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

[2024] SGHC 247

Companies Winding Up No 164 of 2024

In the matter of Sections 124(1)(*a*), 125(1)(*a*)
and 125(1)(*e*) of the Insolvency,
Restructuring and Dissolution Act 2018

And

In the matter of Bu Shen Xi (S) Pte. Ltd.

Between

Bu Shen Xi (S) Pte. Ltd.

… *Claimant*

And

Official Receiver

… *Non-party*

GROUNDS OF DECISION

[Insolvency Law — Winding up — Grounds for petition — Whether company has by special resolution resolved to be wound up — Section 125(1)(*a*) Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed)]

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(Official Receiver, non-party)

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19 July, 2, 8 August 2024

27 September 2024

Goh Yihan J:

Introduction

1 This was an application filed by Bu Shen Xi (S) Pte Ltd (the "Company") for a winding-up order in respect of itself. The Company's application was based on ss 125(1)(*a*) and/or 125(1)(*e*) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) (the "IRDA").

2 After hearing Mr Kok Jia An Alwyn, counsel for the Company, on 19 July 2024, I directed the Company to file further written submissions to address certain issues. Upon considering those submissions, I granted the winding-up order on 8 August 2024 and furnished my brief grounds. I now provide the full grounds for my decision as this application concerned an instance where a company relied on s 125(1)(*a*) of the IRDA (see, as to the rarity of reported decisions on this subsection, the General Division of the High Court

decision of *Re Fusionex Pte Ltd (Resorts World at Sentosa Pte Ltd, non-party)* [2024] 4 SLR 956 ("*Re Fusionex*") at [1]).

The background facts

3 The Company was incorporated for the manufacture of food products and the operation of food stalls and restaurants. It is an exempt private company limited by shares. The Company's total issued share capital is $150,000. The amount of paid-up capital is $130,000. The number of ordinary shares issued is 150,000.[1]

4 The Company has two directors. They are Mr Tan Kim Huat ("TKH") and Mr Li Wangyu ("LWY"). TKH and LWY hold 45,000 ordinary shares each, which each amount to 30% of the issued share capital. Ms Sham Hiu Fan ("SHF"), who is not a director, holds 60,000 ordinary shares, which amounts to 40% of the issued share capital.[2]

5 On 28 May 2024, the Company resolved (or putatively resolved) by a special resolution that it be wound up by the court. This special resolution was passed by way of (a) a members' resolution in writing, signed by TKH and LWY, passed (or putatively passed) pursuant to the Company's constitution dated 28 May 2024 (the "MR"), and (b) a directors' resolution in writing, signed by both directors of the Company, passed pursuant to the Company's constitution.[3]

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1 Affidavit of Tan Kim Huat dated 25 June 2024 ("Claimant's Supporting Affidavit") at para 7.

2 Claimant's Supporting Affidavit at paras 8-9.

3 Claimant's Supporting Affidavit at para 11 and pp 16-17.

6 As for SHF, the Company's evidence was that she had only paid $40,000 out of the total $60,000 payable in respect of her total share capital (*viz*, 60,000 ordinary shares of $1.00 each).[4] This was shown by (a) the Minutes of the Annual General Meeting of the Company held on 6 May 2024 (the "AGM Minutes");[5] and (b) the Company's Business Profile with the Accounting and Corporate Regulatory Authority (the "ACRA"), which shows that, as of 14 June 2024, the amount of its share capital paid-up (or credited as paid-up) is $130,000, which is $20,000 less than the Company's issued share capital of $150,000.[6] Therefore, pursuant to Regulation 61 of the Company's constitution, SHF did not have voting rights to prevent the passage of the MR in general meeting.[7] Since the MR was validly passed, the Company sought a winding-up order pursuant to s 125(1)(*a*) of the IRDA.

7 In the alternative, the Company stated that it was unable to pay its debts as and when they fall due, considering its contingent and prospective liabilities. In this regard, the Company's evidence was that, based on its Statement of Financial Position as of December 2023, its current liabilities exceeded its current assets.[8] Moreover, based on its Statement of Comprehensive Income for the year of 2023, the Company had suffered a net loss of nearly $200,000.[9] The Company also said that its cashflow deteriorated further in 2024, wherein its current liabilities exceeded its current assets by an even greater margin than that in 2023. As such, the Company alternatively sought a winding-up order

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4 Claimant's Supporting Affidavit at para 12.

5 Claimant's Supporting Affidavit at para 12 and p 42.

6 Claimant's Supporting Affidavit at para 12 and p 10.

7 Claimant's Supporting Affidavit at para 13 and p 30.

8 Claimant's Supporting Affidavit at para 15.

9 Claimant's Supporting Affidavit at para 15.

under s 125(1)(*e*) of the IRDA.

My decision: the Company should be wound up pursuant to s 125(1)(*a*) of the IRDA and, alternatively, s 125(1)(*e*) of the IRDA

8 On 8 August 2024, I granted the winding-up order sought under, primarily, s 125(1)(*a*) of the IRDA and, alternatively, s 125(1)(*e*) of the same, giving brief grounds therefor. My full reasons for so doing are provided below.

Section 125(1)(a) of the IRDA

The applicable principles

9 Turning to s 125(1)(*a*), in *Re Fusionex*, Wong Li Kok Alex JC held (at [19]) that there is a limited discretion to withhold winding up under this section. Unlike in a members' voluntary winding up, it is generally not for the court to question the shareholders' decision to pursue a compulsory winding up by the court (in Part 8 Division 2 of the IRDA ("Division 2")) over a voluntary winding up (in Part 8 Division 3 of the same ("Division 3")). This is obviously predicated on a special resolution being validly passed to effect a compulsory winding up.

10 This distinction is to be expected, since the process of a compulsory winding up under Division 2 is subject to "oversight by the court" (see the Court of Appeal decision of *Superpark Oy v Super Park Asia Group Pte Ltd and others* [2021] 1 SLR 998 ("*Superpark*") at [59]) and has been described as being "conducted under the court's direct supervision" (see the Court of Appeal decision of *Sinfeng Marine Services Pte Ltd v Taylor, Joshua James and another and other appeals* [2020] 2 SLR 1332 ("*Sinfeng*") at [24]). In contrast, while a voluntary winding up is still under the court's "general supervision and control" (see *Sinfeng* at [24]), it is *primarily* under the control of the members

(in the case of a members' voluntary winding up of a solvent company) or of the creditors through a committee of inspection (in the case of a creditors' voluntary winding up of an insolvent company) (see Division 3 Subdivisions 2 and 3; see also *Superpark* at [54], relying on the English High Court Chancery Division case of *In re Phoenix Oil and Transport Co Ltd (No 2)* [1958] Ch 565 at 570 ("*Re Phoenix*")).

11 Hence, in a voluntary winding up, the court's role recedes from being in more direct control of the supervision and conduct of the liquidation process (see *Sinfeng* at [24] and Division 2 Subdivisions 2 and 4) to being "in the background to be referred to if the necessity should arise" (see *Re Phoenix* at 570). It is therefore only natural that the court should be more concerned with the members potentially *avoiding* the greater supervision and control of the court by opting for a voluntary winding up under Division 3. This contrasts with the obverse scenario where the members *choose* to subject the liquidation to the court's comparatively greater degree of control by opting *into* the compulsory winding up process under Division 2.

12 Thus, if a special resolution has been validly passed by the members for a compulsory winding up pursuant to s 125(1)(*a*), then, as Wong JC pointed out in *Re Fusionex* (at [19]), the court should generally allow the winding-up application, subject to two considerations, namely: (a) the creditors' interests; and (b) the presence of bad faith or other untoward circumstances. Indeed, the use of the word "may" in s 125(1) of the IRDA makes clear that the grant or refusal of the winding-up application ultimately remains subject to the court's determination. In this regard, the Court of Appeal had, in *BNP Paribas v Jurong Shipyard Pte Ltd* [2009] 2 SLR(R) 949, adopted analogous reasoning (at [5]) about the use of the word "may" within the predecessor provisions found in ss 253 and 254 of the old Companies Act (Cap 50, 2006 Rev Ed) (the "CA

(Cap 50)"), which had provided for the court-ordered winding up of companies (being *in pari materia* to ss 124 and 125 of the IRDA). Chan Sek Keong CJ observed there that the use of the word "may" indicated a *discretionary* power on the part of the court to order a winding up where the grounds for a winding-up petition were satisfied (at [5] and [15]).

13 Building on Wong JC's consideration of the factors set out in *Re Fusionex* (at [19]) that the court should bear in mind in exercising that discretionary power, I turn first to the factor on the creditors' interests. On this factor, the court would consider any objections from creditors, the list and scope of creditors, and whether the winding up was aimed at undermining the creditors' rights and putting them in a worse position than if the company continued as a going concern (see *Re Fusionex* at [19]). Without seeking to constrain the matters which the court may have regard to under this factor, a court should have regard to the commercial reality that the practical effect of the members opting for a compulsory winding up under Division 2 is to obviate a voluntary winding up under Division 3, both of which can be effected by way of a special resolution. In that respect, the court should consider whether the voluntary winding up that was obviated would have been (a) a members' voluntary winding up (see at [14] below), or (b) a creditors' voluntary winding up (see at [15] below). The weight that the court accords to the creditors' views, especially where they diverge from that of the members, will necessarily differ between these two scenarios. I expand on each of these two scenarios at [14]–[15] below.

14 Where the company is solvent as opposed to insolvent, the creditors' interests will naturally take on lesser weight in the court's exercise of discretion to wind up the company pursuant to s 125(1)(*a*). That is because, in the case of a solvent company, a voluntary winding up would have been under the control

of the members and not the creditors. In such a case where "it is the members who are primarily interested in the results of a solvent liquidation, the longstanding policy of the [CA (Cap 50)] is to allow them to continue to manage what in substance are their own affairs" (see *Petroships Investment Pte Ltd v Wealthplus Pte Ltd (in members' voluntary liquidation) (Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd and another, interveners) and another matter* [2018] 3 SLR 687 ("*Petroships*") at [133]). While the High Court made these remarks in the context of an application to remove the liquidators of a company undergoing a members' voluntary liquidation, that principle should apply *mutatis mutandis* where the members of a *solvent* company voluntarily choose to surrender control over the liquidation process in favour of court-ordered winding up pursuant to s 125(1)(*a*). In such a case, the views of the members will naturally take on a stronger weight in the court's exercise of discretion compared to that of the creditors.

15 However, where the company is *insolvent*, the reverse would be the case. Indeed, it was held in *Petroships*, albeit in the context of deciding a removal application (at [128]), that "to determine the interest of a solvent liquidation, a court will ordinarily take into account the views of the members and not the views of the creditors", whereas for an "insolvent liquidation … a court will ordinarily take into account the views of the creditors and not the views of the members". Where the effect of a special resolution for a court-ordered winding up of the company is to avoid the alternative prospect of a creditors' voluntary winding up, the court should logically accord more weight to the views of the creditors than if it was a members' voluntary winding up that had been avoided instead. The effect of the members' election of a compulsory winding up would be to operate to the exclusion of the creditors having greater supervisory control of the liquidation process, as in a creditors' voluntary winding up (see

Division 3 Subdivision 3; see also *Sinfeng* at [24] and *Superpark* at [54]–[55]). That said, the weight to be attributed to this fact is tempered by the fact that, while the creditors are not in control of the process of a compulsory winding up, there remains an avenue for their views and input to be incorporated into the liquidation process through a committee of inspection acting together with the court-appointed liquidator (see Division 2 Subdivision 3).

16 As for the factor of untoward circumstances, a company that sought to be wound up under s 125(1)(*a*) should be transparent and explain the circumstances behind the winding-up application. This would allow the court to understand the underlying facts and exercise its discretion properly (see *Re Fusionex* at [19]). This stems from the broader principle that the court, when confronted with a winding-up application more generally, must ensure that the court's processes are not being abused to further a collateral purpose or ulterior motive (see, *eg*, the Court of Appeal decision of *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268 at [58] and the General Division of the High Court decisions of *Adcrop Pte Ltd v Gokul Vegetarian Restaurant and Cafe Pte Ltd (Rajeswary d/o Sinan and another, non-parties)* [2023] 5 SLR 1435 at [58]–[64] and *Zhejiang Crystal-Optech Co Ltd v Crystal-Moveon Technologies Pte Ltd (Moveon Technologies Pte Ltd and another, non-parties)* [2024] 4 SLR 1736 at [35]–[41]).

17 It is not possible to exhaustively set out the varied circumstances under which a winding-up application brought under s 125(1)(*a*) may be refused on the ground of untoward circumstances. However, a consideration of this factor should take into account the fact that an application brought under s 125(1)(*a*) means that the members have opted *not* to pass a special resolution to effect a voluntary winding up, pursuant to Division 3 Subdivision 1 (see s 160(1)(*b*) of the IRDA). While, in many cases, this may be a legitimate commercial decision

for the members to elect, there may be situations where such an election is pursued for a collateral motive or an improper purpose. For example, the members of an insolvent company may invoke the compulsory winding-up process to avert a creditors' voluntary winding up for various untoward reasons. These reasons may include (a) to avoid the prospect of a liquidation in which the creditors are the primary stakeholders in the process (see *Petroships* at [134]–[135]), (b) to avoid the prospect of good faith litigation that the members believe to be likely to be instituted by a liquidator nominated by the creditors (see ss 166 and 167 of the IRDA; see also, *eg*, the decision of the General Division of the High Court in *Re Castlewood Group Pte Ltd (in creditors' voluntary liquidation)* [2022] 5 SLR 741 at [9]), or (c) to avoid the creditors appointing a committee of inspection which may, in turn, affect the course or conduct of the liquidation process (see s 169 of the IRDA; see also, *eg*, *Petroships* at [165], relying on the Federal Court of Australia decision of *City & Suburban Pty Ltd and others v Smith (as liquidator of Conpac (Aust) Pty Ltd (in liq)) and another* (1998) 28 ACSR 328 at 338).

18 Whether such objects at [17] above may be improper or untoward will, however, ultimately depend on all the circumstances of a particular case. I am mindful, in this regard, that creditors of an insolvent company are not entitled, *as of right*, to a creditors' voluntary winding up over court-ordered compulsory liquidation (see, *eg*, *Superpark* at [59]), and that there are avenues for their interests to be safeguarded within the compulsory liquidation process (see at [15] above). Nevertheless, it is possible to envisage scenarios where members are motivated by reasons of bad faith to avoid a creditors' voluntary winding up, be it to cause injury to the creditors, to stifle potential recourses they might pursue should the creditors have control of the process, or even reasons of spite or animosity. If such a collateral motive or improper purpose is established, then

a court should dismiss a winding-up application made under s 125(1)(*a*).

19 In summary, in considering a winding-up application under s 125(1)(*a*), a court would first determine if the special resolution was validly passed. That would determine if that prerequisite is met for the court's discretion to grant or to refuse the winding-up application under s 125(1)(*a*) to be engaged. Once that discretion is engaged, the court then determines whether to exercise that discretion in favour of granting the winding up sought, for which it would consider: (a) the creditors' interests; and (b) the presence of bad faith or other untoward circumstances.

*A winding-up order should be made pursuant to s 125(1)(*a*)*

(1) A special resolution to wind up the Company was validly passed

20 With the above principles in mind, I was satisfied that a winding-up order should be made pursuant to s 125(1)(*a*) in the present case. To begin with, I determined that a special resolution to wind up the Company was validly passed. It is trite law that s 61(1) of the IRDA clarifies that the term "special resolution" means a special resolution mentioned in s 184 of the Companies Act 1967 (2020 Rev Ed) (the "CA"). Section 184(1)(*a*) of the CA in turn explains that a resolution is a special resolution in the following circumstances:

> **Special resolutions**
>
> **184.**—(1) A resolution is a special resolution when it has been passed by a majority of not less than three-fourths of such members as, being entitled to do so, vote in person or, where proxies are allowed, by proxy present at a general meeting of which —
>
> > (*a*) in the case of a private company — not less than 14 days' written notice; or
> >
> > [s 184(1)(*b*) omitted]

> specifying the intention to propose the resolution as a special resolution has been duly given.

The crux of the present application was whether SHF, who had shares amounting to 40% of the issued share capital, was "entitled to" vote, for the purposes of s 184(1) of the CA, such that she could have prevented the passage of the MR as a special resolution in general meeting. In this regard, I was satisfied by the Company's explanation as to why SHF did not have voting rights to prevent such passage.

21 The Company's evidence was that, on 1 January 2023, TKH and LWY entered into an agreement, as purchasers, with Mr Sham Hong Hei and Ms Sham Hiu Ting, as sellers, for the incorporation of the Company to own and operate eight food stalls (the "Agreement").[10] Neither the Company nor SHF was a party to the Agreement.

22 Crucially for the present application, cl 3 of the Agreement provides that "[t]he Purchaser and the Sellers have subscribed and paid up SGD $60,000.00/60% and $40,000.00/40% of shares respectively in Bu Shenxi".[11] While this may suggest that SHF's shares were fully paid up, it is important to note that cl 3 does not indicate that SHF has herself fully subscribed to and paid up the sum equivalent to 40% of the Company's issued share capital. At the highest, I accepted that SHF is only the sellers' nominee for the purpose of holding shares in the Company. Moreover, cl 3 does not accurately reflect the Company's share capital, which is $150,000, and not $100,000. As such, I accepted that SHF's share capital in the Company that was reflected as $60,000

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10 Affidavit of Tan Kim Huat dated 18 July 2024 ("Claimant's Supplemental Affidavit") at pp 11-14.

11 Claimant's Supplemental Affidavit at p 11.

was not fully paid up.

23 Indeed, SHF had notice of this situation when the Company issued a letter of demand dated 3 May 2024 for her to pay the outstanding sum of $20,000, failing which the Company would lodge a Notice of Error with ACRA regarding her shareholding.[12] Moreover, at the AGM held on 6 May 2024, as recorded in the AGM Minutes, SHF was reminded of Regulation 61 of the Company's constitution, which stated that "[n]o member is entitled to vote at any general meeting unless all calls or other sums presently payable by the member in respect of shares in the company have been paid."[13] However, SHF did not pay the outstanding sum of $20,000.

24 The effect of Regulation 61 is therefore to take away all of SHF's voting rights, and not just the rights in relation to the outstanding amount. This is clear from the wording of Regulation 61, which states that such a member is not "entitled to vote" where they have failed to pay "all" sums due "in respect of shares in the company". On a plain reading, that must mean that such a member would lack voting rights *altogether*. It cannot be read to mean that they are only ineligible to vote in respect of the proportion of their shares which are not paid up, since that narrower view would not be consistent with the phrase "[n]o member is entitled to vote", which, on its face, does not limit the scope of Regulation 61's disqualifying effect to *only* those shares in respect of which the sums are due or "presently payable". Rather, that effect extends to any member who has failed to pay "all" sums "presently payable" in respect of their "shares in the company", *ie*, *any* of their shares in the company.

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12 Claimant's Supplemental Affidavit at p 7.

13 Claimant's Supporting Affidavit at pp 30 and 42.

25 Indeed, this was the view that was adopted by Hoffmann J (as he then was) of the English High Court Chancery Division in the case of *Re Bradford Investments Ltd* [1991] BCLC 224 ("*Re Bradford*"). In that case, Article 71 of the company's articles of association had to be construed and applied in respect of ordinary shareholders who were said to have only partially paid up the share capital for their subscribed shares, like SHF's situation here. Those shareholders were deemed ineligible to vote by the temporary chairman of an extraordinary general meeting for the election of four persons to the board of directors (at 226a and 228a–228i). For completeness, Article 71 read as follows (at 226h): "No Member shall be entitled to vote at any General Meeting unless all calls or other sums presently payable by him in respect of the shares held by him in the Company have been paid." It is clear that the wording of Article 71 in *Re Bradford* is materially similar to that of Regulation 61, which is, in turn, derived from the "model constitution" for private companies found in the First Schedule of the Companies (Model Constitutions) Regulations 2015, just as Article 71 found its origins in the UK's Table A of the First Schedule of the UK's Companies Act 1948 (c 38), which was later superseded by differing language in the UK's Companies Act 1985 (c 6) (at 231h).

26 Hoffmann J held (at 232c–232g) that the plain wording of Article 71 was susceptible of no other textual interpretation than that a failure of a member to pay *all* sums due in respect of their shareholding in the company would have the effect of their *total* disenfranchisement in general meeting. As Hoffmann J put it (at 232c–232g), with which I respectfully agree:

> The difficulty I have is of *reconciling any other interpretation with the language which is used in the article.* The articles, of course, make in many places a very clear distinction between a member and the shares in respect of which he is entitled to vote. Members on a show of hands have one vote however many shares they hold. On a poll they may vote in respect of each of their shares, and so forth. This article says:

> 'No member shall be entitled to vote [and that must mean either on a show of hands or on a poll] at any General Meeting unless all calls … payable by him in respect of the shares held by him in the Company have been paid.'
>
> In the case of a show of hands the decision on whether he can vote is an all-or-nothing decision. It therefore must, in my judgment, mean that if he holds shares in respect of which calls or other sums payable have not been paid he cannot vote on a show of hands at all. But if he cannot vote on a show of hands then it would be anomalous to take a different view on a poll. *Once again, the article simply says that "No member shall be entitled to vote …" Consequently I am, I think, forced to the conclusion which I confess to find somewhat harsh, that a member cannot vote if there is money owing in respect of any of the shares for which he is registered.*
>
> [emphasis added; interpolations in square brackets in original]

27 In my view, the interpretation adopted in *Re Bradford* with respect to Article 71 there is equally applicable to the text of Regulation 61 here. For completeness, Hoffmann J's remarks regarding the effect of Article 71 to a vote by a show of hands versus a vote by poll is equally apt in the Singapore context, as contemplated by s 179(1)(*c*) of our CA, which states that, unless the company's constitution expressly provides otherwise, "in the case of a company having a share capital — (i) on a show of hands, each member who is personally present and entitled to vote has one vote", whereas in the case of a vote by poll, each member holds one vote for each share held by them. In addition to the difficulties in determining how Regulation 61 would apply to a vote by show of hands if one adopts the narrower interpretation that a shareholder such as SHF is *only* disenfranchised in respect of shares which are not paid-up, I also concur with Hoffmann J's observations that the *text* of Article 71 there, and that of Regulation 61 here, cannot be read in that more limited fashion, due to the broad and general nature of the words "[n]o member is entitled to vote" *unless* the condition therein is met. The effect is, on its face, "all-or-nothing", in that a member either satisfies the condition in Regulation 61 to have voting rights in

a general meeting, or if not, have no voting rights *at all*. This is also consistent with the apparent purpose of Regulation 61, which is to enable a company to compel shareholders to pay all outstanding sums. This purpose would be blunted were a shareholder still entitled to voting rights in respect of the proportion of shares that he or she had paid for despite their owing outstanding sums to the company.

28 In the present case, the Company duly filed the Notice of Error with ACRA on 6 May 2024 to reflect SHF's paid-up share capital as $40,000, instead of $60,000.[14] As such, the MR was validly passed on 28 May 2024 in a general meeting by 100% of members with voting rights, namely, TKH and LWY, since the effect of Regulation 61 was that SHF had *no* voting rights even in respect of the 40,000 shares in the Company that were fully paid-up. Thus, in the circumstances, I was satisfied that the MR was validly passed as a special resolution by not less than three-fourths of the Company's members who were entitled to vote in a general meeting.

(2) There were no factors against the making of a winding-up order pursuant to s 125(1)(*a*)

29 Turning then to the other considerations on the premise that a special resolution had been validly passed to wind up the Company pursuant to s 125(1)(*a*), I found that the interests of the Company's creditors would not be compromised by a winding-up order. Indeed, although the present application was advertised on 5 July 2024, none of the Company's creditors raised any objection or appeared at the hearing on 19 July 2024. Further, there was nothing on the facts which suggested any unconscionable or inequitable circumstances which justified withholding a winding-up order. In this regard, I was satisfied

[14] Claimant's Supplemental Affidavit at p 9.

that the Company had made full and frank disclosure of the circumstances leading to the present application. More importantly, it was clear that the Company was in dire financial straits, with a negative equity of $246,750.42 as of March 2024 whilst sustaining a net loss of $198,313.41 from January to March 2024, which motivated the decision to wind up the Company.[15]

30 For all these reasons, I was satisfied that a winding-up order should be made pursuant to s 125(1)(*a*) of the IRDA. It was therefore not strictly necessary for me to consider the Company's alternative basis for the winding-up order sought, *viz*, s 125(1)(*e*) of the IRDA. Nevertheless, I proceeded to consider that alternative ground for the winding-up order, in the interest of completeness.

Section 125(1)(e) of the IRDA

The applicable principles

31 As for s 125(1)(*e*), the Court of Appeal in *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd (formerly known as Tong Teik Pte Ltd)* [2021] 2 SLR 478 ("*Sun Electric*") established the following principles for the test of a company being shown to be "unable to pay its debts" under s 254(2)(*c*) of the old CA (Cap 50) (which is *in pari materia* to s 125(2)(*c*) of the IRDA) (at [65] and [69]):

> 65 We thus hold that the cash flow test is the sole applicable test under s 254(2)(*c*) of the Companies Act. For clarity, the cash flow test assesses whether the company's current assets exceed its current liabilities such that it is able to meet all debts as and when they fall due. We agree with Mr Lim that "current assets" and "current liabilities" refer to assets which will be realisable and debts which will fall due

[15] Claimant's Supporting Affidavit at para 16.

> within a 12-month timeframe, as this is the standard accounting definition for those terms.
>
> …
>
> 69 Finally, we set out a non-exhaustive list of factors which should be considered under the cash flow test, many of which were also stated in *Kon Yin Tong* at [37]–[38]. The court should consider:
>
> > (a) the quantum of all debts which are due or will be due in the reasonably near future;
> >
> > (b) whether payment is being demanded or is likely to be demanded for those debts;
> >
> > (c) whether the company has failed to pay any of its debts, the quantum of such debt, and for how long the company has failed to pay it;
> >
> > (d) the length of time which has passed since the commencement of the winding-up proceedings;
> >
> > (e) the value of the company's current assets and assets which will be realisable in the reasonably near future;
> >
> > (f) the state of the company's business, in order to determine its expected net cash flow from the business by deducting from projected future sales the cash expenses which would be necessary to generate those sales;
> >
> > (g) any other income or payment which the company may receive in the reasonably near future; and
> >
> > (h) arrangements between the company and prospective lenders, such as its bankers and shareholders, in order to determine whether any shortfall in liquid and realisable assets and cash flow could be made up by borrowings which would be repayable at a time later than the debts.

32 More broadly, the court adopts a commercial, rather than a technical, view of insolvency. The key inquiry is whether the liquidity issue is temporary and may be cured in the reasonably near future. In doing so, the court applies the cash flow insolvency test flexibly, based on what is commercially realistic and sensible, to avoid absurd and illogical outcomes (see, *eg*, *Sun Electric* at

[67]–[68]). Hence, the test is intended to be a "broad one" based on "the holistic position of the company", considering "not just liquidated claims, but also those that might be made on the non-monetary assets of the company, though which may ultimately be payable in money" (see the decision of the General Division of the High Court in *Loh Cheng Lee Aaron and another v Hodlnaut Pte Ltd (Zhu Juntao and others, non-parties)* [2024] 4 SLR 1683 (at [8])). As such, despite the wording of s 125(2), the ground in s 125(2)(*c*) is not a deeming provision. Instead, an applicant invoking that provision bears the burden of *positively* proving its inability to pay its debts on the "cash flow" insolvency test in *Sun Electric* without the benefit of any presumptions, based on a broader analysis of *all* the company's liabilities, be they present obligations or contingent and prospective obligations (see the decision of the General Division of the High Court in *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd (Group Lease Public Co Ltd and another, non-parties)* [2024] SGHC 195 at [62]). The common thread is that the test of "cash flow" insolvency is a broad and flexible one, animated not by rigid rules or inflexible presumptions, but a global appreciation of the company's financial position and a commercially sensible inquiry into whether the company would be able to meet its liabilities in the near future.

*Alternatively, a winding-up order should be made pursuant to s 125(1)(*e*)*

33 Applying the test of cash flow insolvency in *Sun Electric* to the evidence from the Company, I found that the Company is unable to pay its debts.

34 First, the quantum of the Company's debts which are due or would be due in the reasonably near future is large and exceed the sum of its assets. In this regard, based on its Statement of Financial Position as of December 2023, the Company had current assets of $1,420,325.57 and current liabilities of

$1,468,762.58.[16] Based on its Statement of Comprehensive Income from January 2023 to December 2023, the Company suffered a net loss of $198,437.01.[17] The evidence also showed that the Company's cashflow worsened in 2024 whereby its current liabilities exceeded its current assets by an even greater margin.

35 Second, it was clear that payment was being demanded or was likely to be demanded for the Company's debts. The Company's Payables Reconciliation report as of December 2023 showed the ageing of its debts. Out of the total sum of $1,487,781.96 owed to creditors, a majority of that sum in the amount of $754,931.30 was outstanding for more than 150 days.[18]

36 Third, it was clear that the Company had failed to pay a large proportion of its debts for a lengthy period. Once again, out of the total sum of $1,487,781.96 owed to creditors as of December 2023, a majority of that sum was already outstanding for more than 150 days. The Company's cashflow had also worsened further through to March 2024 from that in 2023, and more so into 2024 during the present application being filed and heard.

37 Fourth, while the Company had current assets valued at $1,420,325.57 and $1,572,744.20 as of December 2023 and March 2024,[19] respectively, it was highly unlikely that the Company would be able to realise the entire value of these assets in the then-near future. That was because the Company's primary business was in the operation of eight food stalls (see at [21] above). Some of

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16 Claimant's Supporting Affidavit at para 15 and p 48.

17 Claimant's Supporting Affidavit at p 47.

18 Claimant's Supporting Affidavit at p 76.

19 Claimant's Supporting Affidavit at pp 48 and 78.

its current assets were likely sunk costs for the setting up of these stalls, which would depreciate over time.

38 Fifth, the state of the Company's business, to determine its expected cash flow from the business by deducting from projected future sales the cash expenses which would be necessary to generate those sales, was not positive. Based on the Company's Statements of Comprehensive Income from (a) January 2023 through December 2023 and (b) January 2024 through March 2024, the Company had suffered net losses of $198,437.01 and $198,313.41,[20] respectively. In other words, the Company's net cash flow from the business had been consistently negative since its incorporation on 28 December 2022. That did not bode well for the purposes of assessing the Company's likely future income and whether it would be able to meet its future liabilities therewith.

39 Finally, it was unlikely that there could be any arrangements between the Company and prospective lenders, such as its bankers and shareholders, such that any shortfall in liquid and realisable assets and cash flow could be made up by borrowings which would be repayable at a time later than when the debts fell due. Indeed, the discussions at the AGM showed that none of the shareholders of the Company were willing to inject any more funding into it. In this regard, the Company pointed out that, although SHF was aware that the Company was experiencing cash flow issues, she failed to pay the outstanding sum of $20,000 towards the Company's share capital that was subscribed to by her, which would have provided it much needed capital at the time.

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[20] Claimant's Supporting Affidavit at pp 47 and 79.

Conclusion

40 For the reasons above, I granted the winding-up order pursuant to s 125(1)(*a*) of the IRDA and, alternatively, s 125(1)(*e*) of the same.

Goh Yihan
Judge of the High Court

Teoh Seok Pin Audrey, Kok Jia An Alwyn and Iffera Ng Lu Hui (Robert Wang & Woo LLP) for the claimant;
Jeffrey Yip (Insolvency & Public Trustee's Office) for the official receiver.