IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHCR 01

Suit No 1207 of 2016
(Summons Nos 2968 and 2970 of 2018)

Between

StreetSine Singapore Pte Ltd

… *Plaintiff*

And

(1) Singapore Institute of Surveyors and Valuers
(2) Lim Lan Yuan
(3) Tan Choi Heng
(4) Teo Chin Teck John
(5) Goh Heng Hoon (Wu Hengyun)
(6) Loh Kai Chieh
(7) Tay Choon Kwan
(8) Tan Siew Hoon
(9) Chan Kim Mun Eric
(10) Tan Keng Chiam
(11) Low Fook @ Low Fook Kiong
(12) Png Poh Soon (Fang Baoshun)
(13) Soh Chor Yin
(14) Ong Shujuan (Weng Shujuan)
(15) Chwee Shook Mun Valenie (Cui Shuwen)
(16) Yee Yeh Shiunn
(17) Teo Li Kim
(18) Mak Weng Tat
(19) Gan Thiam Hee Joseph
(20) Poh Kwee Eng
(21) Sim Hwee Yan
(22) Han Jee Kheng
(23) Teho Property Consultants Pte Ltd (formerly known as ECG

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Consultancy Pte Ltd)
(24) Jones Lang Lasalle Property Consultants Pte Ltd
(25) Knight Frank Pte Ltd
(26) Edmund Tie & Company (SEA) Pte Ltd (formerly known as DTZ Debenham Tie Leung (SEA) Pte Ltd
(27) CBRE Pte Ltd

… *Defendants*

JUDGMENT

[Civil Procedure] – [Costs] – [Security]

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StreetSine Singapore Pte Ltd
v
Singapore Institute of Surveyors and Valuers and others

[2019] SGHCR 01

High Court — Suit No 1207 of 2016 (Summons Nos 2968 and 2970 of 2018)
Zeslene Mao AR
10 and 12 October 2018

28 December 2018 Judgment reserved.

Zeslene Mao AR:

1 Summons No 2968 and 2970 of 2018 are two applications for security for costs taken out by the 23rd Defendant and the 1st to 22nd Defendants (collectively referred in this judgment to as "the Defendants") respectively against the Plaintiff, StreetSine Singapore Pte Ltd. The 23rd Defendant's application is for security for its costs up to and including the filing of affidavits of evidence-in-chief in the sum of $70,000. The 1st to 22nd Defendants' application is for their costs up to the completion of discovery in the sum of $386,750. The applications for security for costs are made pursuant to s 388(1) of the Companies Act (Cap 50, 2006 Rev Ed), which provides:

> **Security for costs**
>
> **388.**—(1) Where a corporation is a plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his defence, require

> sufficient security to be given for those costs and stay all proceedings until the security is given.

2 In essence, the Defendants' position is that they are entitled to security for costs as there exists credible evidence to believe that the Plaintiff will be unable to pay the Defendants' costs. Such credible evidence consists of, amongst other things, the Plaintiff's financial woes such as its balance sheet insolvency and operating losses as well as loan agreements entered into between the Plaintiff's parent company, StreetSine Technology Group Pte Ltd ("STG"), and STG's shareholders for the funding of the present litigation. The Plaintiff opposes the application, *inter alia*, on the ground that given its liquidity, the Defendants cannot show that there is reason to believe that the Plaintiff will be unable to pay the Defendants' costs if they are successful in their defence.

3 Having considered the parties' respective evidence and submissions, I now give my decision on the applications.

Background and procedural history

4 The Plaintiff is a private company incorporated in Singapore and carries on the business of an information technology company that integrates big data sets with mobile applications to provide property information and transaction tools to the real estate market. It is a wholly-owned subsidiary of STG. The majority of the shares in STG are held by SPH Interactive Pte Ltd.

5 The 1st Defendant is a national body representing professionals who carry out various services relating to the real estate and construction industry, including land surveying, quantity surveying, property management, marketing, estate agency and valuation practice. The 2nd to 22nd Defendants are either

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individual members or employees of the 1st Defendant. The 23rd Defendant, which is also a member of the 1st Defendant, is a property consultancy firm that offers valuation advisory services.

6 The present suit was commenced by the Plaintiff against the 1st Defendant on 10 November 2016. At that time, the Plaintiff alleged that the 1st Defendant had engaged in a conspiracy with the predominant purpose of injuring the Plaintiff's business. On 16 October 2017, the 2nd to 27th Defendants were added as defendants to the action pursuant to leave granted by the Court. The Plaintiff's case is that as a result of the Defendants' wrongful acts and breaches, the Plaintiff has been, amongst other things, unable to market its valuation products to banks, financial institutions or the public in any meaningful manner within Singapore or overseas.

7 On 28 June 2018, the Defendants filed their respective applications for security for costs. At this time, the applications were not supported by any expert opinion. Both the 1st to 22nd Defendants and the 23rd Defendant relied on the Plaintiff's financial statements, especially those produced for the year ended 31 August 2017 ("2017 Financial Statements"). The Defendants highlighted these points from the Plaintiff's financial statements to support their case that security for costs ought to be granted:

(a) The Plaintiff had made losses over the years in 2014 to 2017. The Plaintiff had made a net loss of $41,538 in 2017 and a net loss of $1,227,675 in 2015.

(b) The Plaintiff had a negative total asset position and a negative current asset position over the years from 2014 to 2017. In particular, as

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at 31 August 2017, the Plaintiff had a negative total asset position of $1,354,238 and a negative current asset position of $2,402,275.

(c) In the 2017 Financial Statements, the independent auditors, KPMG LLP ("KPMG"), had expressed a "material uncertainty related to going concern", as follows:

> We draw attention to Note 21 to the financial statements which indicates that [the Plaintiff] incurred a net loss of $41,538 during the year ended 31 August 2017 and, as of that date, the Company's total liabilities exceeded its total assets by $1,354,238, and its current liabilities exceeded its current assets by $2,402,275. As stated in Note 21, these conditions indicate that a material uncertainty exists that may cast significant doubt on the Company's ability to continue as a going concern. Our opinion is not modified in respect of this matter.

8 In a reply affidavit filed by Mr Jason Barakat-Brown, the Chief Executive Officer of STG, the following points in response were made on behalf of the Plaintiff:

(a) The profitability of a company from an accounting perspective did not necessarily reflect the company's financial strength or its liquidity. In any case, the Plaintiff made a profit of $630,860 in 2016. Although it posted a small loss of $41,538 in 2017, its revenue had increased by more than 25% from $4,940,990 in 2016 to $6,192,499 in 2017. Further, the Plaintiff generated positive operating cash flow of $1,330,352 and $1,286,549 respectively in 2016 and 2017.

(b) The claim that the Plaintiff might be in financial difficulties because it was a negative total asset and negative current asset position as at 31 August 2018 was premised on a misunderstanding of the

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Plaintiff's business model. The Plaintiff was an information technology company that offered its services to customers using a subscription business model that allowed them to obtain access to its services over a 12-month membership period. The Plaintiff billed and received payment from its customers for the full amount of the subscription fee at the start of the 12-month period. As a matter of accounting treatment, these sums received were recorded as liabilities as they represented revenue which the Plaintiff had not earned when it received payment. However, the Plaintiff was free to utilise these sums for its business and to meet any obligations or liabilities. Further, under the Plaintiff's contracts with its customers, these sums were not refundable in any circumstances. Thus, this line item in the Plaintiff's balance sheet (referred to hereinafter as "billings in advance"), which formed 72% of the Plaintiff's current liabilities as at 31 August 2017, should be viewed in this light.

(c) While the Plaintiff invested heavily in growing its business, these investments were made on a discretionary, month to month basis. This meant that the Plaintiff could, if required, reduce the cash it invested at short notice in order to make more cash available for funding the legal proceedings. The Plaintiff would be able to do so without affecting its ability to provide services to existing subscribers in any way, because such services were being provided using an existing platform which the Plaintiff had already developed and paid for.

(d) STG entered into separate loan agreements with each of its three shareholders, under which STG's shareholders agreed to provide loans to STG for the purpose of funding the legal costs incurred and/or anticipated by the Plaintiff in connection with the present action. Each

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loan agreement was for a term of two years from 11 January 2017 and could be extended for an additional year by STG and STG's shareholders. STG was entitled to borrow up to $420,000 under these loan facilities.

(e) The 2017 Financial Statements did not reflect the Plaintiff's latest cash position. In this regard, the Plaintiff exhibited redacted bank account statements dated 30 June 2018 showing that it had cash and cash equivalents of $1,696,951.85, which was significantly higher than the sum of $924,511 reflected in the 2017 Financial Statements.

9 The Plaintiff also relied on the evidence of an independent expert, Mr Premjit Dass, a chartered accountant and a director in Navigant Consulting (APAC) Pte Ltd. In his expert report, Mr Dass opined that:

(a) The billings in advance were classified in the Plaintiff's financial statements as current liabilities only because of the timing of the collection of the subscription revenues rather than because they were liabilities that needed to be settled by the outflow of cash at some point in the future. The Plaintiff categorised the billings in advance as liabilities to comply with paragraph B49 of the Financial Reporting Standard in Singapore ("FRS") 115 which states that "the upfront fee is an advance payment for future goods or services and, therefore, would be recognised as revenue when those future goods or services are provided". Thus, an assessment of the Plaintiff's liquidity should exclude billings in advance as the Plaintiff "is not required to discharge those liabilities in cash".

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(b) KPMG's statement that "a material uncertainty exists" does not mean that the Plaintiff is unable to continue as a going concern. Under Singapore standards for auditing and financial reporting, a company's management is required to make an assessment of its ability to operate as a going concern, and to disclose any material uncertainty related to events or conditions that might cast doubt on its ability to do so. An auditor's responsibilities are in turn to review the appropriateness of such an assessment. In this case, the Plaintiff's management was of the view that it was appropriate to prepare the 2017 Financial Statements on a going concern basis (see Note 21 to the 2017 Financial Statements set out at [61] below). The fact that KPMG concluded that its opinion was "not modified in respect of this matter" (see [7(c)] above) meant that KPMG was of the view that (a) that it was appropriate to use the going concern basis for the preparation of the 2017 Financial Statements; and (b) the Plaintiff's financial statements had adequately disclosed any material uncertainty related to its ability to continue as a going concern.

10 In response to Mr Dass' report, the 1st to 22nd Defendants instructed Mr Nicholas James Gronow to file an independent expert report. Mr Gronow, who was also a chartered accountant, was a senior managing director of FTI Consulting (Singapore) Pte Ltd. In his report, Mr Gronow stated:

(a) *Prima facie*, the Plaintiff was balance sheet insolvent as at 31 August 2017. Further, the following reasons indicated that the Plaintiff "may also be considered cash flow insolvent" or at risk of becoming cash flow insolvent:

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(i) the Plaintiff incurred a net loss of $41,538 in 2017;

(ii) the Plaintiff maintained a negative cash flow from 2014 to 2016 and only maintained a positive cash flow in 2017 taking into account cash flow from investing activities; and

(iii) in the 2017 Financial Statements, the auditors stated that there is a "material uncertainty" as to whether the Plaintiff may continue as a going concern.

(b) Although there may be no cash payment each month to the parties that provided the billings in advance, there are material levels of monthly operating expenses incurred by the Plaintiff that need to be settled in cash, including employee benefits, rental expenses and advertisement expenses, in order for the Plaintiff to continue operating its business. As the Plaintiff incurred $3,960,403 in operating expenses in 2017, it can be said to have spent $330,000 per month. The Plaintiff's cash balance of $924,511 as at 31 August 2017 only provided coverage of the Plaintiff's operating expenses for 2.8 months. Apart from the Plaintiff's operating expenses, the Plaintiff also made significant investment in intangible assets. This, coupled with its loss-making position, suggested to Mr Gronow that the Plaintiff "must continually reinvest in the company in order to maintain and grow the business to enable it to reach a critical mass". All these reflected the expenses that the Plaintiff had to continually expend in order to provide services to its customers who paid the billings in advance.

(c) While KPMG expressed the opinion that it was appropriate to use the going concern basis for the preparation of the 2017 Financial

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Statements, the "material uncertainty" identified by KPMG could be ignored.

11 No expert report was filed on behalf of the 23rd Defendant. However, on the eve of the hearing, the 23rd Defendant filed a Notice of Intention to refer to Mr Gronow's affidavit.

The applicable legal principles

12 There are two stages in an application for security for costs under s 388(1) of the Companies Act. At the first stage, the Court will determine if it appears by credible testimony that there is reason to believe that the plaintiff would be unable to pay the defendant's cost if the defendant is successful in its defence. If the first stage is satisfied, the Court will then consider at the second stage whether it should exercise its discretion to order security for costs.

13 Generally, once the first stage is satisfied, the Court would grant security for costs unless there are special circumstances which demonstrate that it would be just for security not to be provided (see *Frantonios Marine Services Pte Ltd and another v Kay Swee Tuan* [2008] 4 SLR(R) 224 ("*Frantonios*") at [61]). This is because the legislative and public policy behind s 388 of the Companies Act is to provide "some protection for the community against litigious abuses by artificial persons manipulated by natural persons", bearing in mind that "[a] man may bring into being as many limited companies as he wishes, with the privilege of limited liability" (per Megarry VC in *Pearson v Naydler* [1977] 1 WLR 899 at 905, cited in *Ho Wing On Christopher v ECRC Land Pte Ltd* [2006] 4 SLR(R) 817 at [71]; see also *Frantonios* at [58]).

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14 It is not disputed that the legal burden to demonstrate that an order for security for costs should be granted rests on the applicant. In this connection, the applicant is *not* required to prove on a balance of probabilities that the plaintiff will be unable to pay when ordered to do so (see *Jirehouse Capital (an unlimited company) and another v Beller and another* [2009] 1 WLR 751 ("*Jirehouse*") at [26]). Rather, the test is whether there is, by credible testimony, "reason to believe" that the plaintiff would be unable to do so. As Clarke J observed in *IBB Internet Services Ltd and another v Motorola Ltd* [2013] IESC 53 ("*IBB*") at [5.8], this requires the Court to predict a future uncertain event, which "involves not only a consideration of the relevant [p]laintiff's current ability to meet an order for costs but also any likely change in that ability brought about by the passage of time and, of course, predicated on the failure of the proceedings".

15 In order to decide whether there is reason for such a belief, the Court will have "to look at the evidence put forward on the application as a whole and form an assessment on the basis of the evidence as a whole as to whether there is reason to believe that the company will not be able to pay costs ordered against it" (see *Jirehouse* at [34]). The fact that a credible witness puts forward a case on behalf of the applicant of the plaintiff's inability to pay would not by itself be sufficient; where there is conflicting evidence, the Court must have regard to that as well and reach a conclusion on the "totality of the evidence placed before it, giving such weight to the various matters deposed to as is appropriate in the circumstances" (per Sir Donald Nicholls VC in *Re Unisoft Group Ltd (No 2)* [1993] BCLC 532 at 534; see also *Jirehouse* at [34]). In *Warren Mitchell Pty Ltd v Australian Maritime Officers' Union and others* (1993) 12 ACSR 1, Lee J expounded on the test in connection with the then

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Australian equivalent to s 388 of the Companies Act (*ie*, s 1335 of the Corporations Law) as follows (at 5):

> The use of the word "credible" suggests a requirement that evidence to be relied upon has some characteristic of cogency. Qualification of the word "testimony" by "credible" suggests that an evidentiary burden is undertaken by the party seeking the order. It amounts to an obligation on an applicant for an order to show that the *material before the court is sufficiently persuasive to permit a rational belief to be formed that, if ordered to do so, the corporation would be unable to pay the costs of that party upon disposal of the proceedings*. … [S]peculation as to insolvency or financial difficulties likely to confront the corporation will be insufficient to ground the exercise of the discretion.
>
> [emphasis added]

16 At the same time, it has been recognised that an applicant for security for costs is not required to provide "anything very conclusive in the way of proof" and can "do no more than to point to the surrounding circumstances" (see *Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd (No 2)* [1977] 1 NZLR 516 at 519). In considering whether credible evidence existed to give reason to believe that the plaintiff would be able to pay the defendant's costs, courts have considered the following factors:

(a) the plaintiff's cash position and the financing and credit facilities available to the plaintiff (see *Frantonios* at [33]);

(b) the plaintiff's assets and liabilities (both current and long term) (see *Frantonios* at [33]);

(c) the solvency of the plaintiff (see *Elbow Holdings Pte Ltd v Marina Bay Sands Pte Ltd* [2014] SGHC 219 ("*Elbow Holdings*") at [9(a)]); and

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(d) whether there is any evidence that the plaintiff has failed to pay or delayed in making payment of a debt that has become due and payable (see, for example, *Ho Pak Kim Realty Co Pte Ltd v Revitech Pte Ltd* [2008] SGHC 230 at [14]; *South East Enterprises (Singapore) Pte Ltd v Hean Nerng Holdings Pte Ltd and another* [2011] SGHC 11 at [5]).

17 If the Court is satisfied that such credible testimony exists, it will then proceed to the second stage, which is to consider whether to exercise its discretion to grant the application for security for costs. At the second stage, the Court would have regard to all the relevant circumstances to decide if it would be just to make the order (see *Creative Elegance (M) Sdn Bhd v Puay Kim Seng* [1999] 1 SLR(R) 112 at [13]). Such circumstances include, amongst other things, the following matters:

(a) whether the plaintiff's claim is *bona fide* and not a sham;

(b) whether the plaintiff has a reasonably good prospect of success;

(c) whether the plaintiff's want of means was brought about by the defendant; and

(d) whether the application for security for costs was being used oppressively, such as to stifle a genuine claim.

18 It is also important to note that in an application for security for costs under s 388(1), the Court will not go into the merits of the case in detail unless the evidence is so plainly, clearly and overwhelmingly in favour of one party (see *Frantonios* at [49]). All parties accepted that this was not the case here, and

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none of the parties delved into merits of their respective claim or defence during the arguments on this application before me.

The issue and the parties' arguments

19 The main issue which the parties focussed their arguments on in respect of these applications was the issue of whether there is reason to believe that the Plaintiff would be unable to pay the Defendants' costs if the Defendants were successful in their defence. While arguments pertaining to the second stage were raised, these were made briefly and in a cursory manner.

20 In my decision, I therefore deal chiefly with the issue of whether the Defendants were able to demonstrate that there is reason to believe that the Plaintiff would not be able to satisfy their costs when ordered to do so. Before turning to my decision in respect of this, I set out a summary of the parties' arguments for context.

The 1st to 22nd Defendants' arguments

21 Counsel for the 1st to 22nd Defendants, Mr Tng Sheng Rong, made three main points in seeking to demonstrate that there is reason to believe that the Plaintiff would be unable to pay their costs. First, Mr Tng submitted that on an analysis of the Plaintiff's financial statements, the Plaintiff was both balance sheet and cash flow insolvent. Second, Mr Tng pointed to the fact that the Plaintiff was the beneficiary of a loan between STG and its shareholders. In Mr Tng's submission, the fact that such loan agreements had to be entered into was telling of the Plaintiff's inability to pay the Defendants' costs. Moreover, the Plaintiff was not a party to the loan agreements, and in any case there was no certainty that the term of the loan agreements would be extended. The loan

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agreements could also be terminated either by STG or STG's shareholders upon giving 30 days' written notice, without prior reference or notification to the Plaintiff. All these demonstrated that little weight could be placed on the loan agreements. Finally, Mr Tng noted that the Plaintiff had disclosed matters in its 2017 Financial Statements that constituted a "material uncertainty" as to its ability to continue as a going concern. These matters related to the exact points that the 1st to 22nd Defendants had highlighted. The 1st to 22nd Defendants thus had sufficient cause for concern as to the Plaintiff's ability to pay their costs.

The 23rd Defendant's arguments

22 Counsel for the 23rd Defendant, Mr Chia Huai Yuan, adopted all of Mr Tng's arguments. He further submitted that based on the points raised by the Defendants, the evidential burden had shifted to the Plaintiff to adduce evidence to demonstrate that there was reason to believe that it would be able to pay the Defendants' costs. However, this evidential burden was not discharged. For example, the Plaintiff did not proffer any evidence to support its assertion that the investments in its business were made on a discretionary basis and that it could divert this cash towards other purposes, such as funding these legal proceedings. Further, with respect to the sum of $1.6m in its bank account, it was glaring that the Plaintiff had failed to explain the sources of these funds and this evidence should thus be treated with extreme caution.

The Plaintiff's arguments

23 Counsel for the Plaintiff, Mr Jaikanth Shankar, submitted that Mr Tng's and Mr Chia's arguments were premised on a fundamental misreading of the Plaintiff's financial statements. In Mr Shankar's submission, the issue to be

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decided in an application under s 388(1) of the Companies Act related to the company's liquidity and *not* profitability. In this regard, the Plaintiff has a high degree of liquidity because:

(a) The vast majority of the Plaintiff's liabilities on its balance sheet in the 2017 Financial Statements related to the billings in advance. These were only liabilities in the sense that they represented an obligation on the Plaintiff's part to perform a service in the future and were not debts. They did not represent a future outflow of cash and could not be said to have any effect on the Plaintiff's liquidity.

(b) The second largest group of liabilities on the Plaintiff's 2017 Financial Statements were amounts owed to the Plaintiff's immediate holding company, STG. Officers of STG have given evidence in affidavits filed on 8 August 2018 for the purpose of these applications that STG will not recall these monies within 12 months of that date.

(c) As at 30 June 2018, the Plaintiff had a sum of $1,696,951.85 in its bank accounts. This sum far exceeded the amount of security sought by the Defendants.

(d) The Defendants presented no evidence of a single creditor having made a demand against the Plaintiff, let alone a claim against the Plaintiff for any unpaid sums.

24 As for the loan agreements between STG and its shareholders in respect of the Plaintiff's litigation, these were not evidence of the Plaintiff's impecuniosity. Instead, this was evidence of prudent financial management on the Plaintiff's part as the Plaintiff could obtain additional funding through the

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loan agreements without having to bear any cost since no interest was payable on the borrowed amounts.

25 Finally, in respect of the 23rd Defendant's application, Mr Shankar submitted that as Mr Gronow's expert opinion was not offered on behalf of the 23rd Defendant, it was not proper for the 23rd Defendant to rely on Mr Gronow's report as a response to Mr Dass' expert opinion through the filing of a Notice of Intention to Refer under O 32 r 13 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). As each party had a separate legal burden to make out the ingredients of s 388(1), and as the 23rd Defendant neither found an expert to rebut Mr Dass' evidence nor said that Mr Dass' evidence was to be disregarded, the 23rd Defendant's application was a non-starter.

The decision

26 Having carefully considered the evidence and arguments, I am not persuaded that there is reason to believe that the Plaintiff would be unable to pay the costs of the Defendants if ordered to do so. I explain the reasons for arriving at this conclusion below.

27 As one of the Defendants' main submissions was that the Plaintiff is balance sheet and cash flow insolvent, it is useful to begin with an analysis of this particular question. Mr Tng submitted that this was a "primary consideration" for the Court in an application under s 388(1), and relied on cases which set out the two tests for solvency in the context of bankruptcy and insolvency law, being the cash flow test and the balance sheet test.

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28 These two tests find their statutory embodiment in s 100(4) of the Bankruptcy Act (Cap 20, 2009 Rev Ed). For the purpose of the analysis, it suffices to note that this section provides that an individual shall be insolvent if (a) he is unable to pay his debts as they fall due; or (b) the value of his assets is less than the amount of his liabilities, taking into account his contingent and prospective liabilities. In *Parakou Shipping Pte Ltd (in liquidation) v Liu Cheng Chan and others* [2017] SGHC 15, Chua Lee Ming J observed (at [64]) that the cash flow and balance sheet tests corresponded to the first and second limb of s 100(4) of the Bankruptcy Act. It has been held that the two tests are to be read disjunctively, and that therefore, no matter how asset rich the company might be, it will still be held to be insolvent under s 100(4) of the Bankruptcy Act if it can be proved that the company was unable to pay its debts as they fell due (see *Living the Link Pte Ltd (in creditors' voluntary liquidation) and others v Tan Lay Tin Tina and others* [2016] 3 SLR 621 ("*Living the Link*") at [26] and [27]).

29 It is of note that the condition to be proved before security for costs will be granted under s 388(1) of the Companies Act closely resembles the language of the cash flow test found in s 100(4)(*a*) of the Bankruptcy Act (which has also been referred to as the liquidity test: see *Living the Link* at [27]). In both instances, the issue is whether the company in question is able to pay its debts as they fall due. The difference lies in that the assessment carried out for the purposes of s 388(1) of the Companies Act requires the Court to consider the future state of the company (*ie*, the company's *potential* ability or inability to pay costs to the defendant *if* the defendant succeeds in its defence (see also the comments of Clarke J cited at [14] above)), while the assessment under s 100(4)(*a*) of the Bankruptcy Act relates to the company's current financial state

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at the time of the assessment. It is also of note that the language of s 100(4)(*b*) of the Bankruptcy Act, *viz*, that the value of the one's assets is less than the amount of one's liabilities, is *not* the test stipulated by the legislature as far as s 388(1) of the Companies Act is concerned. I therefore agree with Mr Shankar's submission that the focus in an application under s 388(1) relates to the company's *liquidity*, and in particular, its potential ability or inability to satisfy an adverse costs order.

30 This is not to say that the balance sheet test is irrelevant in an application under s 388(1). Balance sheet insolvency can certainly be an indication of poor financial health, giving rise to a risk that the company may not be able to satisfy an adverse cost order in the future. However, given the language of s 388(1) of the Companies Act, the fact that a company might be considered insolvent on a strict application of the balance sheet test does not automatically lead to the conclusion that there is reason to believe that the company will not be able to satisfy the defendant's costs in the future. In a similar vein, Belinda Ang J observed in *Chip Thye Enterprises Pte Ltd (in liquidation) v Phay Gi Mo and others* [2004] 1 SLR(R) 434 ("*Chip Thye Enterprises*") at [19] that a "surplus or deficiency of net assets is indicative but not necessarily determinative in establishing whether or not an entity is able to pay all its debts as and when they become due and payable". Instead, regard must be given to all the evidence that appears relevant (*Chip Thye Enterprises* at [20]).

31 With the above in mind, I turn to consider the Plaintiff's financial situation as disclosed from its financial statements and other evidence, focussing in particular on an assessment of the Plaintiff's liquidity. Insofar as the Plaintiff's financial statements are concerned, I focus primarily on the 2017

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Financial Statements as they are the most probative of the Plaintiff's current financial circumstances and the Plaintiff's future ability to satisfy an adverse cost order.

The Plaintiff's assets and liabilities

32 As at 31 August 2017, the Plaintiff had liabilities on its balance sheet amounting to $3,956,510. Of this sum, $70,859 was a loan from STG which was classified as a non-current liability. The remaining $3,885,651 were current liabilities and comprised the following:

Description	**Amount ($)**
Accrued operating expenses	297,681
Amount owing to STG (trade)	684,913
Amount owing to ultimate holding company (trade)	13,364
Amount owing to STG (non-trade)	594
Other payables	54,647
GST payable	19,496
Billings in advance	2,814,956
Total	3,885,651

33 Against these liabilities, the Plaintiff's assets amounted to $2,602,272. These comprised non-current assets valued at $1,118,896 and current assets of $1,483,376 (which comprised $558,865 of trade and other receivables and $924,511 of cash and cash equivalents).

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34 It is true that *prima facie*, the Plaintiff is balance sheet insolvent in the sense that the liabilities on its balance sheet exceed the amount of assets it has to satisfy these liabilities. However, as highlighted above at [29]–[30], this state of affairs is not determinative of an application under s 388(1). Both the nature of the Plaintiff's assets and liabilities must be examined in closer detail in order to understand their impact on the Plaintiff's liquidity. As highlighted by Judith Prakash J (as she then was) in *Kon Yin Tong and another v Leow Boon Cher and others* [2011] SGHC 228 ("*Kon Yin Tong*"), the Court should look at, amongst other things, (a) all of the company's debts in order to determine when those debts were due and payable; and (b) all of the assets of the company in order to determine the extent to which those assets were liquid or were realisable within a timeframe that would allow each of the debts to be paid as and when it became payable, to determine a company's liquidity (at [37]). When the Plaintiff's liabilities are examined in closer detail, it will be seen that the majority of the Plaintiff's liabilities are not *debts* which are due and payable at some future time. This is significant as insofar as the Plaintiff is not required to satisfy these liabilities in cash, such liabilities – though present on the balance sheet – would not directly affect the Plaintiff's cash flow or liquidity.

35 The largest item on the Plaintiff's list of current liabilities, forming 72% of the Plaintiff's current liabilities, is the item known as billings in advance. As stated in Note 10 of the 2017 Financial Statements, the billings in advance relate to subscription fees collected in advance from customers. This revenue is recorded as a liability on the Plaintiff's balance sheet as the Plaintiff had not yet earned these sums at the time it received payment (see [8(b)] above).

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36 In his expert report, Mr Dass explained that the manner in which the Plaintiff categorised this subscription revenue was in line with the accounting standard set out in FRS 115. As explained in paragraph IN7 of FRS 115, the "core principle" of the standard is that "an entity recognises revenue to depict the transfer of promised goods or services to customers in an amount that reflects the consideration which the entity expects to be entitled in exchange for those goods or services". Under FRS 115, an entity is to recognise revenue in accordance with this core principle by applying the following steps:

(a) identity the contract(s) with a customer;

(b) identify the performance obligation in the contract;

(c) determine the transaction price;

(d) allocate the transaction price to the performance obligations in the contract; and

(e) recognise revenue when (or as) the entity satisfies a performance obligation.

37 The last step is explained further in paragraph IN7(e) of FRS 115 as follows:

> [A]n entity recognises revenue when (or as) it satisfies a performance obligation by transferring a promised good or service to a customer (which is when the customer obtains control of that good or service). The amount of revenue recognised is the amount allocated to the satisfied performance obligation. A performance obligation may be satisfied at a point in time (typically for promises to transfer goods to a customer) or over time (typically for promises to transfer services to a customer). *For performance obligations satisfied over time, an entity recognises revenue over time by selecting an appropriate*

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> *method for measuring the entity's progress towards complete satisfaction of that performance obligation.*
>
> [emphasis added]

38 In this case, the Plaintiff recognises the subscription revenue on a straight-line basis over the period of the customer's subscription (*ie*, a period of 12 months). Thus, one-twelfth of the total fees which the Plaintiff receives from a customer at the beginning of the customer's 12-month subscription would be progressively recognised as revenue – and correspondingly deducted from the Plaintiff's liabilities on its balance sheet – every month until the end of that 12-month period.

39 It may be seen from the above that the categorisation of the billings in advance as a liability on the balance sheet is the means of deferring recognition of the subscription revenue until the appropriate time (see Charles H Meyer, *Accounting and Finance for Lawyers in a Nutshell* (Thomson Reuters, 5th Ed, 2013) at p 128). The billings in advance are not debts in the sense that such sums will become due and payable at some time in the future. Hence, the fact that the Plaintiff's liabilities exceed its assets as a result of the large sum of billings in advance categorised as current liabilities does not necessarily mean that the Plaintiff is insolvent or illiquid in the sense of having insufficient assets to pay its debts as they fall due.

40 The Defendant's expert, Mr Gronow, accepted that the billings in advance did not entail any cash payment to parties. However, he contended that the billings in advance were still relevant to an assessment of the Plaintiff's liquidity because the Plaintiff has to incur monthly operating expenses to fulfil its obligations to customers and must also continually reinvest in its business to maintain and grow the business. According to Mr Gronow, such operating

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expenses include advertisement expenses, professional fees, employee benefits expense and rental expenses. Thus, in relation to the billings in advance, Mr Gronow concluded:

> Therefore, given the operating expenses that must be incurred on an ongoing basis and the investments in product development expended each year, the Billings in Advance cannot be removed from an analysis of the financial position of [the Plaintiff] as these costs reflect the expenses that must be continually expended to provide services to the customers that paid the Billings in Advance.

41 Mr Shankar submitted that Mr Gronow's opinion was erroneous for three reasons. First, there was no need for the Plaintiff to reinvest in its business in order to provide services to its existing customers. Like any other company, the Plaintiff invests in the development of its business to grow the business and create new income streams. However, this has no bearing on the Plaintiff's ability to deliver its existing services to customers. The Plaintiff already has the technologies and assets that are required to deliver its existing services without making further investment (see [8(c)] above). Second, while the Plaintiff had to incur some operating expense to provide its services to its customers, these expenses were a fraction of the revenue the Plaintiff earned from its customers. In this regard, the Plaintiff's unchallenged evidence was that its operating model allowed it to provide its services to existing customers at very minimal, or negligible, incremental cost. Finally, the Plaintiff need not incur advertising expenses or professional fees to fulfil its obligations to existing customers as these were discretionary expenses to grow the business and were not incurred to maintain its existing services.

42 Given the nature of the billings in advance as explained above, the issue of whether the Plaintiff will have to spend a significant amount of cash in order

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that the billings in advance may be subsequently recognised as revenue over the relevant period is relevant to the question of whether the billings in advance impact the Plaintiff's liquidity.

43 I begin by considering the alleged expenditure on investment. In this regard, there was no evidence that the Plaintiff had to incur significant expenditure on its investments in order to earn the billings in advance. While the Plaintiff did spend a significant amount of cash on investment activities such as website development, the fact that this was classified as an "investment" in the 2017 Financial Statements demonstrated that this was not an operating expense that the Plaintiff had to incur in order to earn the billings in advance, but rather monies spent to develop and grow the business. In my assessment, the expenditure on investment did not affect the specific issue of whether the billings in advance impacted the Plaintiff's liquidity, though it remains relevant to the issue of the Plaintiff's cash flow generally. I deal with this further at [53]–[55] below.

44 As for the operating expenses which Mr Gronow highlighted, it seemed to me that much of these expenses related to the Plaintiff's operations in general and not to the billings in advance in particular. The evidence given on behalf of the Plaintiff is that its operating model allows it to provide any services that the customers have subscribed for at very minimal, or negligible, *incremental* cost. Mr Barakat-Brown has explained that the reason that this is the case is because all that the Plaintiff is required to do for the billings in advance to be recognised as revenue is provide its customers the requisite access to the Plaintiff's existing software engine or platforms. This evidence also supported by the financial literature which Mr Shankar referred to at the hearing, where the general

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proposition was made that companies in the technology, services and telecommunications business typically receive upfront payments from customers and have low costs associated with providing those incremental services over the revenue recognition period to customers (see, for example, Ryan Lubniewski, *et al*, "Beware of disappearing revenue in an acquisition" (April 2016) Journal of Accountancy at pp 28–31).

45 In his report, Mr Gronow did not grapple with the nature of either the Plaintiff's business as a technology company or its operating model. The basis upon which he disagreed with the Plaintiff's evidence that there was negligible incremental cost involved in the provision of its existing platforms to earn the billings in advance was the significant amount of operating expenses which the Plaintiff incurred in 2017 as reflected in 2017 Financial Statements. However, it bears noting that the operating expenses as reflected in the 2017 Financial Statements were *past* expenses that had already been incurred in 2017, and even then, these – as Mr Gronow observed – constituted only 64% of the Plaintiff's revenue in that year. Moreover, while the Plaintiff did incur a significant amount of expenditure in 2017, it does not necessarily follow that the Plaintiff would have to incur the same expenses *in the future* in order to earn the billings in advance which were reflected on the balance sheet. It must be borne in mind that all the Plaintiff had to do to ensure that the billings in advance would be recognised as revenue over the relevant subscription period would be to provide the customers who had paid the subscription fee access to its existing platforms, and it is clear that the Plaintiff would not have to incur certain expenses, such as advertising fees which is aimed at attracting *new* customers, to do so. This being the case, there appears to be to be little basis to doubt the Plaintiff's

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evidence on affidavit that it will have to incur minimal or negligible incremental cost in order to earn the billings in advance.

46 Taking the above in totality, I am of the opinion that the billings in advance do not have as much of an impact on the Plaintiff's liquidity as the Defendants seek to portray. In particular, though the billings in advance appear as a liability on the Plaintiff's balance sheet, I am of the view that these sums cannot be treated as akin to debt for the purposes of an assessment of the Plaintiff's liquidity.

47 The second largest category of liabilities on the Plaintiff's balance sheet are sums owed to STG. As may be seen at [32] above, these sums formed 100% of the Plaintiff's non-current liabilities and 18% of the Plaintiff's current liabilities in the 2017 Financial Statements. These were interest-free and unsecured loans. In relation to the current liabilities which were repayable on demand, Mr Baker Samuel Cranage, director and co-founder of STG, gave evidence that STG would not recall those monies within the 12 months from 8 August 2018. The Plaintiff thus submitted that these amounts should not be taken into account in considering whether there is reason to believe that the Plaintiff will be unable to pay the Defendants' costs. In response, the Defendants argued that Mr Cranage's evidence did not amount to a waiver of the outstanding debt or a guarantee that STG would never call on the loan, and that the only permissible adjustment would be to re-classify these current liabilities as non-current liabilities.

48 While it is true that the debts owed by the Plaintiff to STG cannot be written off by virtue of Mr Cranage's evidence that STG would not recall the sums within 12 months from 8 August 2018, this revealed that the debt owed

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by the Plaintiff to STG was different in nature from a debt owed to an unrelated and independent creditor. The fact that Mr Cranage was able to give such evidence on behalf of STG and the Plaintiff demonstrated that STG was prepared to assist the Plaintiff financially. It was evident that the relationship between STG and the Plaintiff could not be characterised as one between a creditor and debtor dealing at arms' length. Apart from Mr Cranage's evidence, it is also significant that the loaned sums were interest-free. There was thus no cost involved in borrowing these sums from STG and the Plaintiff could arguably even be said to be placed in a better position by being able to borrow these sums without having to pay interest on the same. In a related vein, it is also relevant that the Plaintiff did not appear, as at 31 August 2017, to have obtained any financing from financial institutions. Indeed, the Plaintiff did not appear to have many creditors apart from STG and its ultimate holding company.

49 Having regard to the above, the mere fact that the 2017 Financial Statements reflected the Plaintiff as being in a negative total asset and negative current asset position as at 31 August 2017 did not necessarily mean that the Plaintiff was in poor financial health in the sense of either being unable to pay its debts as they fell due or being unable to satisfy a costs order if one was made against it. The Plaintiff's current assets amounted to $1,483,376 as at 31 August 2017, and although the balance sheet reflected a sum of $3,885,651 as current liabilities, 72% of these related to billings in advance and a further 18% related to the amount owed by the Plaintiff to STG. As the billings in advance were not in the nature of debts, and the Defendants accepted that the amounts owed to STG could be reclassified as non-current liabilities, the Plaintiff effectively had available an amount of current assets of approximately $1.09m in value to

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satisfy any *further* debts that would accrue in the 12 months after 31 August 2017 after taking into account the remaining current liabilities which the Plaintiff had to satisfy in that period. In fact, if a cost order been made against the Plaintiff on 31 August 2017, the Plaintiff would theoretically have more than $1m to satisfy that costs order. In the premises, despite the Plaintiff's negative total asset and negative current asset position reflected in the 2017 Financial Statements, there is little basis to suspect the Plaintiff as being at risk of being the subject of a winding up petition as a result of an unsatisfied debt obligation.

50 The above sets out the Plaintiff's financial position as at 31 August 2017. Is there any reason to believe that the Plaintiff's financial position has deteriorated in the intervening period? On the evidence before me, I find no reason to believe that this would be the case. The Plaintiff has given evidence that as at 30 June 2018, its cash and cash equivalents had increased to $1.6m. Whilst it is true that the bank account statements reflect the position only as at 30 June 2018 and there is no explanation from the Plaintiff as to the sources of these sums, this is equally nothing to suggest that the increase in the cash and cash equivalents has caused a decrease in the Plaintiff's liquidity. If anything, the evidence of the increase in the Plaintiff's cash and cash equivalents suggested that the Plaintiff's liquidity had improved since August 2017. Furthermore, and more importantly, there was no evidence of the Plaintiff having failed to make payment on a debt that was due and payable in the period after the 2017 Financial Statements were prepared until the time of the hearing. Thus, based on the evidence before me, the Plaintiff appeared to be in at least the same – if not better – financial position in June 2018 as compared to its position on 31 August 2017.

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The Plaintiff's business and cash flow

51 I turn now to the Plaintiff's cash flow position, which complements the balance sheet analysis above by providing information about the Plaintiff's cash flow over the period from 1 September 2016 to 31 August 2017.

52 In this regard, it is pertinent to note that the Plaintiff generated cash flows from its operating activities in the sum of $1,330,352 and $1,286,549 in 2016 and 2017, respectively. As pointed out by Mr Shankar during the hearing, these cash flows from operating activities are derived after deducting any operating expenses. This demonstrates that the Plaintiff has the ability to generate substantial cash inflows from its operations, even after expenses are accounted for.

53 It will be seen from the Plaintiff's cash flow statements that over 2016 and 2017, it was the Plaintiff's investments activities that generated an outflow of cash, with an amount of $1,547,732 and $963,584 used for investing activities in 2016 and 2017, respectively. The fact that a significant amount of cash was used for investing activities in 2016 led to the Plaintiff having a negative cash flow for that year, but in 2017 the Plaintiff achieved an overall positive cash flow of $393,845. This was likely due to the fact that the Plaintiff's cash outflows from investment activities decreased from $1.5m to $0.9m.

54 Mr Barakat-Brown has given evidence that the Plaintiff can reduce the amount it invests to free up cash for other purposes (see [8(c)] above). In response, the Defendants submit that there is no evidence to show that the Plaintiff's investment activities are discretionary apart from the Plaintiff's self-serving statements on affidavit to this effect. In particular, the Plaintiff did not

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produce its annual budget, records of its monthly expenditure, the contracts underlying its expenditure or correspondence evidencing the nature of these investments. Neither did the Plaintiff identify the type or nature of the investments it asserted that it could simply cease making at any time, or explain how such investments could be reduced, suspended or terminated at the Plaintiff's discretion. Moreover, the Plaintiff must continue to invest in growing its business or risk falling behind its competitors. In this regard, Mr Gronow opined:

> As noted, [the Plaintiff] continues to invest heavily in growing its business. It follows that should [the Plaintiff] cut back its investing activities, it *may not* be able to maintain its level of services of keep up with its competitors. It *may* then need to spend more cash to catch up and/or face reduced profitability and cashflow in the meantime. Therefore, it is *likely* that there will be a negative impact should [the Plaintiff] stop or reduce its investments to make cash available for other purposes.
>
> [emphasis added]

55 In my view, there is little reason to doubt Mr Barakat-Brown's evidence that the Plaintiff's investments were discretionary and that it could divert cash used for investing to fund other purposes, such as the payment of legal costs. In the first place, there was no evidence that the cash used for investing activities was encumbered in the sense that the funds had been so earmarked and could not be used for other purposes if the Plaintiff chose to do so. Further, Mr Gronow's opinion that the Plaintiff must continue investing or risk falling behind its competitors was speculative. This is revealed in the tentative language used by Mr Gronow to express his opinion on this issue. In any event, even if it was indeed the case that such diversion of funds from investment activities would negatively impact the Plaintiff's finances and future growth, it was not clear to me how this would have any relevance to the issue of whether

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there is reason to believe that the Plaintiff would be unable to pay the Defendants' costs if ordered to do so. This is because such deterioration, if any, would only occur *after* the diversion of funds from such investment activities to the payment of legal costs had occurred, by which time the costs orders in favour of the Defendants would already have been satisfied. I thus accept the Plaintiff's evidence that it would be able to divert money it would otherwise use for investment – which were, historically speaking, substantial sums – towards satisfying any costs orders made against it.

56 In any case, the Plaintiff achieved a positive cash flow of $322,025 in 2017 even after cash outflows for investing activities were taken into consideration, and a total overall positive cash flow of $393,845, after cash flows from financing activities are accounted for. This is a matter that Mr Gronow accepts. However, he states that "[i]t is not yet clear if this is a sustainable position".

57 In my view, the totality of the evidence points towards the sustainability of the Plaintiff's positive cash flow position as evidenced in the 2017 Financial Statements. First, the Plaintiff's revenues have been steadily increasing since 2014. Between 2014 and 2016, the Plaintiff's revenue increased slightly from $4,239,215 to $4,940,900. In 2017, there was a significant increase in the figure, with the Plaintiff managing to bring in revenue of $6,192,499. This trend may also be seen from the increase in the amount of billings in advance, which has increased from the sum of $2,043,367 in 2014 to the sum of $2,814,956 in 2017. It will be recalled that billings in advance represent the subscription revenue already received by the Plaintiff for services that it has yet to render. In the ordinary course of its business, the Plaintiff would recognise these sums as

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revenue in its accounts in the next financial year. The increase in billings in advance from 2014 to 2017 correlates to the increase in revenue from 2014 to 2017, and indicates that this trend of increasing revenue is likely to continue into 2018 as the billings in advance in the 2017 Financial Statements would be recognised in 2018. Given the positive trend over these four years, indicating that the Plaintiff's business is acquiring more custom and sales as time progresses, there is no credible basis on which to ground a belief that the Plaintiff's sales and revenue would be likely to deteriorate in the future. Second, the increase in revenue has also been accompanied by an increase in the Plaintiff's profitability. The large losses suffered in 2014 and 2015 of $2.4m and $1.8m, respectively, have been replaced by a profit of $630,860 in 2016 and a much smaller loss of $41,538 in 2017. In totality, the factors strongly suggest to me that the Plaintiff's business is gaining momentum.

58 At this juncture, it is important to differentiate the Plaintiff's cash flow from its profitability. As explained by John Flower and Gabi Ebbers in *Global Financial Reporting* (Palgrave Macmillan, 2002) at p 478:

> Debts are paid off with cash and not with profits. Hence, for the assessment of solvency, the cash flow statement is more relevant than the income statement. It complements the balance sheet, in that it provides information about flows (essential for assessing the development over a period) whereas the balance sheet presents the position at a point in time.

59 As Mr Dass has observed in his expert report, there is no necessary relationship between a company's profitability and liquidity. A profitable company may have low levels of liquidity, for example, if it faces delays in the collection of payment for sales. On the flip side, an unprofitable company may have high levels of liquidity if it has cash at its disposal which it can use to satisfy its debts. In an application under s 388(1), the more pertinent issue is not

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whether a company is profitable, but whether it is able to generate a positive cash flow from its operations and other activities such that it will be able to satisfy a costs order if required to do so.

60 On this specific inquiry, the Plaintiff achieved a positive cash flow in 2017. This position is likely to be sustainable, given the signs that point towards an improvement in the state of the Plaintiff's business from 2014 until 2017. The Plaintiff has also given evidence that it can divert monies that it uses for investment towards the payment of legal costs, if required. All these militate against any reason to believe that the Plaintiff will be unable to pay the Defendants' costs if ordered to do so in the future.

Operation as a going concern

61 Overarching the above analysis is the assumption that the Plaintiff will continue to operate as a going concern for the foreseeable future. The basis of preparation of the 2017 Financial Statements on a going concern basis was explained in its financial statements in Note 21 as follows:

> **21. GOING CONCERN**
>
> The [Plaintiff] incurred a net loss of $41,538 during the year ended 31 August 2017 and, as of that date, the [Plaintiff's] total liabilities exceeded its total assets by $1,354,238, and its current liabilities exceeded its current assets by $2,402,275. Notwithstanding these negative conditions, which might *otherwise* give rise to material uncertainty as to the [Plaintiff's] ability to continue to operate as a going concern, the financial statements have been prepared on a going concern basis as:
>
> - The [Plaintiff] generated positive operating cash flow during the year ended 31 August 2017 of $1,286,549.
>
> - Billings in advance of $2,814,956, which represent 72% of current liabilities, are inherent to the nature of the

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> [Plaintiff's] business and the [Plaintiff] is confident that it will be able to generate sufficient operating net cash inflows to cover operating costs, and accordingly, perform and fulfil its obligations such that the revenue billed in advance to its customers can be earned within the next twelve months from the date of approval of the financial statements.
>
> - Amounts owning to the immediate holding company of $685,507, which represent 18% of current liabilities are not going to be recalled within the next twelve months.
>
> [emphasis added]

In preparing the 2017 Financial Statements, KPMG referred to Note 21 and stated that its "opinion is not modified in respect of this matter" (see [7(c)] above).

62 It important to understand the significance of phrases such as "material uncertainty" and an "unmodified opinion" in the context of financial statements. Paragraphs 25 and 26 of FRS 1 require a company's management to assess the company's ability to continue operating as a going concern. Paragraphs 25 and 26 of FRS 1 states:

> When preparing financial statements, management shall make an assessment of an entity's ability to continue as a going concern. An entity shall prepare financial statements on a going concern basis unless management either intends to liquidate the entity or to cease trading, or has *no realistic alternative but to do so*. When management is aware, in making its assessment, of material uncertainties related to events or conditions that may cast significant doubt upon the entity's ability to continue as a going concern, the entity shall disclose those uncertainties. …
>
> In assessing whether the going concern assumption is appropriate, management takes into account all available information about the future, which is at least, but is not limited to, twelve months from the end of the reporting period. The degree of consideration depends on the facts in each case. When an entity has a history of profitable operations and ready access to financial resources, the entity may reach a conclusion

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> that the going concern basis of accounting is appropriate without detailed analysis. In other cases, management may need to consider a wider range of factors relating to current and expected profitability, debt repayment schedules and potential sources of replacement financing before it can satisfy itself that the going concern basis is appropriate.
>
> [emphasis added]

63 The Singapore Standard on Auditing ("SSA") 570, in turn, states that an auditor's responsibilities are to conclude on the appropriateness of the management's use of the going concern basis in preparing the financial statements. Under SSA 570, if the auditors conclude that the use of the going concern basis of accounting is appropriate but a "material uncertainty" exists, it shall draw attention to the note in the financial statements that discloses such matters but state that the auditor's opinion is not modified in respect of this matter. It is not disputed that the import of KPMG's opinion was that the going concern basis was appropriate for the preparation of the 2017 Financial Statements, and the 2017 Financial Statements adequately disclosed the material uncertainty in question. In other words, despite the existence of "negative conditions", the auditors agreed with the Plaintiff's management that the Plaintiff was *not* in a situation where it had no realistic alternative but to cease trading. Indeed, as can be seen from the analysis above, I am of the view that this is far from the case.

64 Further, the fact that a "material uncertainty" is identified in a company's financial statements does not necessarily mean that it has been conclusively demonstrated that there is reason to believe that the company would be unable to pay the defendant's costs. Regard must be had to the surrounding evidence and the nature of the "material uncertainty" disclosed. In *IBB*, a similar "emphasis of matter" paragraph had been included by the

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independent auditor in the company's financial reports. In that case, the "material uncertainty" concerned the significant losses of €18.4m incurred during the financial year in question as well as accumulated losses of €73.5m since the commencement of the company's trade. However, the balance sheet showed a positive asset position as at the end of the financial year as a result of the directors securing funding from investors in the form of share capital. The management's assessment of the company's ability to continue as a going concern referred to the litigation commenced by the company in the following note to the company's financial statements:

> The company and certain of its subsidiary entities have made a substantial claim for damages against a major supplier of technology, equipment and ancillary services. The claim for damages relates to material technical failures and under-performance on contractual arrangements. The claim is being heard in the Commercial court. The outcome of the case is likely to have a significant impact on the long term future of the company and group and on its ability to discharge its liabilities. While the directors are confident of a settlement in their favour, there is an inevitable uncertainty with respect to the same.

65 The Supreme Court of Ireland held that due to a reference in the above quoted note to a possible inability to discharge its liabilities, the note would have been sufficient for a court to conclude that there was reason to believe that the company would be unable to pay costs, if there was nothing else by way of weighty evidence in the case (at [6.2]). However, there was significant other evidence, including in particular, the substantial value of a broadband spectrum owned by the company. In affirming the trial judge's decision to dismiss the application for security for costs, Clarke J also observed (at [5.14]):

> I should, of course, add that there are sound reasons why accounts are required to be prepared in the way that relevant standards require. However, it is important that courts, and indeed experts giving evidence to courts, keep in mind that the

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> question that the court may have to address is not, necessarily, the same as the question that the accounts are designed to answer.

66 In my view, this analysis succinctly captures the point in relation to the passage on the "material uncertainty" found in 2017 Financial Statements. While the "material uncertainty" that has been identified cannot be ignored, the Court must nonetheless have regard to all the surrounding and relevant circumstances in order decide if the "material uncertainty" affects the decision on the specific legal issue before it.

67 In my assessment, the "material uncertainty" identified in the 2017 Financial Statements, being the net loss incurred in 2017 and the Plaintiff's negative total and current assets position, do not show that there is reason to believe that the Plaintiff will be unable to pay the Defendants' costs at the conclusion of the action. This is due, amongst other things, to the character of the Plaintiff's liabilities as reflected on its balance sheet and the evidence of the Plaintiff's liquidity as seen from its cash flow statement in 2017. This is in line with Note 21, which explains that notwithstanding the apparently "negative conditions", the Plaintiff could still operate as a going concern as (a) the Plaintiff had a positive operating cash flow; (b) the billings in advance are inherent to the nature of the Plaintiff's business and the Plaintiff is confident it would be able to earn these sums; and (c) the amount owed to STG would not be recalled within the next 12 months from the date of the financial statements. Moreover, the fact that the Plaintiff continues to operate on a going concern basis despite a "material uncertainty" having been raised in its financial statements in 2016 and 2017 demonstrate that notwithstanding any "material uncertainty" that existed for the purpose of the preparation of the financial

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statements, such "negative conditions" are not, in actuality, real risks to the Plaintiff's ability to run and operate is business.

Financing facilities available to the Plaintiff

68 The final aspect to consider is the financing facilities available to the Plaintiff. As Prakash J noted in *Kon Yin Tong* at [37], a relevant factor to consider in a liquidity analysis is the "arrangements between the company and prospective lenders, such as its bankers and shareholders, in order to determine whether any shortfall in liquid and realisable assets and cash flow could be made up by borrowings which would be repayable at a time later than the debts". In this connection, the Plaintiff has claimed that it has access to additional funds in the form of loan agreements between STG and its shareholders, which it can draw on to pay the Defendants' costs. As explained above, these loan agreements were entered into between STG and each of its three shareholders pursuant to which STG's shareholders agreed to provide loan facilities to STG to fund the legal costs incurred by the Plaintiff in connection with this action. These loan agreements were entered into on 11 January 2017 for a term of two years and could be extended by STG and its shareholders for an additional year (*ie*, until 11 January 2020), which Mr Barakat-Brown had indicated on affidavit that STG and its shareholders were prepared to do. Under the loan agreements, STG is entitled to borrow up to $420,000 and a sum of $100,033.95 was drawn down on between July and August 2017.

69 The Defendants submit that the Plaintiff's reliance on the loan agreements is misplaced. In the main, the Defendants submit that the very fact that such loan facilities were entered into and drawn down on is evidence that the Plaintiff does not have sufficient funding to meet its costs in the action. In

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making this submission, Mr Tng and Mr Chia referred to and relied heavily on the following passage in *Frantonios*, where Chan Seng Onn J observed (at [33]):

> … If there was a need to rely on third-party benefactors to pay the … operational expenses and debts and to meet the potential legal costs of the defendant in the event of an unsuccessful claim by the first plaintiff, that would indicate that the first plaintiff did not itself have the financial resources to pay the costs of [the] defendant, and accordingly the condition in s 388 would be satisfied.

70 Mr Tng also relied on *Elbow Holdings* where Choo Han Teck J relied on the above passage in *Frantonios* for the proposition that if the company in question "needs to rely on third parties to keep it in business" this "is an indication that it may not have the financial means" to pay the defendant's costs if the defendant succeeds in its defence (at [9(c)]).

71 In my view, the passage in *Frantonios* quoted at [69] above does not stand for the general proposition that if a company has available sources of financing from third parties, this would in and of itself satisfy the condition set out in s 388(1) of the Companies Act. Indeed, as Chan J recognised in *Frantonios* (at [34]), the financing and credit facilities available to a company are relevant considerations in an application under s 388(1). Thus, in order to ascertain if the financing from third parties reveal an inability on the company's part to pay its debts or legal costs, the other evidence about the company's financial health and the reasons for the provision of third-party funding must be considered in totality.

72 In this regard, it is relevant that the company in *Frantonios* was in dire financial straits. These difficulties were summarised by AR Eunice Chua in

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Diamond Exchange of Singapore v Singapore Diamond Exchange Pte Ltd [2013] SGHCR 10 at [21] as follows:

> The company in question in [*Frantonios*] was one that had ceased to carry on business and had no sources of income. It had staved off liquidation and bankruptcy proceedings by paying its debts through instalments and progress payments with money from two interested parties who had no intention of allowing the company to become insolvent. The company had also argued that it still had tremendous goodwill despite its cash flow problems. The High Court's observations … had to be considered in that context.

73 Indeed, the company in *Frantonios* had been giving excuses and delaying payment, even for relatively small sums of money. In addition, there were numerous claims against the company with potential liability running up to more than $1m, and the company did not have any property in its name. It was a shell company that was "laden with debts and facing claims of significant amounts". In such a situation, it was no wonder that the condition in s 388(1) was found to have been satisfied since the company, having ceased operations, would be unable to pay its current debts without third-party assistance, much less provide the requisite confidence that it would be able to satisfy any prospective costs orders made against it. Moreover, such third-party assistance came not from enforceable bank loans but appeared to be "non-legally binding offers or avenues of financial assistance … from interested parties" (*Frantonios* at [34]).

74 In a similar vein, the company in *Elbow Holdings* was found to be struggling financially. It was found to be able to continue to remain in business only because of continuing financial support from its shareholders. In fact, the company's own officers had admitted that its financial situation was dire and that the viability of its only business – the operation of a bar and bistro – was at

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risk (*Elbow Holdings* at [9(b)]). There also appeared to be evidence that the company had failed to pay the arrears due from its lease of certain property (*Elbow Holdings* at [7]).

75 The companies in *Frantonios* and *Elbow Holdings* were thus in a vastly different positions from that of the Plaintiff which operates as a going concern, has an increasing stream of revenue and has, as analysed above, a strong cash position and more than sufficient assets to satisfy its current debts. Critically, there is no evidence that the Plaintiff has been unable to or has failed to pay any debts that have fallen due, or even that it has previously delayed in making such payment. This is in stark contrast not only to the facts of *Frantonios* and *Elbow Holdings*, but also to the facts in other cases where security for costs has been ordered (see, for example, the cases cited at [16(d)] above).

76 Neither is there any evidence to suggest that the Plaintiff has to rely on the loans from STG's shareholders to meet its operational expenses and debts and to continue as a going concern. There is nothing in the Plaintiff's financial statements that suggest that this is the case. In addition, the Plaintiff's evidence is that it does not need the monies, as Mr Barakat-Brown explains in his affidavit:

> Neither STG nor [the Plaintiff] needed the monies at the time of the drawdowns. STG's shareholders extended the loans because they wanted to demonstrate their commitment to seeing the litigation through by committing some of their own funds to the payment of [the Plaintiff's] legal costs. Now that STG's shareholders have demonstrated their commitment, STG does not intend to make any further drawdowns on the [loan agreements] for the foreseeable future. In any event, STG's shareholders remain fully capable of fulfilling their obligations under the [loan agreements]. In other words, far from indicating an inability to pay the [Defendants'] costs, these loan agreements show that [the Plaintiff] has access to additional

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> funds which it can draw on at any time to pay the [Defendants'] costs, if necessary.

77 The Defendants submit that the fact that the loan was entered into and drawn down on is indicative of the Plaintiff's inability to pay costs. There would otherwise be no other reason why STG's shareholders would have incurred the opportunity cost in disbursing these loans, quantified at the minimum by the interest that could have been earned on those sums, especially since the loan agreements already impose binding obligations on them to advance the monies to STG in accordance with the terms of the agreements. Hence, the reason given by the Plaintiff to explain the drawdown on the loan is absurd and it is far more likely that the reason for the disbursement of the loans was because the Plaintiff needed these monies to make payment of its legal costs in the suit.

78 In my view, a variety of different reasons exist for why a company may seek to obtain financial assistance from third parties, and why third parties may agree to extend loans to companies. In the present case, it is easy to see why the Plaintiff may accept the monies from STG's shareholders under the loan agreements, since there is no cost or risk to the Plaintiff in receiving the benefit of the loan – which is interest-free – from STG's shareholders. As Mr Shankar submitted, the entry into the loan agreement was a "fantastic deal" for the Plaintiff and showed "prudent financial management" on its part. As for STG's shareholders, in the absence of other evidence that demonstrates that the Plaintiff is unable to continue as a going concern or pay its legal debts without relying on the support of STG's shareholders, I see no reason to doubt the evidence that has been given on affidavit concerning their motivation for entering into the loan agreements and disbursing sums thereunder.

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79 Apart from the above, the Defendants submit that it is unsafe to rely on the loan agreements because the Plaintiff is not a party to the agreements, which may be terminated by STG or its shareholders upon the giving of 30 days' notice. When the loan agreements are terminated, the loan would be repayable out of the Plaintiff's funds, thus reducing the pool of funds available to the Plaintiff to make payment of the Defendants' costs. Further, the agreements are due to expire on 10 January 2019 and there has been no indication from STG's shareholders as to whether they are agreeable to an extension of the loan agreements.

80 In my assessment, the points raised by the Defendants do not detract from the fact that the funds under the loan agreements are an additional financial resource which the Plaintiff can tap on. To the extent that the loan is disbursed, this would place more monies in the hands of the Plaintiff which it can use to satisfy any adverse costs order. As I have explained above, there is no detriment to the Plaintiff if it does so since no interest is payable on the borrowed sums. To the extent that the loan is disbursed and thereafter repaid, this would not reduce the pool of funds available to the Plaintiff to make payment of the Defendants' costs, since, to begin with, the Plaintiff would not have the benefit of such sums without the loan agreements. While it remains to be seen if the loan agreements will be extended, the evidence given by Mr Barakat-Brown on affidavit is that STG and STG's shareholders are prepared to do so. For the purposes of the present interlocutory application, I accept that this amounts to sufficient evidence of STG's and its shareholders' willingness to extend the loan facilities for a further year. There is thus at least a distinct possibility that the Plaintiff may be able to draw on an additional sum of $319,966.05 until 11 January 2020.

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Summary and conclusion on stage one

81 In summary, the evidence suggests that the Plaintiff is a company with healthy levels of liquidity and which has the ability to pay its debts as they fall due:

(a) Although the 2017 Financial Statements reflect the Plaintiff as being in a negative total and current assets position, I am not satisfied that this reveals an inability to pay its debts as they fall due. When the nature of the billings in advance as deferred revenue is accounted for in the analysis and the amount owed to STG is re-classified as a non-current liability, it appears that the Plaintiff had, as at 31 August 2017, more than $1m in current assets to satisfy any further debts that would fall due within the next 12 months from that date.

(b) The Plaintiff generated a positive operating cash flow of $1.33m in 2016 and $1.28m in 2017, and a positive overall cash flow of $393,845 in 2017. The evidence also suggests that the Plaintiff can divert funds it uses for investment – which amounted to more than $1.5m in 2016 and close to $1m in 2017 – to pay legal costs, if necessary.

(c) As at June 2018, the Plaintiff had a sum of more than $1.6m in its bank accounts. This suggests that the Plaintiff's cash position had improved since 31 August 2017.

(d) There was no evidence that the Plaintiff had failed to pay any creditors or had delayed in making payment of debts that were due and payable, whether prior to or after the date of the 2017 Financial Statements.

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(e) In addition to the above, the exists the additionally possibility of obtaining further funds from STG's shareholders, who have evinced a willingness to provide the Plaintiff – through STG – an interest-free loan of $420,000 until January 2020 (of which a sum of $100,033.95 had already been disbursed in July and August 2017).

82 Based on the above analysis, I am of the view that while the Plaintiff may not be a commercial powerhouse with multimillion dollars in assets, it is nevertheless a company that has at its disposal substantial financial resources to satisfy any adverse costs orders made against it. The onus lies on the Defendants to show that there is reason to believe that the Plaintiff would not be able to pay their costs if they are successful in their defence at the end of the trial, and in this connection, I find that the Defendants have not adduced credible evidence to demonstrate that, given these financial resources at the Plaintiff's disposal, that there is reason to believe that it would be unable to do so.

Conclusion

83 Weighing the various strands of the above analysis, I therefore find on the current evidence before me that the Defendants have not discharged their burden of showing that there is reason to believe that the Plaintiff will be unable to pay the Defendants' costs if ordered to do so. Given my decision on the first stage, there is no need for me to proceed to consider either the Plaintiff's argument that the 23rd Defendant had not made out the ingredients of s 388(1) as no expert report was filed on its behalf or the second stage of the application under s 388(1) of the Companies Act.

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84 In conclusion, the applications are dismissed. This is without prejudice to the filing of any future application for security for costs on the basis of any new and relevant further evidence that may go towards demonstrating that the Plaintiff would be unable to pay the Defendants' cost if the Defendants are successful in their defence.

85 I will hear the parties on costs.

Zeslene Mao
Assistant Registrar

Jaikanth Shankar, Tan Ruo Yu and Deborah Loh (Drew & Napier LLC) for the plaintiff;
Tng Sheng Rong and Chan Min Hui (Rajah & Tann Singapore LLP) for the 1st to 22nd defendant;
Chia Huai Yuan (Dentons Rodyk & Davidson LLP) for the 23rd defendant.

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