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

[2024] SGHC 280

Companies Winding Up No 120 of 2022 (Summons No 620 of 2024)

In the matter of the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018)

And

In the matter of Singapore Commodities Group Co, Pte Ltd

Between

Founder Group (Hong Kong) Ltd (in liquidation)

… *Claimant*

And

Singapore Commodities Group Co, Pte Ltd

… *Defendant*

GROUNDS OF DECISION

[Civil Procedure — Payments into and out of court — Payment into court to secure a stay of winding-up application — Whether payment into court should be paid out to satisfy alleged debt — Rules of Court 2021 — Order 3 r 2(2)]

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Founder Group (Hong Kong) Ltd (in liquidation)
v
Singapore Commodities Group Co, Pte Ltd

[2024] SGHC 280

General Division of the High Court — Companies Winding Up No 120 of 2022 (Summons No 620 of 2024)
Vinodh Coomaraswamy J
2 May, 19 July 2024

29 October 2024

Vinodh Coomaraswamy J:

Introduction

1 There are two applications before me: (a) a winding up application ("the CWU"); and (b) an application for money to be paid out of court ("the Payment Out Application"). I heard both applications jointly on 19 July 2024.

The CWU

2 The first application before me is the CWU. The claimant presented the CWU against the defendant in May 2022. In the CWU, the claimant claims that the defendant is insolvent because the defendant has failed to pay a debt in the sum of US$14.12m ("the Debt") that fell due from the defendant to the claimant in December 2015.

3 The defendant denies the existence of the Debt. As a result, the defendant commenced arbitration against the claimant in April 2022 seeking a finding that the Debt *does not* exist ("the Arbitration").

4 In September 2022, by consent, I stayed the CWU until the conclusion of the Arbitration upon the defendant paying a sum equivalent to the Debt, *ie*, US$14.12m, into court ("the Sum").

5 In November 2023, the Arbitration concluded with an award ("the Award"). In the Award, the arbitral tribunal ("the Tribunal") expressly *declined* to find that the Debt *does not* exist (see [38] below). It also expressly declined to find that the Debt *does* exist (see [40] below). The parties agree that the conclusion of the Arbitration means that the stay of the CWU had to be lifted. But the parties differ over the consequence that follows from the Award on the outcome of the two applications before me.

6 I should make clear at this juncture that I use the term "the Debt" to refer to the claimant's claim that the defendant owes it the sum of US$14.12m purely for convenience. My use of that term should not be taken to imply that I have made or now make any finding that the defendant actually does owe a debt of US$14.12m to the claimant. Like the Tribunal, I have made and make no such finding.

The Payment Out Application

7 The second application before me is the Payment Out Application. The claimant filed the Payment Out Application in February 2024. In the Payment Out Application, the claimant prays for an order that the Sum be paid out of court to the claimant ("a Payment Out Order").

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8 The claimant's primary basis for seeking a Payment Out Order is that the defendant's failure to secure in the Award the finding that it had sought in the Arbitration, *ie,* a finding that the Debt *does not* exist (see [3] above), must mean that the Debt *does* exist.

9 The defendant's position on the Payment Out Application is that it does not object to my making a Payment Out Order if the basis of the order is that the Sum is to be paid out to the claimant because the defendant failed in the Arbitration and *not* because the Award *did* find *that* the Debt *does* exist (see [143]–[147] below).

10 I have made a Payment Out Order because, and *only* because, the defendant failed in the Arbitration and *not* because the Award *did* find that the Debt *does* exist.

11 Given my decision to make the Payment Out Order, the parties are agreed that I should grant the claimant leave to withdraw the CWU and hear the parties on the costs of the CWU. I have accordingly granted leave to the claimant to withdraw the CWU. After hearing the parties on costs, I have ordered the defendant to pay the claimant its costs of and incidental to the CWU, such costs fixed in the sum of $85,000 including disbursements. This award of $85,000 in costs to the claimant includes the claimant's costs of and incidental to the Payment Out Application.

The appeal

12 The defendant has now appealed against my decision.

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13 The defendant's appeal is expressly against the *whole* of my decision on *both* the Payment Out Application *and* on the CWU.[1] Despite the expressly all-encompassing nature of the appeal, however, the defendant cannot in fact appeal against my decision to allow the claimant to withdraw the CWU. That decision was in no sense *adverse* to the defendant; it was in fact in the defendant's *favour*. In any event, the defendant does not suggest that there are any independent grounds for its appeal against my decision: (a) to grant the claimant leave to withdraw the CWU; or (b) to order the costs of the CWU against the defendant.

14 The defendant's appeal is therefore in substance, even though not in form, against only my decision to make the Payment Out Order. Restoring the *status quo ante* by reversing the withdrawal of the CWU is merely incidental to the substance of the defendant's appeal.[2]

15 These grounds will therefore be confined to the grounds for my decision to make the Payment Out Order.

The background facts

The parties

16 The claimant is a company incorporated in Hong Kong. In July 2021, the claimant went into liquidation pursuant to a winding up order made by the Court of First Instance in the Hong Kong Special Administrative Region of the People's Republic of China ("the PRC").[3]

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1 Notice of Appeal in CA/CA 47/2024 dated 14 August 2024, paragraph 2.

2 Notes of Argument, 20 September 2024, page 10, lines 2–25.

3 1st Affidavit of Edward Simon Middleton dated 27 May 2022 ("ESM1") at para 4 and p 27.

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17 The defendant is a company incorporated in Singapore. Its principal business is the general wholesale trade of, amongst other things, forest products and chemical products.[4]

18 Until 2021, the claimant and the defendant were both ultimately owned and controlled by a company incorporated in the PRC known as Peking University Founders Group Company Ltd ("PUFG").[5] PUFG is broadly speaking, the commercial arm of Peking University (see *Nuoxi Capital Limited (in liquidation) v Peking University Founder Group Company Limited* [2022] 2 HKC 1 and *Nuoxi Capital Limited (in liquidation in the British Virgin Islands) v Peking University Founder Group Company Limited* [2022] 5 HKLRD 837). In 2021, as a result of PUFG's actual or apprehended insolvency, PUFG's business was reorganised under the supervision of the First Intermediate People's Court in Beijing. In this reorganisation, a consortium of strategic PRC investors acquired a tranche of PUFG's assets. This tranche included the defendant.

19 Since 2021, therefore, the claimant and the defendant are no longer both under the ultimate ownership and control of PUFG. The defendant is now under the ultimate ownership and control of the consortium of strategic PRC investors. As for the claimant, although it remains under the ultimate ownership of PUFG, it is now under the control of its liquidators. Its liquidators were appointed on a petition presented by PUFG's offshore bondholders. PUFG's offshore bondholders are aggrieved by PUFG's reorganisation because it makes no provision for the offshore bondholders' economic and other interests.

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4 ESM1 at para 6.

5 1st affidavit of Lu Yang dated 30 June 2022 ("LY's affidavit") at para 6.

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20 For these reasons, although the CWU appears in form to be a straightforward winding up application by a creditor against a debtor, it is in substance a contest between (on the claimant's side) the economic and other interests of PUFG's offshore bondholders and (on the defendant's side) the economic and other interests of the consortium of strategic PRC investors.

The claimant's claim against the defendant

21 After taking control of and reviewing the claimant's books and records, the claimant's liquidators formed the view that the defendant owes the Debt to the claimant.[6] They formed this view on the basis of four documents:

(a) The first document is a contract dated 17 December 2015 ("the Contract")[7] under which the defendant agreed to buy from the claimant 3,000 tons (+/- 5%) of copper cathodes at a price of US$4,712 per ton for delivery in December 2015.[8]

(b) The second document is an invoice dated 28 December 2015 issued by the claimant to the defendant in the sum of US$14.12m for just over 2,900 metric tonnes of copper cathodes ("the Invoice").[9]

(c) The third document is an audit confirmation that the defendant's Singapore auditor sent to the claimant in February 2019.[10]

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6 ESM1 at para 5(a) and 14(a).

7 ESM1 at p 212; LY's affidavit at para 22.

8 Claimant's Written Submissions dated 22 September 2022 ("CWS") at para 12.

9 ESM1 at p 216; LY's affidavit at para 23.

10 ESM1 at p 41–43.

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(d) The fourth document is an audit confirmation that the defendant's PRC auditor sent to the claimant also in February 2019.[11]

22 The two audit confirmations are, in form, a letter issued by the defendant's Singapore and PRC auditors to the claimant informing the claimant that the defendant's books, as at 31 December 2018, show that the defendant owes the Debt to the claimant. Each auditor then invites the claimant to sign and affix its company stamp at the foot of the letter above words acknowledging that the confirmation correctly states the balance due from the defendant to the claimant. The claimant duly signed, stamped and returned the acknowledgments in both audit confirmations.[12]

23 Curiously, on 3 May 2022 – while the Arbitration was pending – the claimant received from the defendant's Singapore auditor a further audit confirmation dated 18 March 2022 asking the claimant to confirm that the defendant owes the Debt to the claimant.[13] Although this is an odd feature of the case, nothing ultimately turns on it.

The claimant demands payment of the Debt

24 In October 2021, the liquidators issued a letter of demand to the defendant demanding that the defendant pay the Debt to the claimant within 14 days.[14] The defendant failed to comply with the demand.[15]

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11 ESM1 at p 45–47.

12 ESM1 at para 12 and at p 43 and 46.

13 ESM1 at para 41 and p 184.

14 ESM1 at para 14(a) and p 53.

15 ESM1 at para 16.

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25 In February 2022, the liquidators' solicitors issued a letter of demand to the defendant. This letter demanded that the defendant pay the Debt to the claimant within 21 days, failing which the defendant would be presumed under s 125(2)(*a*) of the Insolvency Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("the Act") to be unable to pay its debts within the meaning of s 125(1)(*e*) of the Act.[16] The defendant failed to comply with this demand as well.[17]

26 In March and April 2022, the parties attempted to agree the terms of a standstill and to resolve by negotiation the claimant's claim for payment of the Debt.[18] They were ultimately unable to resolve the claim.[19] Under cl 13 of the Contract, the parties are obliged to submit any claim that they are unable to resolve by negotiation to the China International Economic and Trade Arbitration Commission ("CIETAC") to be resolved by arbitration.[20]

The defendant commences the Arbitration

27 On 12 April 2022, pursuant to cl 13 of the Contract, the defendant commenced the Arbitration with CIETAC by filing a request for arbitration.[21]

28 In its request for arbitration, the defendant accepted: (a) that the claimant and the defendant had in fact entered into the Contract; and (b) that the claimant

16 ESM1 at para 17(a) and p 68–69.

17 ESM1 at para 19.

18 ESM1 at paras 24–40.

19 ESM1 at paras 24–43.

20 ESM1 at p 215; LY's affidavit at p 91.

21 ESM1 at para 47.

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had in fact issued the Invoice to the defendant under the Contract. The defendant nevertheless asserted that the Debt did not exist on two grounds.

(a) First, the Contract was "null and void" under Article 146 of the Civil Code of the PRC because the Contract did not represent "the true intention" of the claimant and the defendant. The defendant asserted that:

(i) both the claimant and the defendant had, in December 2015, "no actual demand for the sale and purchase of electrolytic copper"; and

(ii) the Contract and the Invoice were issued only "for the process of bookkeeping".[22]

(b) Second, the claimant had never delivered any copper cathodes to the defendant under the Contract.[23]

29 On 9 May 2022, the defendant informed the claimant that it had lodged the request for arbitration with CIETAC. On the next day, 10 May 2022, the claimant received a letter from CIETAC enclosing the defendant's request for arbitration.

The claimant presents the CWU

30 On 27 May 2022, the claimant presented the CWU against the defendant. The primary ground on which the claimant seeks to wind up the defendant is that the defendant is deemed by s 125(2)(*a*) of the Act to be unable

[22] ESM1 at p 225, 2nd and 3rd para.

[23] ESM1 at p 226, 1st para.

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to pay its debts within the meaning of s 125(1)(*e*) of the Act because the defendant has, for three weeks after service of the statutory demand (see [25] above): (a) neglected to pay the Debt; and (b) neglected to "secure or compound" for the Debt to the claimant's reasonable satisfaction. The alternative ground on which the claimant seeks to wind up the defendant is that it is "just and equitable" to do so within the meaning of s 125(1)(*i*) of the Act.

31 Before the CWU could come up for hearing, and in view of the ongoing Arbitration, the parties quite sensibly agreed to stay the CWU until the conclusion of the Arbitration upon the defendant paying the Sum into court. But s 130(1) read with s 126(2) of the Act posed a potential obstacle to the defendant's power to pay the Sum into court. Those provisions render void any disposition of the defendant's property after 27 May 2022, the date on which the claimant presented the CWU, unless the court orders otherwise. To avoid any issues arising under these provisions, the defendant applied for leave under s 130(1) of the Act to pay the Sum into court in September 2022.[24]

The defendant pays the Sum into court

32 Both the CWU and the defendant's application for leave under s 130(1) of the Act came up for hearing before me in September 2022. Leading counsel for both parties informed me that they had agreed to stay the CWU upon the defendant's payment of the Sum into court pending the determination of the CWU and the Arbitration. The defendant's application under s 130(1) was accordingly unopposed. I therefore granted an order on that application ("the Leave Order") in the following terms:[25]

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[24] HC/SUM 3591/2022 filed on 28 September 2022.

[25] HC/ORC 5089/2022 dated 29 September 2022 filed 6 October 2022.

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> 1. Pursuant to Section 130(1) of the [Act], the Defendant be and is hereby granted leave to provide security for the Claimant's claim of US$14,117,585.50, by way of payment of an equivalent sum of monies into Court, pending the determination of HC/CWU 120/2022 and the ongoing arbitration proceedings at the China International Economic and Trade Arbitration Commission arising from or related to such claim.
>
> 2. The security to be provided under paragraph 1 above shall be provided within 5 Singapore business days of the date of this order.
>
> 3. The costs of and incidental to this application shall be costs in the cause.

33 Upon making the Leave Order, and with the consent of both parties,[26] I stayed the CWU until further order.[27]

34 On 4 November 2022, the defendant duly paid the Sum into court.[28]

35 There is no provision in the Rules of Court 2021 ("the Rules") which permits a defendant to a winding up application to pay money into court under O 27 of the Rules in a situation such as the present. Order 27 itself is of no assistance. That order deals with the mechanics of payments into and out of court and the obligations of the Accountant-General in holding and dealing with money paid into court between payment in and payment out. Order 27's purpose is not to define the circumstances in which a party is permitted to pay money into court.

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26 Notes of Argument dated 29 September 2022, p 14 line 29 to p 16 line 5; Shook Lin & Bok LLP's letter dated 18 January 2024, para 5.

27 HC/ORC 5089/2022 dated 29 September 2022 filed 6 October 2022.

28 HC/DRI 61/2022 dated 4 November 2022.

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36 In the absence of any such provision, the parties are agreed that the defendant paid the Sum into court pursuant to O 3 r 2(2) of the Rules:

> **General powers of Court (O. 3, r. 2)**
>
> **2.**–(1)…
>
> (2) Where there is no express provision in these Rules or any other written law on any matter, the Court may do whatever the Court considers necessary on the facts of the case before it to ensure that justice is done or to prevent an abuse of the process of the Court, so long as it is not prohibited by law and is consistent with the Ideals.
>
> (3) In exercising any power, the Court may impose any conditions or give such directions that are appropriate.

The Tribunal issues the Award

37 In November 2023, the Tribunal issued the Award. The two key issues in the Arbitration were the two issues that the defendant had advanced in the request for arbitration (see [28] above). Those two issues were, in brief: (a) whether the Contract is null and void under Art 146 of the PRC Civil Code because it was signed only for "the process of bookkeeping"[29] or "[a]ccounts [p]rocessing";[30] and (b) whether the claimant delivered any copper cathodes to the defendant under the Contract.

38 On the first ground, the Tribunal expressly *declined* to make a finding that the Debt *does not* exist. The critical paragraph of the Award on this issue is the following:[31]

> Article 7 of the <<Arbitration Law of the People's Republic of China>> stipulates: "The Arbitral Tribunal shall resolve disputes fairly and reasonably based on facts and in

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29 ESM1 at p 226.

30 2nd affidavit of Edward Simon Middleton dated 29 February 2024 ("ESM2") at p 76.

31 ESM2 at p 76.

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> compliance with legal provisions." According to the above-mentioned legal provisions, ascertaining the facts is the premise and basis for the Arbitral Tribunal to make an award. **Although the [defendant] claimed that the [C]ontract…was signed for "Accounts Processing", it failed to provide sufficient evidence to prove its claim** and should bear the consequences of adverse evidence. In view of this, **the…Tribunal cannot support the [defendant's] request for the…Tribunal to confirm that its debt of US$14,117,585.50 to [the claimant] under the <<Copper Cathodes Purchase Contract>> does not exist**.
>
> [emphasis added]

39 It is a significant point that the Tribunal found only that the defendant had *failed to prove* that the Contract *does not* represent the true intention of the parties. A finding that the Contract *does* represent the true intention of the parties is not the logical corollary of a finding couched in these terms. After all, this finding does not exclude the possibility that the claimant too could "fail to prove" that the Contract *does* represent the true intention of the parties.

40 On the second ground, the Tribunal expressly found that the claimant had failed to prove that it delivered any copper cathodes to the defendant under the Contract. The critical paragraph of the Award on this issue is the following:[32]

> Regarding the [claimant's] claim that the [C}ontract…has been actually performed and that there is a real creditor-debtor relationship between the parties, the**…Tribunal held that the [claimant's] main obligation under the [C]ontract…was to deliver the contract goods.** According to the [C}ontract…and the common trade practice for international goods, the seller's delivery obligation is mainly reflected in handing over to the buyer a bill of lading or warehouse receipt representing the ownership of the goods. However, during the hearing, when inquired about the delivery of the contract goods in the case, the [claimant] replied that it had not found the bill of lading and waybill related to the delivery of the contract goods, and it was unclear about the delivery location, the country of origin of the goods and quality of the goods. Judging

[32] ESM2 at p 76, the Award.

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> from the [claimant's] evidence, **the [claimant] did not submit any relevant evidence to the…Tribunal. Accordingly, the… Tribunal has reason to question the [claimant's] claim that it has fulfilled its delivery obligations.**
>
> [emphasis added]

41 It is also a significant point the Tribunal found only that the claimant had *failed to prove* that it *did* deliver copper cathodes to the defendant under the Contract. This finding too does not exclude the possibility that the defendant too could "fail to prove" that the claimant *did not* deliver copper cathodes to the defendant under the Contract.

42 The Tribunal concluded the substantive section of the Award by reiterating that it declined to find in favour of the defendant on its arbitration request, *ie,* to make a finding that the Debt *does not* exist. But the Tribunal went on expressly to point out that its finding against the defendant did not mean that the Tribunal had found in favour of the claimant, *ie* had found that the Debt *does* exist. This, the Tribunal noted, is especially the case in the absence of any counterclaim by the claimant inviting the Tribunal to make any such finding in the claimant's favour:[33]

> In summary, **the…[T]ribunal … does not support the [defendant's] arbitration request**. At the same time, the…Tribunal emphasizes that not supporting the [defendant's] arbitration request **does not mean that the…Tribunal has supported or made any of ruling on the [claimant's] claim** that it has contractual claims against the [defendant]. It is worth noting that **the [claimant] only raised a defence in this arbitration, but did not raise a counterclaim** in accordance with Article 16 of the <<Arbitration Rules>>.
>
> [emphasis added]

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[33] ESM2 at p 79.

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The stay of the CWU is lifted

43 In January 2024, the claimant's solicitors wrote to the court noting that the defendant had lost in the Arbitration. They asked for the stay of the CWU to be lifted so that it could be finally disposed of and the Sum released to the claimant:[34]

> **II. Update to Court on the Outcome of the Arbitration**
>
> 7. We write to update the Court that the Arbitration has concluded, and the arbitration tribunal has rejected the reliefs sought by the Defendant in its [request for arbitration]. Specifically, the tribunal has rejected the Defendant's arguments and refused to make a declaration that the Debt did not exist.
>
> …
>
> 9. Given that the Arbitration has now been determined, the Claimant humbly requests that the stay of proceedings in CWU 120 be lifted, so that (i) the matter therein can now be heard and finally disposed of; and (ii) the funds currently held by the Court as security for the Claimant's Debt vide ORC 5089 can be released to the Claimant. In this regard, the Claimant is prepared to make a formal application to lift the stay of proceedings in CWU 120 should the Court so direct.
>
> [emphasis in original omitted]

44 In February 2024, I lifted the stay of the CWU by consent. Although both parties agreed that the stay should be lifted, they each took a different view on the effect of the Award on the outcome of the CWU.[35] I accordingly gave directions: (a) for the parties to file further evidence and submissions addressing the effect of the Award on the outcome of the CWU; and (b) for the CWU to be heard.[36]

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34 Shook Lin & Bok LLP's letter to the Registry dated 18 January 2024, para 7 and 9.

35 Minute sheet dated 1 February 2024, page 2.

36 HC/ORC 602/2024.

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The Payment Out Application

45 Before the CWU could be heard pursuant to my directions, the claimant filed the Payment Out Application.[37] I directed the Payment Out Application and the CWU to be heard together at a joint hearing.

The parties' positions

46 The parties set out their positions for the joint hearing in written submissions filed in April 2024 and, upon my direction, in supplementary written submissions filed in July 2024. The parties then attended before me on 19 July 2024 for the joint hearing.

The claimant's position

47 The claimant's primary position is that I should make a Payment Out Order because the Award *did* find that the Debt *does* exist.[38] The claimant makes this submission on three grounds. First, the Tribunal's express refusal to find that the Debt *does not* exist must necessarily mean that the Tribunal rejected the defendant's case that the parties had entered into the Contract with *no* intention of performing it.[39] Second, the Tribunal's express refusal to find that the Debt *does not* exist must also necessarily mean that the Tribunal rejected the defendant's case that the claimant *did not* deliver copper cathodes to the defendant under the Contract.[40] Third, the Tribunal's comments about the

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37 HC/SUM 620/2024.

38 Claimant's Written Submissions dated 18 April 2024 ("CWS1") at para 11; Claimant's Further Written Submissions dated 12 July 2024 ("CWS2") at para 11(d).

39 CWS2 at paras 11(a).

40 CWS2 at paras 11(b).

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inadequacy of the claimant's evidence that it delivered cathodes (see [40] above) were merely *obiter*.[41]

48 If I make a Payment Out Order, the claimant submits that I should grant it leave to withdraw the CWU. If I do not make a Payment Out Order, the claimant submits that I should wind up the defendant either under s 125(1)(*e*) of the Act because the defendant is unable to pay its debts or under s 125(1)(*i*) of the Act because it is just and equitable to do so.[42] The claimant will then lay claim to the Sum in the defendant's liquidation.

The defendant's position

49 The defendant's position changed in a critical way between its written submissions and its oral submissions on the joint hearing.

On the Payment Out Application

50 The defendant's position on the Payment Out Application in its written submissions was that I should dismiss it because the Award made *no* finding that the Debt *does* exist. The premise of this position is that a Payment Out Order *cannot* be made *unless* the Award *did* make a finding that the Debt *does* exist. To put it another way, the defendant's position in its written submissions

41 CWS2 at paras 11(c).

42 CWS1 at para 12 and CWS2 at para 34.

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was that a condition precedent for a Payment Out Order was a finding that the Award *did* find that the Debt *does* exist.

51 Thus, in its written submissions filed in April 2024, the defendant expressly submitted that, in order for the claimant to secure a Payment Out Order, I must *first* find that the Award *did* find that the Debt *does* exist:[43]

> **III. THE TRIBUNAL DID NOT FIND THAT [THE DEFENDANT] IS LIABLE TO [THE CLAIMANT] FOR THE [DEBT]**
>
> 17. For the claimant to succeed in the Payment Out Application, *it must first establish that the Tribunal found that the [Debt] exists* and that the [defendant] is liable to [the claimant] for the [Debt]. We submit that as the Tribunal did not make any finding in this regard, the Payment Out Application should be dismissed accordingly.
>
> [emphasis added]

52 In its supplementary written submissions filed in July 2024, the defendant reiterated this position, *ie,* that the Payment Out Application *must* be dismissed in the *absence* of an express finding that the Debt *does* exist:[44]

> 3. At the outset, we submit that both parties are *ad idem* that the Award … is final and binding on both parties. However, parties diverge in respect of their interpretations of the Award. [The defendant] takes the position that the Tribunal did not make any finding that the [Debt] exists and that [the defendant] is liable to [the claimant] for the [Debt]. We emphasise that despite dismissing [the defendant's] claims in the [A]rbitration, the Tribunal had expressly noted that its dismissal "does not mean that the [Tribunal] has supported or made any of ruling on [the claimant's] claim that it has contractual claims against [the defendant]". *In the absence of an express finding of [the defendant's] liability for the [D]ebt, we submit that the Payment Out Application should be dismissed.*
>
> [emphasis added; emphasis in original omitted]

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43 Defendant's Written Submissions dated 18 April 2024 ("DWS1") at para 17.

44 Defendant's Further Written Submissions dated 12 July 2024 ("DWS2") at para 3.

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53 As will become apparent, counsel for the defendant has taken a materially different position on the Payment Out Application in his oral submissions at the joint hearing. His express position now is that the defendant no longer considers a finding that the Award *did* find that the Debt *does* exist to be a condition precedent for a Payment Out Order. His position has been highly influential on my decision to make the Payment Out Order, despite the misgivings I outline below about doing so.

On the CWU

54 The defendant's position on the CWU has remained constant in its written submissions and in its oral submissions.

55 Its position is that – regardless of the outcome of the Payment Out Application – the CWU should be dismissed for two alternative reasons. First, the defendant's failure to comply with the statutory demand is incapable of raising the presumption of insolvency under s 125(2)(*a*) of the Act because the Award made *no* finding that the Debt *does* exist. Second, even if the Award *did* make a finding that the Debt *does* exist, the claimant has failed to establish either of the two alternative grounds it relies upon. In other words, the defendant submits that it is *not* insolvent, and also submits that it is *not* just and equitable to wind the defendant up:[45]

> **III. [The CWU] SHOULD BE DISMISSED**
>
> 16. We submit that [the] CWU… should be dismissed, given that (i) the Award does not constitute a finding that the [defendant] is liable to [the claimant] for the [Debt]; (ii) in any event, there is no basis to wind up [the defendant] on insolvency grounds. …

[45] DWS2 at paras 16–18.

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> **The Award does not constitute a finding that the [defendant] is liable to [the claimant] for the [Debt]**
>
> 17. The [defendant's] primary position is that the Award does not constitute a finding that the [the defendant] is liable to [the claimant] for the [Debt]. In particular, the [defendant] relies on the Tribunal's conclusion as follows:
>
> > "In summary, the [Tribunal] court does not support the [defendant's] arbitration request. At the same time, the [Tribunal] emphasizes that not supporting the [defendant's] arbitration request **does not mean that the [Tribunal] has supported or made any of ruling on the [claimant's] claim that it has contractual claims against the [defendant].** It is worth noting that the [claimant] only raised a defence in this arbitration, but did not raise a counterclaim in accordance with Article 16 of the Arbitration Rules."
> >
> > …
>
> 18. The Tribunal had come to this finding on the basis that [the claimant] had only raised a defence but did not raise a counterclaim in accordance with Article 16 of the Arbitration Rules. As [the defendant's PRC law expert] has opined, the upshot of [the claimant's] failure to raise a counterclaim is that the Tribunal was not required to and did not in fact make any determination on the issue of whether [the claimant] has a claim against [the defendant] for the alleged debt.
>
> [emphasis in original]

56 I begin by considering the Payment Out Application before turning to consider the CWU.

The proper approach to the Payment Out Application

57 It is common ground that the claimant seeks the Payment Out Order on the same procedural basis that the defendant paid the Sum into court (see [36] above), *ie*, in the exercise of a discretion under O 3 r 2(2) of the Rules.[46] My task is therefore not simply to determine whether the claimant is entitled to the

[46] CWS2, Annex, Section I, para 1; Certified Transcript, p 17 line 29 to p 18 line 30.

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Sum as a matter of substantive or procedural right. So too, my task is not simply to give effect to the intention of the parties as to the ultimate disposition of the Sum at the time the defendant paid the Sum into court.

58 My task is instead to exercise the procedural discretion that is conferred by O 3 r 2(2) of the Rules. My objective is, in the words of O 3 r 2(2) itself, to do justice consistently with the Ideals set out in O 3 r 1(2). Although the discretion is a broad and unfettered one, it is nevertheless a judicial discretion. Exercising the discretion is therefore a multifactorial exercise which requires me to take into consideration all the relevant circumstances of the case.

59 Despite what I have said at [57] above, however, I accept that whether the claimant has a right to the Sum will be a factor in the exercise of my discretion. So too will be the intention of the parties when the defendant paid the Sum into court. After all, it will be rare that doing justice consistently with the Ideals will lead a court to exercise a procedural discretion in order to nullify a subsisting right or to defeat the parties' intention as to the disposition of property. This is especially so in commercial cases, where there is an imperative that outcomes be predictable. These are both therefore weighty factors in the exercise of this discretion. But a weighty countervailing factor will be whether the rights or interests of third parties will or may be adversely affected by a Payment Out Order.

60 Given the multifactorial nature of this discretionary exercise, however, the factors I have identified cannot be exhaustive. So too, no one factor can be dispositive. The task of doing justice consistently with the Ideals cannot readily be confined to a framework of principles fixed *a priori*, however flexible that framework and those principles may be.

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61 As I have already mentioned, I have exercised my discretion to make a Payment Out Order. I have done so after considering the following five factors that I consider to be relevant: (a) whether the claimant has a right to the Sum; (b) in particular, whether the Sum is security for the claimant; (c) the intention of the parties; (d) the new position that the defendant's counsel has taken at the joint hearing (see [53] above and [142]–[157] below); and (e) the rights and interests of third parties. For the reasons that follow, the first three factors are of virtually no weight in the exercise of my discretion. The weightiest of these factors, therefore are the fourth and fifth factors.

62 I analyse these five factors in turn.

The exercise of the discretion

The claimant does not assert a right to the Sum

63 As I have pointed out, the claimant does not submit that it is entitled to the Sum as a matter of substantive right. Thus, it does not claim, for example: (a) that the parties entered into a contract under which the claimant agreed to consent to a stay of the CWU in consideration of the defendant agreeing to pay the Sum into court; (b) that that contract attached a legally-binding condition regulating when and to whom the Sum should be paid out of court; and (c) that that condition has now been satisfied so as to endow the claimant with a substantive contractual right, as against the defendant, to payment out of the Sum.

64 So too, the claimant does not submit that it is entitled to payment of the Sum as a matter of procedural right. Thus, it does claim the Sum as a matter of right under any provision of the Rules such as, for example, O 14 r 4(3). That provision applies only to money paid into court in an action for debt or damages

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(see O 14 r 1). The CWU is not an action in debt; even more so it is not an action for damages. That is why the Sum was paid into court under O 3 r 2(2), not under O 14 r 1. Equally, O 27 r 8 is of no assistance to the claimant. That provision deals only with the mechanics of payment out of court. Indeed, the purpose of O 27 as a w hole is not to set out the substantive or procedural legal rules that mandate a payment into court or out of court. The purpose O 27 as a whole is instead to prescribe the mechanics of payments in and out, and the Accountant-General's obligations while holding money paid in.

The claimant asserts the Sum is security for the Debt

65 Although the claimant claims no contractual right to the Sum, it does submit that the Sum is its security for the Debt.[47] "Security" generally means a right that a creditor has against an asset of his debtor that entitles the creditor to have recourse to that asset if the debtor defaults in paying the debt and which right will prevail in favour of the creditor over the rights of unsecured creditors in the debtor's subsequent insolvency.

66 The claimant's case is that it became a secured creditor of the defendant at common law, upon and by reason of the defendant's payment of the Sum into court under the Rules. The claimant, therefore, asserts that it should now be allowed to have recourse to the Sum, given that: (a) the defendant *failed* to establish in the Arbitration that the Debt *does not* exist;[48] and (b) the defendant has failed to pay the Debt.

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47 CWS2 at para 9.

48 CWS2 at para 9.

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67 A creditor faces two types of risk as against its debtor. The first is the risk that the debtor will *refuse* to pay the debt even though it has enough money to pay all of its unsecured creditors in full. I shall refer to this first risk as "collection risk". The second is the risk that the debtor will be *unable* to pay the debt because it does not have enough money to pay all of its unsecured creditors in full. I shall refer to this second risk as "insolvency risk".

68 The defining feature of security – and the core of the claimant's claim that the Sum is its security for the Debt – is that the creditor is protected *not only* against collection risk *but also* against insolvency risk.

69 The security interest that the claimant asserts in the Sum is, of course, quite unlike the ordinary security that a debtor grants a creditor under, for example, a mortgage, a charge or a pledge. The first and most fundamental difference is that the security which the claimant claims is one that arose at common law, upon and by virtue of the payment into court under the Rules. An ordinary security interest arises out of contract, not by operation of law.

70 There are three further significant differences between the security that the claimant claims and ordinary security. First, a party who pays money into court parts outright with that money such that it is no longer his property (see [103] below). But an ordinary security interest must and can only subsist in an asset or class of assets that are or will become the property of the debtor. Second, the claimant accepts that its security can be defeated by the exercise of a discretion such as the one that the claimant now invites me to exercise under O 3 r 2(2). But ordinary security is a substantive contractual right that has a substantive proprietary dimension. Neither this contractual right nor its proprietary dimension can be defeated by the exercise of a discretion, let alone a discretion that is merely procedural rather than substantive or remedial. Third,

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part of the claimant's case, as I will show (see [148] below), is that its security interest in the Sum arose and subsists *even if* the Award did *not* find that the Debt *does* exist. But ordinary security cannot even exist if there is no underlying current or future obligation whose performance it secures. If the Debt does not exist, the claimant cannot possibly have an ordinary security interest in the Sum simply because there is no liability of the defendant for that interest to secure.

71 Despite these differences, and subject to my caveats at [69] above, I shall use the term "security" and "security interest" as convenient shorthand to describe, purely for present purposes, the interest that the claimant asserts in the Sum as set out at [65] above. Even in this limited sense, the critical point remains that, if the claimant is correct, its security interest in the Sum protects it *not only* against collection risk *but also* against insolvency risk. In other words, if the claimant is correct, I should exercise my discretion to make the Payment Out Order even if I make a winding up order against the defendant and regardless of the adverse effect that payment out will have on the general body of the defendant's unsecured creditors.

72 The defendant agrees with the claimant on this issue of law. Thus, the defendant accepts that the claimant became "in effect a secured creditor" of the defendant upon and by reason of the defendant's payment of the Sum into court under the Rules.[49]

73 The defendant's agreement with the claimant on this issue may seem surprising. But it may not be so surprising after all. I say that for two reasons. First, agreeing with the claimant on this issue is one way that the defendant can be certain that the CWU will be withdrawn (see [48] above). That will, in turn,

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[49] DWS2 at para 53.

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give the defendant certainty that its affairs will not be scrutinised by an independent insolvency professional in a liquidation. Tacitly acquiescing in a Payment Out Order as a matter of substance (all the while objecting to it as a matter of form) may be seen as a small price for the defendant to pay in order to be certain of avoiding the rigours and discomfiture of such scrutiny. Second, if the defendant is indeed insolvent, its members no longer have any substantive economic interest in the Sum. In that event, the defendant ceases to have any economic incentive to resist a Payment Out Order and a much greater incentive to elude a winding up order. The entire prejudice of a Payment Out Order will fall on the defendant's unsecured creditors.

74 Whatever the reason may actually be for the defendant's tactical decision to agree with the claimant on this issue, I make no finding on it and need say no more about it.

Three broad categories of payment in

75 Although the parties now agree that a security interest arose in the Sum in favour of the claimant upon and by reason of the payment into court under the Rules, I do not accept that that is the correct position in law for the reasons that follow.

76 The cases that the parties have cited to me show that a litigant pays money into court for three broad purposes, that can be categorised as follows:

(a) to support an offer of compromise;

(b) as the price for seeking and obtaining a forensic advantage; and

(c) pursuant to a specific procedural rule that expressly prescribes the payment into court to be "security".

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77 In the first category, a litigant who makes an offer of compromise to the opposing litigant may support the offer by paying money into court to demonstrate his earnestness, *ie*, that his offer is a serious offer and that he is good for the money. In the second category, a litigant who has sought and obtained a forensic advantage may demonstrate his good faith in obtaining the advantage by paying money into court, *ie*, to show that he has done so for a proper purpose and not as a delaying tactic or for another collateral purpose. In the third and final category, an express procedural rule may permit or require a litigant to pay money into court and may go on expressly to prescribe that that money is to be "security" for a potential obligation to the opposing litigant.

78 In my view, it is only in the third category that the litigant's payment into court is protection for the opposing litigant against *not only* collection risk *but also* insolvency risk. That is because it is only in the third category that there is express legislative mandate for treating the payment into court as security in the ordinary sense of the term, *ie,* as protection against both risks. Without express legislative mandate, it appears to me that the Rules intend – by merely permitting or requiring a litigant to pay money into court without more – to protect the litigant's opponent against *only* collection risk *and not* against insolvency risk.

79 I transpose my last point to the facts of this case. It does not appear to me that it was the intent of the Rules that the claimant should ordinarily receive payment of the Sum out of court in *full* satisfaction of the Debt and in *priority* to all of the defendant's unsecured creditors simply because the claimant: (a) happened to be the first creditor to be sufficiently motivated to present a winding-up application against the defendant; (b) happened to rest its winding up application on a *disputed* debt; and therefore (c) happened to be the first

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creditor to be in a position extract a payment into court from the defendant as the price of staying the CWU while the existence of that disputed debt was adjudicated.

80 If in fact the defendant were insolvent, this outcome would subvert two deeply embedded principles of our insolvency law: (a) the *pari passu* principle; and (b) the priority conferred on certain classes of debt by s 203(1) of the Act by way of statutory exception to the *pari passu* principle. This outcome subverts the *pari passu* principle because the claimant would be paid the Debt in full while the defendant's other unsecured creditors would have to prove for a dividend. This outcome would subvert s 203(1) of the Act because it would allow the claimant to be paid in priority even those creditors of the defendant that are entitled to priority payment under s 203(1) of the Act. These preferential debts include the costs and expenses of the winding up, unpaid wages, unpaid retrenchment benefits and unpaid tax.

81 This outcome would also be forensically absurd. It would give a claimant who rests his winding up application on a disputed debt a substantial advantage over a claimant who rests his winding up application on a wholly undisputed or even indisputable debt. The former claimant will be in a position to obtain security for the disputed debt by extracting a payment into court as the price of staying the winding up application. The latter claimant will not.

82 For all of these reasons, this outcome, in my view, requires express legislative mandate.

83 To establish my point, I consider the case law on each of these three categories in turn.

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(1) By way of an offer of compromise

84 In the first category, a litigant may pay money into court to support an offer of compromise. For example, O 14 r 1(1) of the Rules permits a defendant who is contesting an action in debt or for damages to pay a sum of money into court as an offer to compromise one or more of a claimant's causes of action. This leaves the claimant free to consider the defendant's offer purely on its commercial and forensic merits, knowing that the offer is serious and that the defendant is good for the money. If the merits of the offer are sufficiently compelling, the claimant can accept the money paid into court under O 14 r 3(1). The claimant is then "entitled to receive payment of that sum in satisfaction" of the compromised causes of action under O 14 r 3(6).

85 In my view, and as a matter of principle, the intent of O 14 is that the money paid into court protects the claimant against only collection risk and not against insolvency risk.

86 The parties have cited two English cases that fall into the first category. I analyse them in turn.

(A) PEAL FURNITURE

87 The first English case is *Peal Furniture Co Ltd v Adrian Share (Interiors) Ltd* [1977] 1 WLR 464 ("*Peal Furniture*"). In that case, a defendant paid just under £4,000 into court and gave notice of the payment in to the plaintiff under the English equivalent of O 14 r 1(1) of the Rules (at 466D). The defendant then went into receivership (at 466G). The receiver considered it possible that the defendant might not be able to pay all of its unsecured creditors in full (at 468D). To protect its unsecured creditors, the defendant applied to court under the English equivalent of O 14 r 1(3) to withdraw its notice of

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payment in (at 466H and 467G) and for a payment out order in its favour.

88 The English Court of Appeal held that the judge at first instance had exercised his discretion correctly in ordering the money in court to be paid out to the defendant. In part, this was because "if it turned out that the [defendant] company were indeed insolvent, [the plaintiffs] would be given a preference over the general body of creditors, which would produce a result which in a general sense would be inequitable" (at 468E per Shaw LJ). As Roskill LJ put it (at 469E):

> If this money is allowed to remain in court, and if the plaintiffs recover upwards of £4,000, it is likely that this money would have to be paid out to the plaintiffs in *pro tanto* satisfaction of what would be recoverable under the judgment. They would thus become in the position of secured creditors, or preferred creditors, and thus in a far better position than that in which they would have been as judgment creditors.

89 With respect, I consider the reasoning in *Peal Furniture* to be compelling. The purpose of O 14 is not to create a new exception to the *pari passu* principle or to add a new category to the preferential debts enumerated in s 203(1) of the Act. The purpose of O 14 is merely to encourage parties to compromise their disputes without judgment, *ie,* before trial or, at the very latest, after trial has commenced but before judgment is delivered. That is why O 14 r 3(1) forbids a claimant from accepting, after trial has begun, an offer that the defendant made before trial. And that is also why, O 14 r 3(2) expressly forbids a claimant from accepting, once the judge begins to deliver judgment, an offer that the defendant has made or enhanced during trial. Order 14 takes this approach because the earlier the compromise, the greater the benefits that accrue from the saving of time and expense arising from the compromise not only to the litigants but also to the civil justice system.

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90 Bearing the purpose of O 14 in mind, the rubric of O 14 regulates how an offer, once made, can be accepted, modified or withdrawn. Order 14 requires an offer made within its rubric to be supported by a payment into court. The money paid into court serves as a tangible demonstration of the defendant's earnestness in making the offer. In my view, the purpose of O 14 in requiring a payment into court is to give the claimant protection only against collection risk and, even then, only if the offer is accepted. Order 14 does not even go so far as to protect the claimant against collection risk if the offer is never accepted and the claimant eventually secures a judgment in his favour after trial. There is no provision in O 14 that mandates payment out to the claimant upon judgment being entered for the claimant after trial. There is no such provision because, for the reasons I have already given (at [89] above), the purpose of O 14 is a *compromise*, *ie*, a resolution of the litigants' dispute *without* judgment. Payment out upon a claimant securing judgment is therefore not regulated by O 14 but is left to the court's general discretion.

91 Upon a claimant securing judgment, and assuming the claimant is *solvent* at that time, it is of course perfectly appropriate – and perhaps even inevitable – that the court will exercise its general discretion by ordering payment out in favour of the claimant. That is because making an order for payment out against a solvent defendant has only bilateral consequences. It cannot, in itself, have any adverse effect on third parties.

92 But if a claimant secures judgment at a time when the defendant is *insolvent*, there is no reason why the court should, in the exercise of its general discretion and in the absence of any express legislative mandate in O 14, convert the claimant from an unsecured creditor of the defendant into a preferred or secured creditor of the defendant simply because the defendant chose to make

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an offer of compromise to the claimant under the rubric of O 14 r 1. No such advantages would ensue if a defendant were to make an offer of compromise to a claimant in correspondence and to demonstrate the earnestness of the offer by paying a sum of money to its solicitors to be held as stakeholders in their client account, pending the claimant's acceptance of the offer.

93 In my view, the analysis in *Peal Furniture* is correct in that it recognises that the *pari passu* principle and the statutory scheme of preferential debts in s 203 of the Act are deeply-embedded principles of insolvency law and, further, recognises that an express legislative mandate is required to detract from those principles. Neither O 14 nor O 3 r 2(2) contain any such mandate.

(B) SHERRATT

94 The second English case is the decision of the English Court of Appeal in *W A Sherratt Ltd v John Bromley (Church Stretton) Ltd* [1985] 2 WLR 742 ("*Sherratt*"). In *Sherratt*, a defendant pleaded a defence and raised a counterclaim. It paid £13,000 into court as an offer of compromise under the English equivalent of O 14 r 1(1) (at 744F). It then went into liquidation (at 744H). While in liquidation, the defendant applied for a payment out order in its favour on the grounds that paying the £13,000 out to the plaintiff instead would prejudice the general body of the defendant's unsecured creditors (at 745A). The plaintiff cross-applied for a payment out order in its favour (at 745B). Crucially, the defendant conceded for the purposes of both applications that the plaintiff had good prospects of securing judgment at trial (at 745C). The application and the cross-application therefore proceeded on the basis that the plaintiff's claim was "extremely strong" (at 745E), *ie,* that there was *no* substantial dispute over the debt.

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95 Hutchison J at first instance followed *Peal Furniture* and ordered payment out to the defendant (at 745E-G). In doing so, Hutchison J declined to follow a long line of English authority that was cited to him but had not been cited to the court in *Peal Furniture*. The effect of that line of authority was that, where a defendant pays money into court in satisfaction of a claim, the plaintiff is a secured creditor of the defendant to the extent of the money paid into court in the defendant's subsequent insolvency (at 745H). Thus, the plaintiff is protected against *not only* collection risk *but also* against insolvency risk.

96 Hutchison J preferred *Peal Furniture* over this line of authority. He distinguished the line of authority on the basis that those cases had been decided under procedural rules that were materially different from the English equivalent of O 14 then in force. Considering that material difference, he preferred the reasoning in *Peal Furniture* because it had been decided under the same procedural rules as the applications before him and because, in any event, it accorded with deeply embedded principles of insolvency law (at 747E).

97 The English Court of Appeal reversed Hutchison J and held that the money should be paid out to the plaintiff instead of to the defendant. It held that the *ratio* in *Peal Furniture* was "totally inconsistent" (at 750E) with the long line of English authority that had been cited to Hutchison J. The court therefore held that *Peal Furniture* had been decided *per incuriam* (at 756H). Further, there were no material differences in the procedural regime governing payment into court when that line of authority had been decided and the English equivalent of O 14 currently in force (at 756H).

98 Accordingly, the English Court of Appeal held that, where a defendant pays money into court under the English equivalent of O 14, the plaintiff should not be deprived of the advantage gained by the payment in, even in the

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defendant's subsequent insolvency (at 757E). The money in court protects the plaintiff *not only* against collection risk *but also* against insolvency risk.

99 According to Oliver LJ, there was nothing unfair or inequitable about this outcome, despite what was said in *Peal Furniture*, because, by paying the money into court, the defendant was in effect tendering payment of the sum claimed to a creditor at that time of the payment in (at 757E-G):

> The *Peal Furniture* case…seems to have been based on the supposition, with which Hutchison J obviously sympathised, that there was something inequitable or unfair in a plaintiff achieving a preference in the event of his obtaining judgment. For myself, I do not see why this should be. Subject to the bankruptcy rules relating to fraudulent preferences, there has never been any restriction upon a debtor preferring a particular creditor if he wishes to do so, and I am not clear why it should be thought desirable that a creditor who has a valid claim but is kept out of his money by a defence which ultimately fails should be deprived of the advantage which he gains by a payment into court. In the ordinary way, his claim ought to have been dealt with and discharged when payment was demanded and if this had been done no question would arise. Why, because he has been made to wait for payment as a result of an unsuccessful defence until the defendant has gone into liquidation, his position in the meantime being secure to the extent of the money in court, should he be put in a worse position than the creditor of equal degree whose claim has been admitted and paid?

100 With the greatest respect, I do not find this reasoning persuasive. When a defendant pays money into court under O 14 r 1(1), he is not tendering payment of a debt or a claim to a creditor. He is paying money into court as required by O 14 r 1(1) to support an offer of compromise of a dispute. The offer of compromise, if accepted, gives rise to a fresh contract that extinguishes the underlying debt or claim, it does not discharge the underlying claim by accord and satisfaction.

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101 It appears to me that Oliver LJ's view of the legal position was coloured by the concession in *Sherratt* that the plaintiff had an "extremely strong" case against the defendant. There is also some suggestion that the defendant may not have put forward its defence and counterclaim *bona fide* but merely to stave off a summary judgment application (at 744F). That is no doubt a weighty circumstance to take into consideration in exercising the discretion to order payment out. But it is not a basis on which to establish, as a general proposition, that the effect of *every* payment into court is to protect *every* claimant against the insolvency risk of every defendant.

102 In *Sherratt*, Oliver LJ also doubted whether the court should have regard, when exercising its discretion to order payment out of court, to matters outside and unconnected to the litigation. These matters include, on the facts of that case, the adverse effect of a payment out order on third parties such as the unsecured creditors of an insolvent litigant (at 757H). Again, with the greatest of respect, this appears to me to be an unduly narrow view of the procedural discretion that is being exercised. In my view, there is no doubt that the deeply embedded principles of our insolvency law that are in play when a litigant who has paid money into court becomes insolvent must be a proper consideration in the exercise of the court's broad and unfettered procedural discretion to make a payment out order.

103 Oliver LJ held further that, when a litigant pays money into court, he parts outright with the money such that it ceases to be his asset and therefore ceases to be available to his creditors in his insolvency. Instead, the disposal of the money become entirely at the court's discretion (at 758A). It is therefore wrong, Oliver LJ held, to assume that what is merely *one* of the ways in which the court can exercise its discretion, (*ie*, by making a payment out order that

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revests the money in the litigant who paid it in) serves to define the legal status of the money as that litigant's property while it is held in court.

104 All of this is undoubtedly true. As Oliver LJ points out, once a litigant pays money into court, he is neither a creditor nor a *cestui qui trust* of the Accountant-General (at 758A). The money paid into court, from that point onwards, is no longer the property of that litigant. The disposition of that money is at large. It is not a matter purely of the law of property or indeed the law of contract. It is indeed entirely in the broad and unfettered discretion of the court. That is, of course, subject to the Rules and the judicial nature of the discretion.

105 But Oliver LJ's same point militates equally against defining the legal status of the money, once paid into court, as security for the opposing litigant. To do that is equally to assume that what is merely *one* of the ways in which the court can exercise its procedural discretion (*ie*, by making a payment out order in favour of the opposing litigant despite the insolvency of the litigant who paid the money into court) serves to define the legal status of the money as security, *ie*, as protecting the opposing litigant *not only* against collection risk but *also against* insolvency risk.

106 I am not bound by any part of the long line of English authority that was cited in *Sherratt* and not cited in *Peal Furniture*. For the reasons I have given, I find the approach in *Peal Furniture* to be far more persuasive than the approach in *Sherratt*. That is particularly the case given that the exercise in considering whether to make a payment out order is not to ascertain and give effect to the legal status of the money paid into court, but to exercise a broad and unfettered procedural discretion considering all the circumstances of the case. To the extent that *Sherratt* is authority for the proposition that *every* litigant's payment into court *always* protects *every* opposing litigant against *not only* collection

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risk *but also* against insolvency risk simply upon and by virtue of the payment into court under the Rules, it goes too far in my respectful view. Protecting the opposing litigant against insolvency risk is only one possible outcome of exercising the discretion. And that, in my view, is as far as the proposition to be drawn from *Sherratt* should go.

(2) As the price of a forensic advantage

107 In the second category, a party may pay money into court as the result of seeking and obtaining a forensic advantage, as the price for that advantage. For example, on a summary judgment application, a defendant who has established nothing more than a defence "of a dubious nature" may nevertheless stave off summary judgment and obtain leave to defend upon condition that he pays a sum of money into court (see O 9 r 17(7)(*d*) of the Rules). So too, as in this case, a defendant in a winding up application who disputes that it owes a debt to the claimant may pay an equivalent sum of money into court as the price of securing a stay of the winding up application while the existence of the disputed debt is adjudicated.

108 The parties cite two cases in this category. In my view, neither case establishes that a that *every* litigant's payment into court *always* protects *every* opposing litigant against *not only* collection risk *but also* against insolvency risk simply upon and by virtue of the payment into court under the Rules.

(A) SHANDONG

109 The first case is the decision of the Hong Kong Court of Final Appeal in *Shandong Chenming Paper Holdings Ltd v Arjowiggins HKK 2 Ltd* [2022] 5 HKC 318 ("*Shandong*").

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110 In *Shandong*, a corporate debtor anticipated a winding up petition by a creditor. The creditor's debt arose from an arbitration award. It was therefore not merely undisputed but in fact indisputable. The debtor commenced pre-emptive proceedings against the creditor seeking to establish that the Hong Kong insolvency court had no jurisdiction over the debtor. Whether the Hong Kong insolvency court had jurisdiction over the debtor was a live issue because the debtor was a company incorporated in the PRC, not in Hong Kong.

111 The debtor lost its jurisdictional challenge at first instance and appealed against that decision. While that appeal was pending, the creditor presented a winding up petition against the debtor. In view of the pending appeal, the debtor sought and obtained an adjournment of the winding up petition *sine die* upon the debtor's undertaking to procure a third party to pay a sum equivalent to the debt into court (at [14]). The payment into court was expressly to abide by the further order of the Hong Kong courts (at [87]).

112 The debtor lost its jurisdictional challenge in the Hong Kong Court of Appeal and in the Hong Kong Court of Final Appeal (at [88]). At the conclusion of the final appeal, the court made a payment out order in favour of the creditor (at [89] and [91]). In doing so, the court rejected the debtor's submission that the court must hear from the third party who had funded the payment into court on the *audi alteram partem* principle before it could order payment out to the creditor.

113 The court held that it did not need to hear from the third-party funder because the funder must have known that it was paying the money into court to "secure" the debt while the debtor was pursuing its appeals against the jurisdictional challenge. As Fok and Lam PJJ said (at [90]):

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> …[The third] party must be taken to be fully aware of the terms of the undertaking given by the appellant pursuant to which the sum was paid into court, which included a term that it would be paid out at the discretion of the Court of First Instance, Court of Appeal or this Court. As such, it must have been the common intention of all parties, including the third party, that the discretion was to be exercised in the light of the outcome of any appeal against [the first instance] decision. *The payment in was plainly made to secure the [creditor's] interest in obtaining repayment of the debt, being the subject of the statutory demand, pending the outcome of any such appeal.* In these circumstances, any interest the third party…might have had must be subordinated to the contingency that this Court might order payment out of the sum to the [creditor] in the event of the dismissal of this appeal.
>
> [emphasis added]

The claimant relies on the *dictum* in italics to submit that, in the present case too, the defendant's payment of the Sum into court was to secure the claimant's interest in obtaining payment of the Debt.

(B) NG KIN SIU

114 The second case that the parties rely on is a decision of the Hong Kong Court of First Instance in *Ng Kin Siu v Gentle Soar Limited* [2024] HKCU 935 ("*Ng Kin Siu*"). In that decision, Ng J dismissed an individual debtor's application to set aside a statutory demand in the sum of HK$52m. Further, Ng J authorised the creditor to present a bankruptcy petition against the debtor based on the statutory demand. The debtor paid HK$52m into court as a condition of obtaining a stay of execution of Ng J's order pending appeal to Hong Kong's Court of Appeal. The debtor's appeal was eventually dismissed.

115 When the bankruptcy petition came back to Ng J on the merits, he held that *Shandong* was authority for the proposition that "where a sum of money, calculated by reference to the amount of the debt owed by a company, is paid into Court as security to obtain a stay or adjournment of winding up proceedings

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pending appeal, the whole of the sum so paid in, together with accrued interest, should be paid out to the respondent who is successful in resisting the appeal". He therefore held that the HK$52m was "by nature a kind of security for the [d]ebt owed" should the appeal be unsuccessful (at [11]–[12] and [14]) and made a payment out order in favour of the claimant.

(C) THE EFFECT OF THESE CASES

116 On the authority of *Shandong*, as interpreted and followed in *Ng Kin Siu*, the parties before me submit that the Sum is likewise "a kind of security" for the Debt and that I should likewise make a Payment Out Order.[50]

117 Even though both parties advance this submission, I reject it. There are four features in both *Shandong* and *Ng Kin Siu* that lead me to conclude that those cases cannot support the weight of the submission that the parties attempt to rest on them.

118 First, the debtor company in *Shandong* was undoubtedly solvent. The basis of the winding up petition was that the company had a debt of RMB 168m in Hong Kong and had no assets in Hong Kong (*Shandong* at [11]). But the company had net assets of RMB 16bn in the PRC. Its global assets were therefore worth almost 100 times the debt (at [6]–[7]). Indeed, the true *ratio* of *Shandong* turns specifically on the solvency of the debtor. The true *ratio* of that case is that: (a) it is an entirely proper purpose for a creditor to present a winding-up petition against a solvent company in order to apply commercial pressure to secure the repayment of an undisputed debt (at [39]–[44]); and (b) the ability to apply this pressure is a "sufficient benefit" for the Hong Kong

50 CWS2 at para 9.

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insolvency court to exercise its jurisdiction over a company incorporated outside Hong Kong (at [57] and [61]). Equally, in *Ng Kin Siu*, there was no suggestion that the debtor there was unable to pay his debts as they fell due. As such, the courts in both cases had no reason and no need to balance the benefit of a payment out order to the petitioning creditor against the detriment of a payment out order to the unsecured creditors of an insolvent debtor. The use of the word "security" in these cases therefore indicates only that the payment into court provided protection against collection risk. The question whether the payment in also provided protection against insolvency risk simply did not arise. That is no doubt why Ng J in *Ng Kin Siu* referred to the payment into court, not as security without qualification, but as "a *kind* of security" [emphasis added].

119 Second, the money paid into court in *Shandong* did not come from the debtor but from a third-party funder. As such, that money could never have been available for distribution to the debtor's creditors. It is true that, unlike the company in *Shandong*, the debtor in *Ng Kin Siu* paid his own money into court (at [4]). But the critical point in *Ng Kin Siu* remains that the case did not proceed on the basis that the debtor was insolvent. Therefore, in that case too, just like in *Shandong*, there was no need to consider unsecured creditors' interests.

120 Third, it was no part of the *ratio decidendi* in *Shandong* that the money that the debtor paid into court was security for the creditor. The only issue in *Shandong* was whether the Hong Kong insolvency court should exercise jurisdiction over the debtor even though the debtor was not incorporated in Hong Kong (at [3] and [4]). The court made the payment out order as a matter of course upon dismissing the appeal. It was merely a consequential order, not a contested order granting a substantive remedy.

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121 Fourth, both *Shandong* and *Ng Kin Siu* (like *Peal Furniture* and *Sherratt*) accept that the ultimate decision to make a payment out order is a matter of procedural discretion not a matter of substantive right. Thus, in *Shandong*, it was common ground that payment out was in the discretion of the court (at [90]). So too, in *Ng Kin Siu*, Ng J's framing of the proposition he extracted from *Shandong* was not that the payment in was *security* for the creditor or even that it *must* be paid out to the creditor but simply that the sum "should be paid out" to the successful creditor (at [14]).

122 For all of the above reasons, I do not consider either *Shandong* or *Ng Kin Siu* to be authority for the proposition that *every* litigant's payment into court *always* protects *every* opposing litigant against *not only* collection risk *but also* against insolvency risk simply upon and by virtue of the payment into court under the Rules.

(3) Pursuant to a specific rule which deems the payment to be "security"

123 In the final category, a specific procedural rule may permit or require a litigant to pay money into court and expressly prescribe that that money is to be "security" for an actual or potential obligation to the opposing litigant. For example, O 18 rr 20(4)(*b*), 30(4)(*b*) and 35(8)(*b*), as well as O 19 rr 16(4)(*b*), 27(4)(*b*) and 35(9)(*b*) of the Rules all permit a party to pay money into court in order to furnish the requisite "security for costs" in an appeal to an appellate court or an application to an appellate court. So too, O 34 rr 6(10) and 7(7)(*i*) oblige a party to pay money into court in order to furnish the requisite "security for costs" for an appeal on a question of law arising out of an award under the Arbitration Act 2001 (2020 Rev Ed). Finally, O 9 r 12 empowers a defendant to seek "security for costs" against a claimant on the grounds set out in O 9 r 12(1).

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Although it is now rarely done, it remains permissible for a claimant who is ordered to furnish such security to do so by paying money into court.

124 In my view, this is the only category in which there is a legislative mandate to hold that a litigant's payment into court protects the opposing litigant *not only* against collection risk but *also against* insolvency risk.

125 The leading case on this category, at least in Singapore, is the decision of the Court of Appeal in *Cheng Lip Kwong v Bangkok Bank Ltd* [1992] 1 SLR(R) 941 ("*Cheng Lip Kwong*"). In that case, an appellant paid money into court as security for the respondents' costs of an appeal to the Court of Appeal (at [3]). A bankruptcy order was then made against the appellant. The Court of Appeal dismissed the appeal with costs to the respondents (at [2]). The issue was whether the money that the appellant had paid into court as security for the respondents' costs of the appeal should be paid out to the respondents or to the appellant's estate.

126 After considering both *Peal Furniture* and *Sherratt*, the Court of Appeal ordered that the money be paid out to the respondents (at [18]). The two reasons given by Chao Hick Tin J (as he then was) were: (a) the money, once paid in to court, ceased to belong to the appellant; and (b) the money was subject entirely to the outcome of the appeal and any order the Court of Appeal may then make. Therefore, the respondents were "secured creditors to the extent of the security paid into court or such part of it as would be sufficient to satisfy the taxed costs of the respondents" (at [17]):

> In our judgment, in the light of the authorities referred to above, it is clear that the respondents here are secured creditors to the extent of the security paid into court or such part of it as would be sufficient to satisfy the taxed costs of the respondents. The sum once deposited ceases to belong to the appellant. The

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> money becomes subject entirely to the outcome of the appeal and any order the Court of Appeal may make in the matter unless the respondents consent to a withdrawal of the appeal by the appellant. In this respect, we are unable to see any distinction between such a payment in and a payment in ordered by the court under O 14 or a voluntary payment in under O 22. Nothing in the present case raises the question of undue preference.

127 I make two points about *Cheng Lip Kwong*.

128 First, although Chao J did describe the respondents as "secured creditors", he also went on to hold that the money was subject to any order the Court of Appeal may make. Thus, *Cheng Lip Kwong* confirms that the ultimate question is one of procedural discretion, not one of substantive right.

129 Second, the procedural provision of the Rules in *Cheng Lip Kwong* expressly characterised the payment into court as "security" for the costs of appeal. Thus, there was an express legislative mandate for the payment into court to protect the respondents against *not only* collection risk *but also* insolvency risk.

130 It is true that in the passage I have cited, Chao J says that there is no distinction between a payment in as security for costs and a payment in as a condition of leave to defend under what is now O 9 r 17(7)(*d*) or a voluntary payment into court under what is now O 14. That would appear to be contrary to my threefold classification of the cases on payments into court in so far as it denies any distinction between my first and third category. But with the greatest respect, that part of *Cheng Lip Kwong* is *obiter dictum*.

131 In my view, an inroad into principles as fundamental and as deeply embedded in our insolvency law as the *pari passu* principle and s 203 of the Act

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must have an express legislative mandate. It is only in this third category where that requirement is met.

Conclusion

132 For all of the above reasons, I do not accept that the Sum was at common law the claimant's security for the Debt in the sense that it protects the claimant against *not only* collection risk *but also* against insolvency risk simply upon and by virtue of the payment into court under the Rules. I therefore do not consider that the parties' characterisation of the Sum as security for the claimant can be one of the factors I take into account in the exercise of my procedural discretion on the Payment Out Application.

What the parties intended when the defendant paid the Sum into court

133 As I have pointed out, it is not the claimant's case that the defendant paid the Sum into court in performance of its obligations under a contract that binds the parties. My inquiry into the parties' intention is therefore merely an inquiry into their *consensus ad idem*, falling short of a contract, that led to them asking me to stay the CWU upon the defendant's payment into court.

134 There are two aspects of the parties' intention that I consider are relevant factors in the exercise of my discretion to make a Payment Out Order: (a) *when* the Sum should be paid out of court; and (b) *to whom* the Sum should, at that time, be paid out of court.

135 There can be no ambiguity on the first aspect. It is common ground that the parties intended the Sum to be paid out upon the Arbitration concluding with an Award. And it is beyond dispute that this event has occurred.

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136 It is only on the second aspect that there is ambiguity. There are two possibilities on the second aspect:

(a) The first possibility is that the Sum should be paid out to whoever was the victor in the Arbitration. If the claimant was the victor, the Sum should be paid out to the claimant. If the defendant was the victor, the Sum should be paid out to the defendant.

(b) The second possibility is that the Sum should be paid out according to the Tribunal's finding as to whether the Debt *does* or *does not* exist. If the Tribunal found that the Debt *does* exist, the Sum should be paid out to the claimant. If the Tribunal found that the Debt *does not* exist, the Sum should be paid out to the defendant.

137 There can be no doubt that the claimant was the victor in the Arbitration. Therefore, if the first of the two possibilities was the parties' intention, there can be no doubt that the parties intended the Sum now to be paid out to the claimant. But if the second of the two possibilities was in fact the parties' intention, then it is not possible now to give effect to that intention. That is because *both* the claimant *and* the defendant failed to secure from the Tribunal a finding in their favour as to the existence or non-existence of the Debt.

138 Defendant's counsel accepts that the parties' intention at the time the defendant paid the Sum into court was the second of these two possibilities (see [171]–[173] below). Unfortunately, I cannot, in the exercise of my discretion, give any weight to advancing the parties' intention because the parties' intention has been frustrated. That is because the Tribunal disposed of the Arbitration despite expressly declining to find that the Debt *does not* exist and also that the Debt *does* exist.

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139 This curious state of affairs has come about because of four features of the Arbitration:

(a) First, by commencing the Arbitration, the defendant reversed the natural forensic roles of a putative creditor and a putative debtor in a dispute over a debt. The putative *debtor* (the defendant) was the *claimant* in the Arbitration; and the putative *creditor* (the claimant) was the *respondent* in the Arbitration.

(b) Second, following from the first feature, the only substantive relief that the defendant (as the putative debtor) sought in the Arbitration was what amounts to a *negative* declaration, *ie*, a finding by the Tribunal that the Debt "does not exist".[51]

(c) Third, the claimant (despite being the putative creditor) chose *not* to bring a counterclaim in the Arbitration seeking a *positive* finding by the Tribunal that the Debt *does* exist.

(d) Fourth, following from the second and third features, the Tribunal was able to dispose of the arbitration simply by making a *negative* finding on the burden of proof rather than by making an *affirmative* finding on the underlying facts, *ie*, by finding only that the defendant had *failed to prove* that the Debt *does not* exist rather than finding as a fact that the Debt *does* exist.

140 The result of these features is that the claimant was the undoubted victor in the Arbitration. And that necessarily means that the defendant failed to secure a finding by the Tribunal that the Debt does not exist. But the claimant, by not

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[51] ESM1 at p 225, Request for Arbitration.

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bringing a counterclaim, gave the Tribunal no opportunity to make a finding in the Award that the Debt *does* exist. The claimant therefore left the Tribunal no room to make any such finding in the Award. Further, the Tribunal, by couching its finding against the defendant as a finding merely on the burden of proof, made it at least theoretically possible that the claimant could – in a hypothetical future arbitration – *also* fail to prove that the Debt *does* exist. In other words, as the Tribunal itself expressly held (see [42] above), its finding that the defendant had *failed to prove* that the Debt *does not* exist does not imply, as a matter of necessity and logic, that the Debt *must* exist.

141 As such, I cannot exercise my discretion on the Payment Out Application so as to advance the parties' intentions because that intention has been frustrated.

Defendant's counsel's new position at the joint hearing

142 In oral submissions, claimant's counsel has maintained his primary position as set out in its written submissions. As noted above at [47], that position was that: (a) the Award should be interpreted as having found that the Debt exists;[52] and (b) I should, for that reason alone, make a Payment Out Order.

143 In oral submissions, defendant's counsel has abandoned the position set out in his written submissions and advances a new position. He has told me expressly:

(a) that the defendant no longer objected to the Payment Out Application, even though it did not consent to it;

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52 CWS1 at para 11; CWS2 at para 11(d).

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(b) that the defendant accepted that the Sum was the claimant's security for the Debt pending the outcome of the Arbitration;

(c) because the outcome of the Arbitration was adverse to the defendant, the defendant did not have a claim to the Sum; but

(d) the only proviso he attached was that the defendant *did not* accept that the Award *did* find that the Debt *does* exist.

144 Defendant's counsel has advanced his new position in three separate passages and on three separate occasions. At the very outset of the joint hearing, he said:[53]

> TanCT: If I may, Your Honour, just put my client's position on record. *I have no instructions to consent [to the Payment Out Application],* but *I am---certainly accept the authority of the cases which have been placed before Your Honour [ie, that money paid into court is security for the opposing litigant].*
>
> Court: Yes.
>
> TanCT: *I further accept that the payment in was security pending the outcome of the arbitration*, which had been filed by the time the payment in was made. … We do take issue with whether the award---
>
> Court: The scope of the award or the effect of the award.
>
> TanCT: Well, *whether the award also says that the [Debt] is* established*, that---that's---that we don't accept. But we do accept that we failed in the award.*

[53] Notes of Argument dated 19 July 2024 ("NA") at p 3 lines 1–15.

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145 As part of his submission that the Sum was security for the Debt, defendant's counsel submitted that the defendant had no claim to the Sum simply because it did not succeed in the Arbitration:[54]

> ---we take the position that it was security pending the outcome of the arbitration. … [I]t was for us to establish that the [Debt] was, for want of a term, unenforceable or illegal under a particular provision of the Chinese Civil Code. We failed to establish that, and on that basis, we say that the arbitration's---that arbitration has been completed, and we did not succeed, therefore we don't have a claim to that---those funds. We don't accept, however, that the arbitration established that the [Debt] has been proven.

146 Finally, defendant's counsel reiterated that the defendant did not object to the Sum being paid to the claimant on the basis that the defendant had had its chance in the Arbitration to prove that the Debt does not exist and had failed to do so. He did this when he resisted my characterisation of a Payment Out Order made on this basis as being nothing more than settlement of a successful wager on the outcome of the Arbitration:[55]

> Court: But if you are saying it's security, it has to be security for a claim. It cannot be like a prize you win just because the arbitration is over. It has to be paid out in order to discharge an existing claim which is the [Debt]. And therefore, it's not enough for the Tribunal to say, "I decline to find that there is no [Debt]", for the claimant … to get the money. Otherwise---I mean, they're not---it's not meant to be paid out as a windfall to them.
>
> TanCT: No, no. It---
>
> Court: It's meant to be paid out in satisfaction of a legal debt.
>
> TanCT: At---it---I think our position is meant to be it's---it can be paid out or it's---rather, it was paid in

[54] NA at p 34 lines 5–13.

[55] NA at p 35 lines 22–25.

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> pending us---at---being able to establish in the [A]rbitration that the [Debt] did not exist.
>
> Court: No, no. It can't---no, no, no. The money was not paid in as a bet. There was no---
>
> TanCT: No. We don't say that.
>
> Court: In effect, that's what you are saying. You were betting---
>
> TanCT: No. We're not saying that, Your Honour.
>
> Court: No. You are saying that. Because you're saying the money should be paid to them simply because you lost the [A]rbitration.
>
> TanCT: *No---wait, I'm saying that we---the money should be paid---well, rather, we don't object to the money paying out because we had our chance in the arbitration to prove that the [Debt] did not exist. We failed to discharge that burden.*
>
> [emphasis added]

147 The upshot of defendant's counsel new position is that he is telling me that I *can* make a Payment Out Order *simply because* the claimant was the victor in the Arbitration,[56] *without* making any finding that the Award *did* find that the Debt *does* exist. In support of his new position, defendant's counsel relies on the wording of the Leave Order (see [32] above).[57] The Leave Order records expressly that the defendant is paying a sum of money equivalent to the Debt into court, "pending the determination of [the CWU] and the ongoing arbitration proceedings…".[58]

148 Quite naturally, claimant's counsel has adopted defendant's counsel's new submission. After all, it is to the claimant's advantage to rest the Payment

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56 NA at p 34 lines 5–13.

57 NA at p 34 lines 19–22 and 28–30.

58 HC/ORC 5089/2022.

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Out Application *only* on the claimant having been the victor in the Arbitration and not instead or in addition on a finding that the Award *did* find that the Debt *does* exist. There can be no dispute about the former; there is considerable dispute about the latter. Claimant's counsel therefore has accepted the new position of defendant's counsel, *ie*, that I should make a Payment Out Order simply because the claimant was the victor in the Arbitration,[59] also relying on the express wording of the Leave Order.[60]

149 I initially had misgivings about accepting the new position taken by defendant's counsel, even though it was adopted by claimant's counsel. It appeared to me that the Payment Out Application could not and should not succeed simply because the claimant was the victor in the Arbitration.[61] It appeared to me that defendant's counsel's initial position in his written submissions must be correct: a finding that the Award *did* find that the Debt *does* exist must be a condition precedent for a Payment Out Order (see [50] above). I had these misgivings for four reasons.

150 First, given that the parties' intention at the time the defendant paid the Sum into court was that the Sum should be paid out according to the Tribunal's finding in the Arbitration as to whether the Debt does or does not exist, the parties must have equally intended a Payment Out Order in favour of the claimant to operate as a discharge of the Debt. But it could have that effect only if the Payment Out Order was based on a positive finding that the Award *did* find that the Debt *does* exist. Otherwise, there would be nothing for payment of the Sum to the claimant under the Payment Out Order to discharge. An order

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59 NA at p 37 lines 16–17 and p 38 line 30.

60 NA at p 41 lines 1–3.

61 NA at p 34 lines 14–18.

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made on this new basis would leave it open, at least theoretically, for the claimant to pursue the defendant for the Debt in the future despite having received the Sum under the Payment Out Order.

151 Second, the new position advanced by defendant's counsel's amounted, in effect, to the parties wagering on the outcome of the Arbitration (see [146] above and [171] below). If I were to make a Payment Out Order *without* finding that the Award *did* find that the Debt *does* exist, discharging the Debt could not be the legal basis or the legal consequence of the Payment Out Order. In those circumstances, the only legal basis for paying the Sum out to the claimant would be as settlement of a successful wager on the outcome of the Arbitration.

152 Third, the parties, at the time the defendant paid the Sum into court, fully expected the Tribunal to make an express finding in the Arbitration either that the Debt *does* exist or that it *does not* exist. Neither party could or would have foreseen that the result of the four curious features of the Arbitration (see [138]–[140] above) could or would be that the Tribunal could and would dispose of the Arbitration, as it did, by expressly declining to make *both* findings. Accepting defendant's counsel's new submission therefore had no basis in the parties' intention at the time the defendant paid the Sum into court.

153 Fourth, the reliance of both counsel on the phrase "pending the determination of … the ongoing arbitration proceedings" in the Leave Order was misplaced for several reasons. The purpose of the Leave Order was not to reflect or record the parties' intention at the time the defendant paid the Sum into court, much less to reflect or record their intention as to the condition on which the Sum should be paid out of court. The purpose of the Leave Order was simply to prevent any possibility that the defendant's payment of the Sum into court would be void under s 130(1) read with s 126(2) of the Act. Further, the

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purpose of this phrase in the Leave Order was to set only the *time* at which the Sum should be paid out of court (the conclusion of the Arbitration), and not to set the *condition* that would determine to whom the Sum should be paid out of court at that time. Finally, even if the purpose of this phrase in the Leave Order was to set the condition for payment out, the words "the determination of the…arbitration proceedings" were ambiguous. They could refer equally to either of the two possibilities (see [136] above). They could refer to the conclusion of the Arbitration with an Award in which one party was the victor and the other the vanquished. Or they could refer to a substantive determination in the Arbitration that the Debt *does* or *does not* exist.

154 Despite my misgivings, however, I have ultimately allowed defendant's counsel to persuade me to accept his new position, *ie*, that the Sum should now be paid out of court to the claimant as the victor in the Arbitration regardless of whether the Arbitration had found the Debt to exist. I have accepted the defendant's counsel's new position for three reasons.

155 First, it was the defendant who paid the Sum into court. Therefore, it was only the defendant (assuming it to be solvent (see [93] above and [157]–[161] below)) who would be adversely affected by a Payment Out Order. This included the difficulty I foresaw arising from the Payment Out Order being unable to operate to discharge the Debt and the resulting risk, albeit theoretical, that the claimant would nevertheless remain free to pursue the defendant in the future for the Debt. The primary obligation to protect the defendant from this risk was defendant's counsel's, not mine. I had to assume that his new position was a considered position that the defendant had expressly instructed him to take upon proper advice and with knowledge of the consequences.

156 Second, it appeared to me that I could cater for the risk that a Payment

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Out Order would fail to discharge the Debt by stipulating expressly in the order that payment of the Sum to the claimant pursuant to the order should be in full and final satisfaction of the "debt or alleged debt" that was the subject of the Arbitration. The result of my express stipulation was that the defendant could rely on the Payment Out Order to establish that the Debt had been discharged if, in the future, the claimant were either: (a) to assert that the Debt exists; or (b) somehow able to secure or attempt to secure a finding that was binding on the defendant that the Debt does exist. Further, I included the words "alleged debt" in the express stipulation to satisfy the proviso that defendant's counsel had attached to his new position (see [143(d)] above) by making clear that I had made no finding that the Debt exists.

157 Third, it appeared to me that the unsecured creditors of the defendant would not be prejudiced by a Payment Out Order. I deal with this factor under the next heading.

The rights and interests of third parties

158 For the purposes of the Payment Out Application, both the claimant and the defendant submit to me that the defendant is solvent and is able to pay its debts as they fall due.[62] But the claimant's alternative submission on the CWU, if the Payment Out Application fails, is that the defendant is insolvent.

159 For the purposes of disposing of the Payment Out Application, I need not make any finding that the defendant is solvent. It suffices for the purpose of exercising my discretion that I consider that the evidence before me establishes

62 NA at p 11 lines 15–17 and p 12 lines 6–11.

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that it is highly unlikely that the rights or interests of third parties will or may be adversely affected by a Payment Out Order.

160 I say that for the following reasons:

(a) The defendant was able to pay into court, from its own resources, the Sum as the price of obtaining a stay of the CWU pending the determination of the Arbitration.

(b) The defendant's audited financial statements for the financial year ending 31 December 2022 reflected that it had total current assets of US$58.74m, well in excess of its total current liabilities of US$36.09m.[63]

(c) It is true that the defendant's auditors had noted, in relation to these financial statements, that there was insufficient audit evidence to conclude that it was appropriate to assume that the defendant was a going concern.[64] But, as the defendant points out, its management accounts as at 30 April 2024 show that the defendant continues to be solvent with total current assets of US$45.81m well in excess of its total current liabilities of US$30.25m.[65]

(d) The defendant had substantial bank balances as at 29 May 2024 totalling S$0.6m,[66] US$29.01m,[67] and RMB 77.59m.[68]

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63 7th affidavit of Lu Yang affirmed on 4 June 2024 ("LY's AEIC7") at para 6 and p 20.

64 LY's AEIC7 at p 17.

65 LY's AEIC7 at p 39.

66 LY's AEIC7 at p 41.

67 LY's AEIC7 at p 43.

68 LY's AEIC7 at para 10, pp 45–47.

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(e) Finally, despite the CWU having been presented and advertised more than two years before the joint hearing before me, no creditor has ever indicated any intention to attend the hearing of the CWU, no creditor opposed the Leave Order, and no creditor has ever supported the making of a winding up order against the defendant. This suggested to me that, even if I were to assume the Debt to exist and even if I were to assume that the defendant is insolvent, the claimant is the defendant's only material creditor.

161 On this final factor, I am therefore satisfied a Payment Out Order is highly unlikely to have any adverse effect on the general body of the defendant's unsecured creditors.

Conclusion on the exercise of the discretion

162 For all of the foregoing reasons, I consider that the new position taken by defendant's counsel and the very low likelihood of any adverse effect on the defendant's unsecured creditors are factors that point very strongly in favour of exercising my discretion to make a Payment Out Order, despite my initial misgivings. I have therefore made the Payment Out Order.

The CWU

163 The parties are agreed that, in light of my decision to make the Payment Out Order, the claimant ought to be granted leave to withdraw the CWU. In particular, the defendant does not ask that the CWU be dismissed. The defendant accepts, further, that the claimant is entitled in principle to its costs of the CWU, including the costs of the Payment Out Application. The defendant's only submission is that the quantum of those costs ought to be reduced to account for the possibility that the claimant might have failed in the

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CWU if it had been necessary for the claimant to argue the CWU on the merits rather than withdrawing it.

164 In my view, the claimant is entitled to all of its costs of the CWU. The claimant has acted entirely reasonably in presenting and pursuing the CWU up until the moment I granted it leave to withdraw the CWU. In particular, the claimant acted reasonably in preparing for and attending the joint hearing on the basis that the CWU would be heard and disposed of on the merits. Further, the claimant did not seek leave to withdraw the CWU because of any lack of confidence in the merits of the CWU but only because the outcome on the Payment Out Application has given the claimant everything it wanted when it presented the CWU. In my view, the claimant was entitled to the costs of the CWU in precisely the same way as any other creditor who presents a winding up application and then receives full payment of the debt on the day the winding up application is scheduled to be heard. Defendant's counsel accepts all of these points.[69]

165 In fixing the quantum of the costs payable to the claimant, I have not distinguished between the claimant's costs of the Payment Out Application and the claimant's costs of the CWU. I consider it more appropriate to award the costs of the Payment Out Application as part of the claimant's total costs of the CWU rather than separately for two reasons. First, the leave that I granted to the claimant to withdraw the CWU followed as a matter of course and without objection upon making the Payment Out Order. The event which this award of costs follows therefore arises on the Payment Out Application and not on the CWU. Second, the claimant's costs of the CWU cover all of its costs from the

69 NA at p 66 lines 17–26.

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time it presented the CWU in May 2022 to the time I allowed the claimant to withdraw the CWU in July 2022. This includes, in the usual way, the claimant's costs of all interlocutory applications in the CWU for which no separate costs order has been made. The Payment Out Application is simply one of those interlocutory applications.

166 Having heard the parties, I consider $85,000 to be a reasonable amount for the costs that the claimant reasonably incurred in presenting and pursuing the CWU, including but not limited to the costs of the Payment Out Application.

Conclusion

167 For all the foregoing reasons, I have made the following orders:

(a) On the Payment Out Application, I have ordered that the Sum together with interest be paid out to the claimant in full and final satisfaction of the debt or alleged debt that was the subject matter of the Award.[70]

(b) On the CWU, I have ordered that:[71]

(i) The claimant be granted leave to withdraw the CWU.

(ii) The defendant pay the costs of the CWU fixed at $85,000 to the claimant.

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70 HC/ORC 3727/2024

71 HC/ORC 3761/2024.

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A coda

168 As I have mentioned, the defendant has appealed against the whole of my decision. After filing the appeal, the defendant applied to stay execution of the Payment Out Order pending appeal. Different leading counsel, albeit from the same firm, argued the stay application for the defendant.

169 The claimant opposed the stay application. One of the grounds for its opposition was that the defendant's appeal has no merit, given: (a) defendant's counsel's express position at the joint hearing that I could make a Payment Out Order *without* finding that the Award *did* find that the Debt *does* exist; and (b) given that I accepted the defendant's counsel's submission and made no such finding when I made the Payment Out Order.

170 The defendant insists that its appeal has merit.[72] The defendant's position on the subject matter of the appeal is, quite to my surprise, that defendant's counsel at the joint hearing did *not* take the position that I could make a Payment Out Order *without* finding that the Award *did* find that the Debt *does* exist. The defendant relies for this submission on the following passage from the transcript of the joint hearing:[73]

> Court: The triggering condition, as I understand from both counsel, for payment out was the debt being established in the arbitration. Not your client losing the arbitration---
>
> TanCT: Yes.

---

72 Defendant's Written Submissions in HC/SUM 2322/2024 dated 13 September 2024 at para 25.

73 NA at p 36 lines 17–20.

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171 This passage does not set out the position that defendant's counsel's took on the Payment Out Application at the joint hearing. This question and this answer come at the end of an exchange with defendant's counsel in which he agreed with me that the parties' intention *at the time the defendant paid the Sum into court* was that the triggering condition for payment out would be whether the Arbitration established that debt does or does not exist and not simply who won the Arbitration. Thus, when this passage is read in context, it is clear that the "Yes" at the end of this passage means "Yes, that was the triggering condition that the parties intended when the defendant paid the Sum into court" and not "Yes, that is my position today".

172 The relevant passage that I cite below follows immediately from the passage at [146] above:[74]

> Court: Then on what legal basis is the money being paid to them, unless it's a wager?
>
> TanCT: It's not a wa---
>
> Court: No, it has to be. Because the only legal basis, to be paid to them, is to satisfy a debt which the Tribunal found to exist. In other words, you could---this money could be paid out to them and leave aside issues of ***Henderson v Henderson***.
>
> TanCT: Yes.
>
> Court: They could get an arbitral award that you [owe] them and they can come back and ask you for the money again.
>
> TanCT: *Well, that, I think we expected the Tribunal---we expected the arbitration to be---to resolve positively.*
>
> Court: Yes, correct. So that's what I'm saying. …[T]he triggering condition for payment to them cannot simply be you losing the arbitration. It has to be their debt being established.

---

74 NA at p 35 line 26 to p 36 line 20.

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> TanCT: I think we---I think my position is, we take the consequences of how the parties chose to present their cases in the [Arbitration].
>
> Court: No, no, no. The---no. This is a matter which we now have to look at at the date the money was paid into Court or the date when---
>
> TanCT: Yes.
>
> Court: ---that order was made under which the money was paid [into] Court.
>
> TanCT: Yes.
>
> Court: The triggering condition, as I understand from both counsel, for payment out was the [Debt] being established in the [Arbitration]. Not your client losing the [Arbitration]---
>
> TanCT: Yes.
>
> Court: ---without the [Debt] being established.
>
> TanCT: Yes.

173 In this passage, defendant's counsel is doing nothing more than agreeing with me that, when the claimant agreed to stay the CWU upon the defendant's payment of the Sum into court: (a) both parties *at that time* expected the Arbitration to determine positively either that the Debt *does* exist or that the Debt *does not* exist; and therefore (b) both parties intention *at that time*, was the second possibility at [136(b)] above, *ie*, that the Sum should be paid out according to that positive determination, and not merely according to who was the victor in the Arbitration divorced from any such determination.

174 I was, frankly, surprised to hear the defendant's submission on the stay application that I had misunderstood defendant's counsel's position on the Payment Out Application. I was even more surprised that the defendant should, on the stay application, rely on quoting this passage out of context as support for its submission that I had misunderstood the defendant's counsel's position on the Payment Out Application. This passage does no such thing.

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175 If defendant's counsel did *not* take the position on the Payment Out Application that I could make a Payment Out Order *without* finding that the Award *did* find that the Debt *does* exist, he would no doubt have objected when I made the Payment Out Order subject to my express stipulation that the payment out be in full and final satisfaction of the Debt. The reason he did not object is because my express stipulation, also referred to the "alleged debt" and therefore acknowledges that the Debt remains merely an allegation by the claimant rather than an existing liability to the claimant that I had found had been established in the Arbitration. In other words, my express stipulation made it clear that I accepted defendant's counsel's submission that my finding that the Award *did* find that the Debt *does* exist was *not* a condition precedent for a Payment Out Order.

176 I conclude by saying that I find it difficult to see in what way the Payment Out Order is adverse to the defendant and therefore in what way the defendant can have any right to appeal against it given that: (a) I made the Payment Out Order because I accepted (albeit with misgivings) the defendant's own counsel's position as to the proper basis for making the order; (b) I included my express stipulation in the Payment Out Order precisely in order to make it clear that I had made *no* finding that the Award *did* find that the Debt *does* exist; and (c) I included the express stipulation in order to *protect* the defendant against a future claim by the claimant for the Debt.

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Vinodh Coomaraswamy
Judge of the High Court

Sarjit Singh Gill SC, Daniel Tan, Hoang Linh Trang, Jeremy Chu and Edwin Yang (Shook Lin & Bok LLP) for the Claimant;
Tan Chuan Thye SC, Sim Kwan Kiat, Mark Cheng, Tan Tian Hui and Timothy Ang (Rajah & Tann Singapore LLP) for the Defendant;
Beverly Wee for the Official Receiver.

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