' behalf) on board the vessel is found to be infected with a highly infectious or contagious disease and the vessel has to (i) deviate, (ii) be quarantined, or (iii) barred from entering any port, all time lost, delays and expenses whatsoever shall be on owners' account and the vessel shall be off-hire. …

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39 Syed Asad Raza Naqvi's ADM 103/2021 Affidavit at para 14.1.1.

40 Syed Asad Raza Naqvi's ADM 103/2021 Affidavit at pages 64–65.

41 Syed Asad Raza Naqvi's ADM 103/2021 Affidavit at page 84.

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13 As already described above (at [6]), the Vessel did not ultimately deliver the cargo at the Lanqiao port.[42] The plaintiff alleges that this was a result of the defendant's inability or failure to comply with the plaintiff's legitimate orders as charterer, and that this exposed the plaintiff to claims against it by the sub-charterer.[43] This formed the basis of part of the plaintiff's cross-claim in the London arbitration.

14 On 20 December 2021, the two-member arbitral tribunal (the "tribunal") issued the PFA adjudging that the plaintiff "shall forthwith pay to [the defendant] the sum of US$2,147,717.79 [*ie*, the PFA Sum]", together with interest thereon at the rate of 4.5% per annum compounded at 3-monthly rests from 1 July 2021 to the date of the payment.[44] The tribunal also directed the plaintiff to pay the costs of the reference and the costs of the award, with interest at the rate of 4.5% per annum compounded at 3-monthly rests from 20 December 2021 to the date of payment.[45] On 21 December 2021, the defendant made a demand for the PFA Sum, as well as interest and costs awarded under the PFA.[46] However, the plaintiff did not make payment.[47]

15 Instead, the plaintiff amended its counterclaim in the London arbitration to include a claim for the PFA Sum (such that the plaintiff's cross-claim was now for an increased amount of US$9,809,562.18) and sought leave to appeal

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42 Syed Asad Raza Naqvi's ADM 103/2021 Affidavit at para 33.

43 Syed Asad Raza Naqvi's ADM 103/2021 Affidavit at paras 33–34.

44 Shingade Ajay Babu's 1st Affidavit at pages 108–109.

45 Shingade Ajay Babu's 1st Affidavit at page 109.

46 Shingade Ajay Babu's 1st Affidavit at pages 129–130.

47 Shingade Ajay Babu's 1st Affidavit at para 22.

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against the PFA in the English courts.[48] On 1 April 2022, the plaintiff was granted leave to appeal on a question of law,[49] the question being:[50]

> *Where a charterparty clause provides that no deductions from hire (including for off-hire or alleged off-hire) may be made without the shipowner's consent: Is non-payment of hire a 'deduction' if the Vessel is off hire at the instalment date?* [emphasis in original]

16 In granting leave for the plaintiff to appeal, Andrew Baker J found that although "[t]he arbitrators answered the question of law 'Yes' … the contrary [was] also well arguable" and "the arbitrators' decision on the question of law … [was] open to serious doubt".

17 Counsel for the plaintiff informed me at the hearing on 27 May 2022 that the appeal before the English courts is likely be heard in October 2022.[51]

Arrest of the Vessel in Singapore

18 On 28 December 2021, the plaintiff arrested the Vessel in Singapore to obtain security for its cross-claim in the London arbitration: ADM 103/2021.[52] The plaintiff included the PFA Sum as part of the quantum of security it demanded on the basis that "[the plaintiff had] incurred a liability to pay [the PFA Sum]".[53] The defendant furnished the full sum of security demanded by way of a letter of undertaking dated 5 January 2022 for the sum of

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48 Syed Asad Raza Naqvi's 1st Affidavit at para 11; PWS at paras 9 and 28.

49 PWS at para 9.

50 PWS at Annex A.

51 Minute Sheet for the hearing on 27 May 2022 at page 1.

52 Shingade Ajay Babu's 1st Affidavit at para 13.

53 Shingade Ajay Babu's 1st Affidavit at pages 112–113 and 118.

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US$11,269,629.34 issued by the defendant's protection and indemnity club.[54] According to the defendant, it was required to put up US$7,869,629.34 as cash collateral to procure the said letter of undertaking.[55]

Service of the statutory demand and filing of the present application

19 On 30 December 2021, the defendant's Singapore solicitors served the statutory demand for the PFA Sum on the plaintiff.[56] The plaintiff's Singapore solicitors responded by demanding a withdrawal of the statutory demand.[57] On 21 January 2022, the plaintiff filed the present application to obtain an injunction in order to restrain the defendant from presenting a winding-up application.[58] As earlier mentioned (at [2] above), prior to the hearing of the present application, the plaintiff applied in SUM 289/2022 for an interim injunction. At the hearing of SUM 289/2022, the defendant gave an undertaking that it would not commence any winding-up proceedings pending the disposal of the present application, rendering it unnecessary for the court to make any order in SUM 289/2022.

The defendant's request for the plaintiff's financial statements

20 In the course of these proceedings in Singapore, on 16 February 2022, the defendant's Singapore solicitors wrote to the plaintiff's Singapore solicitors stating that the defendant had reason to believe that the plaintiff was unable to carry on its business as a going concern or pay its debts as and when they fell

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54 Shingade Ajay Babu's 1st Affidavit at para 17 and pages 125–127.

55 Defendant's Written Submissions dated 5 April 2022 ("DWS") at para 13.

56 Shingade Ajay Babu's 1st Affidavit at para 22.

57 Shingade Ajay Babu's 1st Affidavit at para 24.

58 Shingade Ajay Babu's 1st Affidavit at para 28.

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due.[59] The defendant requested that the plaintiff provide its financial statements for the financial years ending 31 December 2020 ("FY 2020") and 31 December 2021 ("FY 2021") as evidence of its solvency.[60] On 23 February 2022, the plaintiff provided a redacted copy of its audited financial statements for FY 2020 (the "2020 Financial Statements").[61]

The parties' cases

21 The plaintiff argues that the injunction should be granted because the plaintiff has a cross-claim of a value that exceeds the PFA Sum and the cross-claim is subject to the arbitration agreement between parties.[62] The cross-claim is for the sum of US$9,809,562.18. This sum comprises the following:[63]

(a) US$5,122,992.71 for loss and damage claimed by the sub-charterer against the plaintiff arising from the Vessel's failure to proceed to Lanqiao and deliver the cargo;

(b) US$2,458,500.00 for demurrage which would have fallen due to the plaintiff under the Sub-Charterparty, said to be occasioned by the defendant's breaches of the Charterparty, resulting in the Vessel not being able to tender a valid Notice of Readiness, which resulted in laytime and demurrage not running against the sub-charterer under the Sub-Charterparty;

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59 Shingade Ajay Babu's 1st Affidavit at para 31.

60 Shingade Ajay Babu's 1st Affidavit at para 31.

61 Shingade Ajay Babu's 1st Affidavit at para 34.

62 PWS at para 28.

63 PWS at para 28.

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(c) US$80,351.68 for overpaid hire, which arose by reason of bunkers remaining on board the Vessel when she arrived at Lanqiao and which were then consumed and/or converted by the defendant while the Vessel was off-hire; and

(d) US$2,147,717.79, being the PFA Sum, which the plaintiff is counterclaiming against the defendant in the ongoing London arbitration as damages for breach of the Charterparty and/or off-hire from 18 May 2021 to 24 August 2021. The plaintiff's case is that the Vessel had deviated and/or that hire would never have accrued had the defendant not breached the Charterparty in failing to proceed to Lanqiao on arrival.

22 The plaintiff also contends that the PFA Sum is a disputed debt in light of its cross-claim, as well as because of its appeal against the PFA before the English courts.[64] The plaintiff emphasises that, in view of the arbitration agreement between the parties, it only needs to meet a *prima facie* standard in showing that the PFA Sum is a disputed debt or that it has a cross-claim of a value exceeding the PFA Sum.[65] This standard is lower than the "unlikely to succeed" standard (or triable issue standard) that would typically apply where the relevant cross-claim or disputed debt is not subject to arbitration.[66]

23 The plaintiff also argues that the balance of convenience favours the grant of the injunction.[67] According to the plaintiff, there is a lower risk of

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64 PWS at para 29; Minute Sheet for the hearing on 27 May 2022 at page 1.

65 PWS at para 18.

66 PWS at para 18.

67 PWS at para 21.

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injustice if the injunction is granted since it would mean that the *status quo* is maintained pending the outcome of the London arbitration.[68] Although the defendant would have to await the final outcome of the London arbitration before it presents a winding-up application against the plaintiff (if it is so entitled to do so at that juncture), the defendant would suffer no prejudice if the injunction is granted.[69] On the other hand, if the injunction is not granted, a winding-up application would trigger an event of default under the plaintiff's financing instruments and also cause serious reputational damage.[70] The financial implications of such an application being presented would also severely affect the plaintiff's ability to pursue its counterclaim against the defendant in the London arbitration.[71]

24 The defendant argues that it should not be restrained from presenting a winding-up application as the PFA Sum is not one that is *prima facie* disputed and there is no *prima facie* cross-claim.[72] According to the defendant, the PFA Sum cannot be characterised as a "disputed debt" because the intention and effect of the PFA is such that the plaintiff is immediately obliged and required to make payment of the PFA Sum to the defendant, regardless of the plaintiff's claims of off-hire (see [10]–[11] above).[73] The defendant also submits that there is no *prima facie* cross-claim because there is no merit in the plaintiff's assertions that there exists a cross-claim exceeding or equal to the PFA Sum.[74]

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68 PWS at para 21.

69 PWS at para 22.

70 PWS at para 23; Syed Asad Raza Naqvi's 1st Affidavit at para 22.

71 PWS at para 23.

72 DWS at paras 28 and 36.

73 DWS at para 28.

74 DWS at para 36.

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In this regard, the defendant points to the tribunal's finding in the PFA that clause 11 of the NYPE Form required the plaintiff to make payment of hire that is indisputably due to the defendant free of any cross-claims or deductions from hire for any reason whatsoever.[75] In other words, the alleged cross-claim does not extinguish the plaintiff's liability to pay the PFA Sum.[76]

25 The defendant further argues that the plaintiff has brought OS 66/2022 in abuse of the court's process.[77] In line with the principles elucidated in *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 ("*AnAn Group*") at [56], the defendant submits that it should not be restrained from presenting a winding-up application on the basis of a dispute or cross-claim raised by the plaintiff in abuse of the court's process.[78] The defendant points to inconsistent positions taken by the plaintiff in the London arbitration and the proceedings before the Singapore courts as to the effect of the PFA and the plaintiff's liability to immediately pay the PFA Sum.[79] The plaintiff acknowledged in the London arbitration that the PFA was immediately enforceable in a "pay now, argue later" fashion.[80] In ADM 103/2021, which the plaintiff commenced to arrest the Vessel, the plaintiff demanded security of a sum that included the PFA Sum.[81] The plaintiff's basis for including the PFA Sum was that it had "incurred a liability

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75 DWS at para 40.

76 DWS at para 41.

77 DWS at para 50.

78 DWS at para 48.

79 DWS at para 51.

80 DWS at para 52.

81 DWS at para 53.

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to pay" that sum.[82] However, the plaintiff subsequently refused to pay the PFA Sum, or provide security for or compound the sum.[83] The defendant argues that, since the plaintiff relied on its liability to pay the PFA Sum to obtain security in the sum of US$11,269,629.34 in ADM 103/2021, it must not be allowed to now argue, in abuse of the court's process, that there is a disputed debt or cross-claim in respect of the PFA Sum.[84]

26 Finally, the defendant also seeks to argue that the court should take into account the solvency of the plaintiff in determining whether to grant the injunction and that there are reasonable grounds on which to believe that the plaintiff is insolvent.[85] To determine solvency, the defendant relies on the "cash flow test" endorsed in *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd (formerly known as Tong Teik Pte Ltd)* [2021] 2 SLR 478 at [56] and [65], which assesses whether the debtor's current assets (*ie*, assets realisable within a 12-month timeframe) exceed its current liabilities (*ie*, debts which would fall due within a 12-month timeframe).[86] According to the defendant's expert, Mr Martin John Tupila ("Mr Tupila"), there are indications that the plaintiff was insolvent during FY 2020.[87] On the assumption that the plaintiff's financial performance in FY 2021 was similar to that in the preceding two years, Mr Tupila opined that is unlikely that the plaintiff is able to meet its current liabilities.[88] The defendant also alleges that the plaintiff has been evasive about

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82 DWS at para 55; Shingade Ajay Babu's 1st Affidavit at page 118.

83 DWS at para 57.

84 DWS at para 58.

85 DWS at paras 65 and 76.

86 DWS at para 67.

87 DWS at para 70(c).

88 DWS at paras 70(d)–70(e).

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its financial position since it has only provided the 2020 Financial Statements and has never explicitly stated that it is currently solvent despite the defendant's allegations.[89] The defendant thus invites the court to draw "the necessary adverse inferences".[90]

27 As an alternative argument, the defendant argues that, should the court allow the plaintiff's application, the injunction should be granted only on the condition that the plaintiff furnishes security of a value equal to the PFA Sum, pending the outcome of the London arbitration.[91]

The law

28 The Court of Appeal in *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268 considered (at [62] and [82]) that, in the two following circumstances, the court may restrain the presentation of a winding-up application: (a) where the debtor-company disputes the creditor's debt on *bona fide* and substantial grounds; and (b) where the debtor-company has a genuine cross-claim based on substantial grounds equal to or exceeding the creditor's undisputed debt. A debtor-company relying on either ground to resist a winding-up application would have to demonstrate to the court that there is a *triable issue* as to the existence of the relevant ground it seeks to rely on: *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 at [23] and [25]. However, the standard of review is different when the court is faced with either a disputed debt or a cross-claim that is subject to an arbitration agreement. In such a case, the *prima facie* standard

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89 DWS at paras 73–74.

90 DWS at para 74.

91 DWS at para 84.

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of review is to be adopted: *AnAn Group* at [56]. This means that the court will ordinarily dismiss a winding-up application if the debtor-company is able to show, on a *prima facie* basis, that the disputed debt or cross-claim falls within the scope of a valid arbitration agreement between the parties (provided that the dispute is not raised by the debtor-company in abuse of the court's process): *AnAn Group* at [110].

29 Although *AnAn Group* itself concerned a debtor-company resisting a winding-up application, the principles in *AnAn Group* apply equally in a case such as the present, where the alleged debtor-company seeks to restrain a purported creditor from presenting a winding-up petition: *BWG v BWF* [2020] 1 SLR 1296 ("*BWG v BWF*") at [128].

30 In determining whether there is a disputed debt or cross-claim that is subject to a valid arbitration agreement between the parties on the *prima facie* standard, the court will not inquire into the merits of the defences raised by the debtor-company: *AnAn Group* at [82]. As explained by the Court of Appeal in *AnAn Group* (at [77]), parties to an arbitration agreement should not be allowed to bypass the arbitration agreement by presenting a winding-up application in an attempt to get the court to resolve their disputes. Party autonomy should be given effect to, and the parties' agreed method of dispute resolution should be upheld. The court will not examine the merits of the debtor-company's defences in place of the arbitral tribunal and in so doing undercut the parties' pre-dispute bargain. However, in making a *prima facie* determination, the court is fully entitled to determine whether a dispute exists which falls within the scope of the arbitration agreement by construing the arbitration agreement to discover its full ambit and determining whether there has been a clear and unequivocal admission of liability: *Merrill Lynch Pierce, Fenner & Smith Inc v Prem Ramchand Harjani and another* [2009] 4 SLR(R) 16 at [19]–[20].

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31 If the plaintiff is able to show, on a *prima facie* standard, that there is a disputed debt or a cross-claim that is subject to an arbitration agreement, then an injunction restraining the commencement of winding-up proceedings should be granted: *BWG v BWF* at [128]. However, this is subject to the caveat stated above at [28] that the disputed debt or cross-claim was not raised in abuse of the court's process.

32 If the injunction is granted, it may also be appropriate for the injunction to be granted subject to certain conditions. In *AnAn Group*, the Court of Appeal stated (at [111] and [112]) that, where the creditor is able to demonstrate legitimate concerns about the solvency of the debtor, and no triable issue was raised by the debtor, the court could stay rather than dismiss the winding-up application. The creditor would then be given liberty to apply to the court to proceed with the winding-up if, for example, it could be shown that the debtor had no genuine desire to arbitrate the dispute, and that it was taking active steps to stifle the arbitration. Similarly, in *BWF v BWG* (at [131]), the Court of Appeal took the view that an injunction may be granted with liberty for parties to apply where there are legitimate concerns about the solvency of the debtor-company.

The issues

33 In view of the contentions raised by the parties, four main issues arise for determination:

(a) whether there is a disputed debt that falls within the scope of the arbitration agreement between the parties;

(b) whether there is a cross-claim that falls within the scope of the arbitration agreement between the parties;

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(c) if there is a disputed debt or a cross-claim that falls within the scope of the arbitration agreement between the parties, whether the plaintiff is raising the disputed debt or the cross-claim in an abuse of the court's process; and

(d) if an injunction should be granted, whether the court should impose any conditions on the injunction.

Whether there is a disputed debt that falls within the scope of the arbitration agreement

34 The plaintiff argues that the PFA Sum is *prima facie* in dispute in view of its cross-claim that no hire is ultimately due under the terms of the Charterparty, and the appeal before the English courts against the PFA (as earlier mentioned at [21]–[22] above). On the other hand, the defendant argues that the PFA Sum is presently due regardless of the plaintiff's cross-claim concerning the Vessel being off-hire and the pending appeal against the PFA, given the final and binding partial award by the tribunal.

35 There can be no question that the dispute over whether hire must be paid first, even though the plaintiff may take the position that the Vessel was off-hire, is subject to the parties' arbitration agreement. That dispute was referred to arbitration. The PFA issued by the tribunal has resolved that issue in favour of the defendant. The tribunal has determined that the plaintiff is required to pay the disputed amount of hire over to the defendant, but that the plaintiff can proceed with its cross-claim in the arbitration to make good, *inter alia*, its claim that the Vessel was off-hire at the material time, and thus the hire received by the defendant pursuant to the PFA must be repaid. Therefore, in so far as the contractual framework and arbitration process agreed between the parties is

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concerned, there is no doubt that the PFA Sum is presently payable to the defendant.

36 However, it does not necessarily follow that there is no longer any dispute over the PFA Sum, such that the defendant is entitled to commence winding-up proceedings in a Singapore court. The defendant's contractual right to payment of the PFA Sum is being disputed by the plaintiff through its appeal to the English courts. The plaintiff is entitled to pursue this avenue of appeal that is available under the law of the seat of the arbitration chosen by the parties, *ie*, English law, and in that limited sense, there is still a dispute that falls within the scope of the parties' arbitration agreement. As Baker J held, it is "well arguable" that the tribunal had erred in law in deciding that the "no deductions" clause in the Charterparty (see [15]–[16] above) applied when the Vessel was off-hire. Put another way, the tribunal might well have been wrong in deciding that the plaintiff was required to pay the disputed hire to the defendant first, even though the plaintiff's position was that the Vessel was off-hire at the material time. That question is presently before the English courts, and it is the English courts that will have the final say as to whether the PFA Sum is indeed due and payable. Given that, I am not prepared to accept that the PFA Sum is a debt that is indisputably due such that the defendant is entitled to proceed with a winding-up application under Singapore law on the basis of that debt.

37 The defendant relies on the oft-cited case of *LKM Investment Holdings Pte Ltd v Cathay Theatres Pte Ltd* [2000] 1 SLR(R) 135 ("*LKM Investment*") for the proposition that a judgment creditor is entitled to present a winding-up application against the judgment debtor even if the judgment is under an appeal. This is so because where a judgment in favour of a judgment creditor is obtained, the debt does not become disputed merely because the judgment

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debtor is appealing against the decision.[92] That is well-established law. Unless there is an order staying execution of a judgment pending appeal, the judgment creditor can take all legal steps open to him to recover the amount of the judgment debt: *LKM Investment* at [18]. However, the distinction here on our facts is that the PFA Sum is not yet enforceable as a debt in Singapore. The defendant has not taken any steps to seek leave to enforce the PFA in Singapore. In fact, counsel for the defendant candidly admitted in the course of the hearing on 27 May 2022 that the plaintiff may face difficulty obtaining leave to enforce the PFA in Singapore, pending the resolution of the appeal in the English courts.[93] Section 31(5) of the International Arbitration Act 1994 (2020 Rev Ed) (the "IAA") provides:

> Where, in any proceedings in which the enforcement of a foreign award is sought by virtue of this Part, the court is satisfied that an application for the setting aside or for the suspension of the award has been made to a competent authority of the country in which, or under the law of which, the award was made, the court may —
>
> (*a*) if the court considers it proper to do so, adjourn the proceedings or (as the case may be) so much of the proceedings as relates to the award; and
>
> (*b*) on the application of the party seeking to enforce the award, order the other party to give suitable security.

38 When there are pending setting aside proceedings in relation to an arbitral award, the decision to grant an adjournment of enforcement proceedings is a matter of discretion for the enforcing court: *Man Diesel Turbo SE v IM Skaugen Marine Services Pte Ltd* [2019] 4 SLR 537 at [46]. I agree with counsel for the defendant that there is a likelihood that the Singapore courts will not

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92 DWS at para 32.

93 Minute Sheet for the hearing on 27 May 2022 at page 4.

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grant leave for enforcement of the PFA because it is presently the subject of an appeal before the English courts, in accordance with the law of the seat of the arbitration (see [15] above). In fact, it would be a most anomalous situation if the defendant can seek to wind the plaintiff up on the basis of the PFA Sum, when that sum presently is not capable of being the subject of enforcement proceedings under Singapore law (by reason of leave not being obtained under the IAA to enforce the PFA). In view of the foregoing, I find that, on a *prima facie* standard, the PFA Sum is still a disputed debt that falls within the scope of the parties' arbitration agreement.

Whether there is a cross-claim that falls within the scope of the arbitration agreement

39 The plaintiff also argues that the injunction should be granted in view of its cross-claim of US$9,809,562.18, which exceeds the PFA Sum. As earlier set out (at [21]), the plaintiff's cross-claim is in respect of the following:

(a) its liability to the sub-charterer and demurrage which would have fallen due to the plaintiff under the Sub-Charterparty, which it alleges resulted from the defendant's breaches (see [21(a)] and [21(b)]);

(b) overpaid hire (see [21(c)]); and

(c) its counterclaim for the PFA Sum awarded to the defendant under the PFA (see [21(d)]).

40 In respect of [39(a)], the plaintiff is able to provide evidence of the sub-charterer's claim against it in the form of a letter of demand from the sub-

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charterer.[94] The plaintiff is also able to point to the clauses that the defendant is allegedly in breach of: clauses 8 and 11 of the NYPE Form and clause 32 of the Recap, which, according to the plaintiff, renders the defendant liable in respect of the sub-charterer's claim against the plaintiff.[95] With regard to [39(b)], the plaintiff has provided an invoice substantiating its claim of overpaid hire.[96] For [39(c)], the plaintiff is able to provide an explanation as to the basis for its counterclaim. As earlier set out (at [10]–[11]), the plaintiff takes the view that the Vessel was off-hire and it should not be liable to pay the PFA Sum.

41 The defendant argues that the plaintiff's cross-claim is "frivolous and vexatious", and that the plaintiff has raised the cross-claim in abuse of the court's process.[97] In this regard, the defendant raises three points:

(a) the PFA Sum is owing regardless of any cross-claim (see [24] above);

(b) the plaintiff has taken inconsistent positions in the ongoing London arbitration and before the Singapore courts as to its liability to pay the PFA Sum (see [25] above); and

(c) in the London arbitration, the plaintiff made an offer to permanently compromise its claims against the defendant that are premised on the plaintiff's liability to the sub-charterer, and this indicates that those claims are not genuine.[98]

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94 Syed Asad Raza Naqvi's ADM 103/2021 Affidavit at pages 188–192.

95 Syed Asad Raza Naqvi's ADM 103/2021 Affidavit at paras 33–35.

96 Syed Asad Raza Naqvi's ADM 103 Affidavit at p 196.

97 Defendant's Further Written Submissions dated 24 May 2022 ("DFWS") at para 58(c); DWS at para 4.

98 DFWS at paras 19 and 26.

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42 In respect of [41(a)], the defendant repeatedly emphasises the finality of the PFA and that the PFA Sum is presently owing regardless of any cross-claim. I have already dealt with whether the PFA Sum is an undisputed debt for the purposes of a winding-up in the Singapore courts (see [34]–[38] above). For the purposes of the analysis as to whether there is a cross-claim, the defendant ignores the fact that the plaintiff's case is that it is ultimately not liable for any hire, even though it may have to pay it over to the defendant first given the PFA, because the Vessel was off-hire during the material time. In other words, the plaintiff has raised, on a *prima facie* standard, that it has a cross-claim that is subject to the parties' arbitration agreement that will at least equal the amount in the PFA Sum.

43 As for [41(b)], the alleged "inconsistent positions" are in essence the plaintiff's refusal to make payment despite having acknowledged its liability to pay the PFA Sum. I do not see how this indicates any inconsistency in position. The plaintiff has acknowledged that the PFA creates a contractual obligation for it to pay the amount awarded to the defendant. Its reason for having not complied with the PFA is that it is presently appealing the PFA to the English courts. It also claims that it will ultimately be seeking an order in its cross-claim in the arbitration that the Vessel was off-hire and any amount paid over to the defendant has to be repaid (see [21(d)] above). Whether these are valid reasons for non-compliance with the PFA as things presently stand is not for this court to decide. The court here is only concerned with whether there is a cross-claim that falls within the scope of the parties' arbitration agreement such that the defendant should not be allowed to present a winding-up application against the plaintiff based on the PFA Sum.

44 I do not agree that the plaintiff's cross-claim can be described as being not genuine or abusive of the court's processes. As emphasised by the Court of

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Appeal in *AnAn Group* (at [99]), the threshold for showing abusive conduct is "very high". The plaintiff had arrested the defendant's Vessel in Singapore waters to obtain security for its cross-claim in the London arbitration. The defendant's complaints are effectively that the plaintiff had overstated its claim amount in the admiralty proceedings it commenced. This is because its claim amount included the PFA Sum, which the plaintiff had hitherto not paid to the defendant. Nonetheless, the defendant put up security for the release of its arrested vessel in the amount of US$11,269,629.34. Also, I noted counsel's confirmation that the defendant, up to the date of the hearing before me, had not applied to set aside any part of the plaintiff's claim. I am not convinced that the plaintiff can be described as acting in abuse of the court's process. What the Court of Appeal had in mind when it talked about the abusive conduct exception in *AnAn Group* is for instance, where a party has admitted to the creditor's claim as regards both liability and quantum but seeks a stay for no reason other than its alleged inability to pay (*AnAn Group* at [99(a)]). Here, even if one is to accept that the plaintiff has overstated the amount of its cross-claim, and the PFA Sum amount should be excluded from consideration because the plaintiff has not paid that sum over to the defendant, the remaining portion of the plaintiff's cross-claim still exceeds the PFA Sum claimed by the defendant as the basis for winding-up.

45 The defendant's contention in [41(c)] relates to the plaintiff's actions in the London arbitration subsequent to the filing of its counterclaims in those proceedings. On 21 March 2022, the defendant applied to the tribunal for an order of security for costs in defending the plaintiff's counterclaims.[99] The

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[99] Shingade Ajay Babu's Affidavit dated 17 May 2022 ("Shingade Ajay Babu's 2nd Affidavit") at para 33.

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tribunal made an order that the plaintiff put up security for costs in the sum of £270,000.00.[100] On 22 April 2022, the plaintiff made an application to the tribunal seeking, *inter alia*, the defendant's consent for the order for security for costs to be revoked in exchange for the plaintiff discontinuing its counterclaim for US$5,122,992.71, among other things.[101] The counterclaim was for the loss and damage allegedly suffered by the plaintiff as a result of claims by the sub-charterer against the plaintiff (see [21(a)] above). The defendant argues that this indicates the plaintiff's lack of genuine belief in the strength of its counterclaim. Counsel for the plaintiff, on the other hand, explains that the decision to make an offer to discontinue the counterclaim was premised on an assessment of risk.[102] In my view, the fact that the plaintiff made an offer to compromise its counterclaim does not necessarily mean the counterclaim is frivolous and lacks merit. Indeed, counsel for the defendant accepted at the hearing before me that the defendant is unable to point to any admission by the plaintiff that the counterclaims are without basis.[103]

46 In view of the above, I find that, on a *prima facie* standard, there is a cross-claim subject to the arbitration agreement that exceeds the PFA Sum. The defendant obviously cannot deny that the cross-claim falls within the scope of the arbitration agreement. I should add that the defendant is essentially trying to get this court to determine whether there is any merit to the plaintiff's cross-claim in the arbitration. That is precisely what this court cannot do because it would then be usurping the role of the arbitral tribunal and undermining the

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100 Shingade Ajay Babu's 2nd Affidavit at para 37.

101 Shingade Ajay Babu's 2nd Affidavit at para 41.

102 Minute Sheet for the hearing on 27 May 2022 at page 2.

103 Minute Sheet for the hearing on 27 May 2022 at page 3.

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agreement between the parties that their disputes are to be decided in arbitration, not in the courts. Any investigation into the merits of the plaintiff's cross-claim is entirely inconsistent with the premise for adopting the *prima facie* standard of review. The Court of Appeal in *AnAn Group* (at [75]) rejected the triable issue standard in favour of the *prima facie* standard because the former, when applied in the context of disputes subject to arbitration, "offends against the principle of party autonomy". As the Court of Appeal went on to explain (at [77]–[78]):

> 77 The triable issue standard … requires the court to critically consider the merits of the company's defences. If the defences raised are deemed frivolous, the company will be wound up. This is in spite of the parties' agreement that such disputes are to be determined by an arbitrator. … By winding up the company on the basis that its defences are unmeritorious, the court in effect takes the place of the arbitral tribunal, against the parties' agreement …
>
> 78 More crucially, by displacing the decision-making capacity of the arbitral tribunal in respect of the dispute, the court is in effect *presuming* that it has arrived at the same result as the tribunal would have, when this may not necessarily be the case. … Hence, substantive prejudice may be caused to the parties if their choice of dispute resolution is not strictly adhered to. Such prejudice is exacerbated by the severe reputational and commercial damage that follow a winding-up application.

Whether the injunction should be granted and whether security for costs should be ordered

47 Given my finding that there is, on a *prima facie* basis, a cross-claim subject to the arbitration agreement that exceeds the PFA Sum, I find that an injunction restraining the defendant from commencing winding-up proceedings should be granted.

48 As earlier mentioned (at [27]), the defendant argues that the court should grant the injunction only on the condition that the plaintiff furnishes security of

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a value equal to the PFA Sum. In *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] 2 SLR 510 ("*Diamond Glass Enterprise*"), a stay of winding-up proceedings was granted on the condition that security was to be paid into court. There, the creditor had commenced an adjudication application against the debtor under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) and obtained an adjudication determination in its favour. The creditor subsequently obtained an order to enforce the adjudication determination as a judgment and issued a statutory demand against the debtor. When the debtor did not make payment, the creditor commenced winding-up proceedings. However, it was found that the debtor had a cross-claim on a *prima facie* basis based on substantial grounds that exceeded the debt due to the creditor, and the winding-up petition was stayed. The creditor then argued that the stay should be granted only on the condition that the debtor first paid the value of the debt into court as security.

49 The Court of Appeal (at [110]–[111] of *Diamond Glass Enterprise*) declined to lay down a general rule that parties should pay adjudicated amounts into court pending the resolution of the arbitral tribunal or the court, but caveated that there may be circumstances that make payment into court a just condition to impose. The creditor's argument that payment of security into court should be ordered because the debtor was at real risk of insolvency was rejected (at [113]). The Court of Appeal held that the creditor's allegation that the debtor was at real risk of insolvency was premised on "bare assertions" and the debtor's "balance sheet … [showed] that its total assets … far exceeded its total liabilities". It also considered that there was "no evidence … that any creditors aside from [the said creditor] had taken out winding-up applications against [the debtor]". The court ultimately required the debtor to make payment of security into court for different reasons (at [112]).

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50 In the present case, the defendant raises three points in support of an order for security to be paid into court:[104]

(a) if the injunction is granted, the defendant would be prevented from obtaining the PFA Sum despite it being indisputably due;

(b) it would be a "grave miscarriage of justice" if the plaintiff were allowed to be "double-secured" because it had included the PFA Sum in the quantum of security demanded in ADM 103/2021 (see [25] above); at the same time, the defendant is left unable to obtain the PFA Sum while maintaining the security required to secure the release of the Vessel (see [18] above); and

(c) the defendant has significant concerns about the plaintiff's solvency, namely that, should the defendant be successful in the London arbitration, the plaintiff may not be able to pay the PFA Sum and/or any sum issued in the final award.

51 In respect of [50(a)], I have already found that the PFA Sum is not an undisputed debt for the purposes of winding-up proceedings in Singapore (see [38] above).

52 With regard to [50(b)], counsel for the defendant acknowledged at the hearing before me that the defendant could apply to moderate the quantum of security in ADM 103/2021 or apply to set aside the arrest of the Vessel.[105] In my view, either of these possible courses of action might provide a more appropriate means of addressing the defendant's concerns in respect of the

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104 DWS at para 84.

105 Minute Sheet for the hearing on 27 May 2022 at page 4.

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quantum of security it had to put up to secure the release of the Vessel, as opposed to winding-up the plaintiff.

53 As for [50(c)], the defendant alleges that the plaintiff was balance sheet insolvent since FY 2020.[106] Although the 2020 Financial Statements show a net asset position of US$460,677, the defendant relies primarily on the significant uncollected receivables (totalling US$11,954,052) in the plaintiff's balance sheet to argue that the plaintiff is insolvent.[107] The defendant's expert, Mr Tupila, points out that the plaintiff's own auditor had issued a qualified opinion because it was unable to conclude on the recoverability of the plaintiff's receivables.[108] The plaintiff's auditor flagged that the plaintiff had past due receivables that were long outstanding. Although the plaintiff's management stated that it was confident of recovery, and the plaintiff has initiated legal action to recover receivables that have fallen due for more than a year, the auditor took the position that it was unable to come to a conclusion as to the recoverability in the absence of satisfactory audit evidence.[109] Thus, Mr Tupila's position is, in essence, that there is some doubt about the net asset position in so far as it includes the receivables.

54 Mr Tupila opined that, based on the 2020 Financial Statements, the plaintiff was not in a position to settle its current liabilities without converting substantially all its trade receivables into cash. *On the assumption* that the

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106 DFWS at para 46.

107 Tupila Martin John's Affidavit dated 17 May 2022 ("Tupila Martin John's 2nd Affidavit) at page 7, para 4.3.

108 Tupila Martin John's Affidavit dated 29 March 2022 ("Tupila Martin John's 1st Affidavit") at page 6, para 3.1(a).

109 Thio Khiaw Ping Kelvin's Affidavit dated 26 April 2022 ("Thio Khiaw Ping Kelvin's Affidavit") at page 11, para 6.1.

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plaintiff's financial performance in FY 2021 was consistent with that in FY 2020, the plaintiff would have had to convert the overwhelming majority of its trade receivables into cash to meet its current liabilities at the end of FY 2020.[110] Mr Tupila therefore concluded in his report dated 29 March 2022 that the information in the 2020 Financial Statements was "insufficient to demonstrate that [the plaintiff] is *currently* solvent on a cash flow basis" [emphasis in original].[111]

55 However, according to the plaintiff's expert, Mr Thio Khiaw Ping Kelvin ("Mr Thio") in his report dated 26 April 2022, the plaintiff's net current asset position should be adjusted to US$6,220,493 as at 31 December 2020.[112] Mr Thio's calculations were as follows:[113]

Description		**Sum (US$)**
Plaintiff's Net Current Assets		460,677
Adjustments	Less: Trade receivables that have been due for more than 365 days	(1,038,562)
	Add: Debts which may not be demanded (trade payables from related parties)	3,233,343
	Add: Debts which may not be demanded (payables from director)	3,565,035
Plaintiff's Adjusted Net Current Assets		6,220,493

56 In essence, Mr Thio took into consideration that, even if the long outstanding receivables cannot be collected (as argued by Mr Tupila), the net

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110 Tupila Martin John's 1st Affidavit at page 10, para 5.10.

111 Tupila Martin John's 1st Affidavit at page 10, para 6.1.

112 Thio Khiaw Ping Kelvin's Affidavit at page 11, para 5.2.16.

113 Thio Khiaw Ping Kelvin's Affidavit at page 11, para 5.2.15.

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current asset position should also take into account the commercial reality that certain liabilities to related parties and the plaintiff's director would not fall due to be payable. In short, one would not expect these related parties and the plaintiff's director to commence any recovery actions against the plaintiff. Mr Thio thus concluded that, based on the adjusted net current asset position, assuming the plaintiff's financial performance in FY 2021 was consistent with that in FY 2020, the plaintiff would still be solvent even if the issues with recoverability of trade receivables persisted.[114] Mr Tupila, in a further report dated 17 May 2022, disagreed with Mr Thio's conclusions. Amongst other things, Mr Tupila disagreed with Mr Thio's treatment of debts owed to related parties and the plaintiff's director.[115]

57 In my judgment, there is insufficient evidence for the court to find that the plaintiff is insolvent. As it stands, the 2020 Financial Statements record a net asset positive position. The evidence as to the trade receivables is equivocal. It would not be appropriate for the court to infer that the receivables cannot be collected and, on that basis, conclude that the plaintiff is insolvent. It is also speculative for the court to assume that the plaintiff's financial performance after FY 2020 would remain the same. Further, counsel for the defendant accepted that the defendant is unable to point to any other creditors pursuing claims or winding-up proceedings against the plaintiff.[116] In short, there is no real evidence of the plaintiff not being able to meet its current liabilities as they fall due. The circumstances here are similar to those in *Diamond Glass*

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114 Thio Khiaw Ping Kelvin's Affidavit at page 11, para 5.2.17.

115 Tupila Martin John's 2nd Affidavit at pages 9–10, paras 4.14–4.19.

116 Minute Sheet for the hearing on 27 May 2022 at page 4.

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Enterprise (outlined at [49] above) in so far as there is insufficient evidence to show that the debtor is at a real risk of insolvency.

58 For completeness, I note that, as earlier mentioned (at [26]), the defendant argues that the concerns surrounding the plaintiff's solvency should factor into the determination as to whether to grant the injunction. However, given my conclusions on the issue of the plaintiff's solvency, this point has no bearing on my decision to grant the injunction. I therefore cannot agree with the defendant that the plaintiff should be ordered to put up security on the basis of its alleged insolvency as a condition for the grant of the injunction.

59 The defendant also contends that the plaintiff has "taken active steps to stifle the London Arbitration".[117] According to the defendant, the plaintiff has made three attempts to avoid putting up security for costs that have been ordered against it by the tribunal:[118]

(a) first, the plaintiff resisted the application for security for costs;

(b) second, the plaintiff applied for a stay of the London arbitration and the order for security for costs; and

(c) third, after the tribunal dismissed the stay application, the plaintiff sought to re-argue the order for security for costs and requested that the order be revoked in exchange for the plaintiff dropping its counterclaims.

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117 DFWS at para 32.

118 DFWS at para 33.

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60 The defendant has also placed before the court the parties' correspondence with the tribunal on the appropriate form of security for costs.[119] In essence, parties disagreed on the form of security, which led to a delay in the plaintiff putting up security. The tribunal ordered that security be provided in the form of an appropriate bank guarantee.[120] The plaintiff reached out to their bank to provide security by way of a "First Class London Bank Guarantee". However, the defendant took issue with the wording of the guarantee, refusing to accept a time limited guarantee. The plaintiff explained that banks are often not prepared to issue a first class bank guarantee without a limitation period.[121] On the material that is placed before the court, I am not in a position to make a finding that the plaintiff is indeed taking active steps to stifle the arbitration. From my review of the correspondence, both parties have raised concerns and made arguments in support of their respective positions on the issue of the form of the bank guarantee. I am of the view that any issues regarding the plaintiff's delay in complying with the orders of the tribunal should be taken up with the tribunal, which will be able to issue the appropriate directions, if necessary.

Conclusion

61 For the above reasons, I will grant the injunction sought in the Originating Summons, save that it is to last only until the conclusion of the London arbitration. I also grant parties liberty to apply.

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119 Kavitha Ganesan's 1st Affidavit dated 4 August 2022 ("Kavitha Ganesan's 1st Affidavit") at pages 6–15.

120 Kavitha Ganesan's 1st Affidavit at page 15.

121 Kavitha Ganesan's 1st Affidavit at page 12.

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62 I will deal separately with the issue of costs.

Ang Cheng Hock
Judge of the High Court

Toh Ka-Chun Gregory and Karluis Quek (Oon & Bazul LLP) for the plaintiff;
Loh Jen Wei, Tan Chengxi and Kavitha Ganesan (Dentons Rodyk & Davidson LLP) for the defendant.

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