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

[2021] SGHC 81

Suit No 158 of 2019

Between

Marina Towage Pte Ltd

… *Plaintiff*

And

(1) Chin Kwek Chong
(2) Chin Chee Chien

… *Defendants*

JUDGMENT

[Civil Procedure] — [No case to answer]
[Companies] — [Directors] — [Fraudulent trading] — [Whether declaration of liability may be sought in standalone proceedings] — [Whether business of company carried on with intent to defraud creditors] — [Whether defendants knowingly parties to carrying on of business of company with intent to defraud creditors] — [Section 340(1) Companies Act (Cap 50, 2006 Rev Ed)
[Evidence] — [Witnesses] — [Weight of evidence of witness with dementia]

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Marina Towage Pte Ltd
v
Chin Kwek Chong and another

[2021] SGHC 81

General Division of the High Court — Suit No 158 of 2019
Vinodh Coomaraswamy J
24–26 November 2020, 4, 24 March 2021

21 April 2021 Judgment reserved.

Vinodh Coomaraswamy J:

Introduction

1 In February 2018, the plaintiff secured a substantial judgment debt against a company known as Island Logistic Pte Ltd ("IL"). The judgment debt proved irrecoverable. In February 2019, the plaintiff commenced this action. By this action, the plaintiff applies under s 340(1) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") for a declaration holding the defendants personally responsible for IL's judgment debt. The plaintiff's case is that IL was trading fraudulently at the material time and that both the defendants were knowingly a party to IL's fraudulent trading.

2 I dismiss the plaintiff's claim. The plaintiff has failed to prove that IL was trading fraudulently at the material time. Further, I accept the second

defendant's submission that the plaintiff's case against him is so weak that it ought to be dismissed even though he elected to call no evidence at trial.

Background

The parties

3 The plaintiff owns and lets vessels on charter.[1] Its chief executive officer is Mr Lim Boh Tee.[2]

4 IL is a shipping agent and takes vessels on charter.[3] The two defendants are IL's only two directors and shareholders.[4] The first defendant is also IL's managing director. The second defendant is also IL's company secretary. The first defendant is the second defendant's uncle.

IL becomes a judgment debtor of the plaintiff

5 In July 2015, the plaintiff chartered two vessels to IL for delivery in August 2015:[5] a barge at a rate of US$30,000 per 30 days[6] and a tug at a rate of US$47,000 per 30 days.[7] IL immediately sub-chartered the two vessels back-to-

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1 Agreed Bundle of Documents ("AB") dated 16 November 2020 at p 71.

2 AB at pp 72–73.

3 AB at p 75.

4 AB at pp 76–77.

5 Statement of Claim (Amendment No 1) ("SOC") dated 17 October 2019 at paras 7.1–7.2.

6 AB at pp 170–171.

7 AB at p 199.

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back[8] to Blue Metal Investments Pte Ltd ("BMI") at a total profit of US$8,000 per vessel per 30 days.[9]

6 Both vessels were duly delivered to BMI, which deployed them in the Maldives. BMI paid the first month's hire to IL under the subcharterparties. IL in turn paid the first month's hire to the plaintiff under the main charterparties.[10]

7 By early 2016, disputes arose between BMI and IL as to the condition of the vessels.[11] By April 2016, the dispute had escalated to the point that BMI sued the plaintiff in the Maldives and secured a court order detaining the vessels.[12]

8 As a result of these disputes, BMI stopped paying the hire which was due to IL under the subcharterparties with effect from February 2016. IL in turn stopped paying hire to the plaintiff under the main charterparties, also with effect from February 2016.[13] It is common ground that IL has been dormant since 2013 and that it has had no source of revenue or other cash flow at any time other than these two subcharterparties with BMI. IL's only means of paying the hire due to the plaintiff under the main charterparties was therefore BMI's payments of hire due to IL under the subcharterparties.

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8 SOC at para 7.3.

9 AB at pp 185–186 and 212.

10 Lim Boh Tee's affidavit of evidence-in-chief ("AEIC") dated 7 October 2020 at para 28; Chin Kwek Chong's AEIC dated 2 October 2020 at para 51.

11 AB at p 793.

12 AB at pp 838–839.

13 Lim Boh Tee's AEIC at para 30; Chin Kwek Chong's AEIC at para 52.

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9 In July 2016, the plaintiff commenced an arbitration against IL under each charterparty to recover damages for breach of contract, including but not limited to the unpaid hire.[14] IL participated in the constitution of the tribunal[15] but withdrew from the arbitrations after that.[16] In November 2017, the plaintiff secured two awards against IL. The awards required IL to pay the plaintiff over $900,000 plus compound interest at 6% per annum together with the plaintiff's costs. These costs were subsequently quantified at over $120,000.[17] There is no doubt that the plaintiff has suffered a substantial loss as a result of IL's breach of the main charterparties.

10 IL did not satisfy the arbitration awards, in whole or in part. In January 2018, the plaintiff commenced enforcement proceedings under s 46 of the Arbitration Act (Cap 10, 2002 Rev Ed) read with O 69 r 14 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). In February 2018, the plaintiff duly secured leave to enforce both awards against IL in the same manner as judgments of the High Court to the same effect.[18]

11 In March 2018, the plaintiff secured an order to examine the second defendant as director and company secretary of the judgment debtor, *ie*, IL.[19] In April 2018, the plaintiff secured a similar order against the first defendant.[20] The first defendant ignored the order for examination. A warrant was accordingly

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14 SOC at para 7.4.

15 Defence of the First Defendant (Amendment No 1) ("D1 Defence") dated 31 October 2019 at para 9.

16 AB at p 89, para 2.3; AB at p 132, para 2.3.

17 AB at pp 83–169.

18 AB at pp 820–821.

19 AB at pp 822–823.

20 AB at pp 824–825.

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issued for his arrest. He was eventually found in contempt of court. He was fined $8,000 or eight days' imprisonment in default and ordered to pay the costs of the committal proceedings to the plaintiff on the indemnity basis. The first defendant avoided imprisonment by paying the fine. The first defendant did, however, cooperate in that he gave IL's financial documents to the second defendant, who produced them to the plaintiff in the enforcement proceedings. Those documents disclosed that IL had nothing of value against which the plaintiff could levy execution. There is no doubt that the plaintiff has suffered a significant amount of aggravation in attempting to recover its judgment debt from IL.

12 The plaintiff commenced this action in February 2019. The principal relief which the plaintiff seeks in this action is a declaration under s 340(1) of the Act that each defendant is personally liable to the plaintiff for the full value of IL's judgment debt.[21]

The applicable legislation

13 The trial of this action took place in November 2020. This judgment is delivered in April 2021. Section 340(1) of the Act was in force when the plaintiff commenced this action. With effect from 30 July 2020, however, s 340(1) of the Act was repealed and replaced by s 238(1) of the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) ("the IRDA"). The plaintiff's claim for relief is therefore being decided at a time when s 340(1) of the Act is no longer in force. The question which arises is whether it is s 340(1) of the Act or s 238(1) of the IRDA which applies to the plaintiff's claim.

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[21] SOC at para 5.

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14 The IRDA makes transitional provisions for corporate insolvency in s 526 and s 527. These transitional provisions allow the Act to continue to apply in specified circumstances to certain applications, orders, windings up and persons as though the IRDA had not been enacted. An application under s 340(1) of the Act does not come within either s 526 or s 527 of the IRDA. That suggests on its face that the parties' rights and liabilities in issue in this action are governed with effect from 30 July 2020 by s 238(1) of the IRDA instead of s 340(1) of the Act. But it would be in principle wrong for rights and liabilities which arose in or around July 2015 to be governed retrospectively by legislation which was not to come into effect until more than five years later. "Simple fairness" is the basis for the presumption against the retrospective application of legislation: *ABU v Comptroller of Income Tax* [2015] 2 SLR 420 at [73], citing *L'Office Chefifien Des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486 at 525.

15 Fortunately, s 16(1)(*c*) of the Interpretation Act (Cap 1, 2002 Rev Ed) operates to ensure that s 340(1) of the Companies Act continues to apply to this action. That section provides as follows:

> **Effect of repeal**
>
> **16.**—(1) Where a written law repeals in whole or in part any other written law, then, unless the contrary intention appears, the repeal shall not —
>
> …
>
> (*c*) affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed ….

I do not consider that Parliament's omission of any specific reference to s 340(1) of the Act in s 526 and s 527 of the IRDA manifests a contrary intention within

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the meaning of s 16(1)(*c*) of the Interpretation Act with respect to the effect of the repeal of s 340(1) of the Act.

16 I therefore proceed on the basis that the parties' rights and liabilities in issue in this action continue to be governed by s 340(1) of the Companies Act despite its repeal. Even if that is not the case, the potential for retrospectivity has no practical significance in this action. Section 340(1) of the Act and s 238(1) of the IRDA are identical in all respects which are material to the rights and liabilities in issue in this action.

17 For convenience, I shall proceed as though I am deciding the plaintiff's claim in February 2019, when the plaintiff commenced this action, at a time when s 340 of the Act was still in force.

Section 340 of the Act

18 Section 340(1) of the Act provides as follows:

> If, in the course of the winding up of a company or in any proceedings against a company, it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court, on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper to do so, declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.

As convenient shorthand, I shall use the interchangeable terms "fraudulent trading" or "trading fraudulently" to refer to the carrying on of any of a company's business "with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose" within the meaning of s 340(1) of the Act.

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The parties' cases

19 The plaintiff's case is as follows. IL was trading fraudulently when it entered into the main charterparties. Each defendant was knowingly a party to IL trading fraudulently.[22] IL was insolvent in or around July 2015, at the time it entered into the charterparties. This is circumstantial evidence from which to draw inferences against both the defendants under s 340 of the Act.

20 The first defendant's case is as follows. IL was not trading fraudulently when it entered into the main charterparties. It arranged back-to-back subcharterparties with BMI at a profit. This meant that IL had an honest belief that it would be able to pay the plaintiff the sums due under the main charterparties out of the sums which IL was due to receive from BMI under the subcharterparties.[23] The first defendant also denies that IL was insolvent in or around July 2015. The subcharterparties provided IL with the revenue to pay the hire due to the plaintiff under the main charterparties as the hire fell due.[24]

21 The second defendant's pleaded case is as follows. The second defendant was not involved in IL's day-to-day operations.[25] He was not therefore involved in or aware of its decision to enter into the main charterparties. He was also not aware of the arbitrations and enforcement proceedings which followed them.[26] IL was not insolvent in or around July

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22 SOC at para 6.

23 D1 Defence at para 15(d).

24 D1 Defence at para 15(c); First Defendant's Closing Submissions ("D1CS") dated 11 January 2021 at paras 25 and 101.

25 Defence of the Second Defendant (Amendment No 1) ("D2 Defence") dated 30 October 2019 at para 7(f).

26 D2 Defence at paras 7(a)–7(e) and 8.

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2015.[27] Even if it was insolvent, he had no reason to believe that it was insolvent.[28] Therefore, the second defendant did not behave dishonestly or fraudulently in connection with IL's entry into the main charterparties.[29]

22 The second defendant elected to call no evidence at trial to establish his pleaded defence. He submits, however, that the plaintiff's case against him is so weak that it ought to be dismissed despite this election.

23 The second defendant, in addition, takes a preliminary, procedural objection. He submits that the plaintiff's action should be dismissed *in limine* because the plaintiff has failed to comply with the procedural requirements for invoking the court's declaratory jurisdiction under s 340(1) of the Act.

The issues

24 Given the manner in which the parties have presented their cases, there are four issues which I must determine:

(a) Has the plaintiff complied with the procedural requirements for invoking s 340(1) of the Act?

(b) Was IL trading fraudulently in or around July 2015, when it entered into the main charterparties with the plaintiff?

(c) Was either defendant knowingly a party to IL trading fraudulently?

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27 D2 Defence at paras 7(j) and 20.

28 D2 Defence at para 7(j); Second Defendant's Closing Submissions ("D2CS") dated 11 January 2021 at paras 5–11.

29 D2 Defence at paras 25 and 27.

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(d) Is the plaintiff's case against the second defendant so weak that it ought to be dismissed even though he elected to call no evidence at trial to establish his pleaded defence?

The second defendant's procedural objection

25 I begin my analysis with the second defendant's procedural objection. The second defendant makes two submissions as to why the plaintiff has failed to comply with the procedural requirements for invoking s 340(1) of the Act.

First argument: winding up as condition precedent

26 The first submission is that the plaintiff has failed to fulfil a condition precedent for invoking s 340(1) of the Act because it has not commenced proceedings to wind up IL.[30] It is true that IL is not "in the course of … winding up" within the meaning of s 340(1) of the Act. In fact, IL is not and has never been the subject of any winding up proceedings, whether initiated by the plaintiff, by another creditor or even voluntarily. Presumably, IL's assets are so meagre that the costs of winding it up and appointing a liquidator are unjustifiable even to its shareholders, let alone to a creditor.

27 But this is not a reason for dismissing the plaintiff's action *in limine*. The express language of s 340(1) allows an applicant to seek declaratory relief under s 340(1) of the Act if the fraudulent trading appears *either* "in the course of the winding up of a company" *or* "in any proceedings against a company". If authority is needed for what is plain on the face of the section, it can be found

[30] Second Defendant's Opening Statement ("D2OS") dated 17 November 2020 at paras 31–32; D2CS at paras 24–26.

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in *Aquariva Pte Ltd v Gezel Group Pte Ltd and another* [2017] SGHCR 14 at [30]–[31].

28 The legislative history of s 340(1) confirms that a winding up is deliberately *not* a condition precedent to an application under s 340(1) of the Act. Section 340(1) of the Act is derived from s 304(1) of the Malaysian Companies Act 1965. The Malaysian section is derived from s 304(1) of the Victorian Companies Act 1961. The Victorian section is derived from s 332(1) of the English Companies Act 1948 (c 38).

29 The alternative phrase "or in any proceedings against a company" did not appear in either the English or the Victorian equivalents of s 340(1) of the Act. The Malaysian legislature introduced this phrase into s 304(1) of the Malaysian Companies Act 1965 in response to a recommendation made in 1962 by the Company Law Committee chaired by Lord Jenkins in the UK: see Malaysia, Senate, *Parliamentary Debates* (16 August 1965), vol 2 at col 769 (Lim Swee Aun, Minister of Commerce and Industry). The Jenkins Committee noted that the English equivalent of s 340(5) of the Act framed too narrowly the liability of a person who uses a company to defraud its creditors: United Kingdom, *Report of the Company Law Committee* (Cmnd 1749, 1962) at paras 497, 499 (Chairman: Lord Jenkins). The Jenkins Committee therefore recommended at para 503(c) that it be "made clear that [the English equivalent of s 340(5) of the Act] provides a penalty for fraudulent trading where the facts are discovered *in other circumstances than in the course of winding up*" [emphasis added]. The Malaysian legislature adopted this recommendation. It therefore expanded the scope of the civil liability created by s 304(1) of the Malaysian Companies Act 1965 by introducing the words "or in any proceedings against a company" into that section. This had the result of

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expanding the coterminous criminal liability for fraudulent trading. These provisions were then adopted without amendment in s 340 of the Act.

30 A textual analysis of s 340(1) of the Act shows that there are only two conditions precedent for invoking it. First, there must be either: (a) a winding up of the company; or (b) proceedings against the company. Second, it must appear in the course of the winding up or in those proceedings that the company has traded fraudulently. If both conditions precedent are satisfied, the liquidator or any creditor or contributory of the company may apply to invoke the court's declaratory jurisdiction under s 340(1) of the Act. Whether the applicant will succeed is, of course, an entirely separate matter.

31 In the present case, the plaintiff commenced proceedings to enforce the arbitration awards against IL. Those proceedings are without doubt within the meaning of the phrase "any proceedings against a company" in s 340(1). The plaintiff received IL's financial documents in those proceedings, as a result of the examination of judgment debtor procedure. It appears to the plaintiff from those documents that IL has traded fraudulently. The plaintiff has satisfied both conditions precedent for invoking s 340(1) of the Act. The fact that the plaintiff has not commenced winding up proceedings against IL is irrelevant.

Second argument: nature of proceedings

32 The second submission on the procedural point is that the plaintiff cannot commence an application under s 340(1) of the Act by issuing originating process against the directors alone, as it did to commence this action. In support of this submission, the second defendant cites *Max-Sun Trading Ltd and another v Tang Mun Kit and another (Tan Siew Moi, third party)* [2016] 5

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SLR 815 ("*Max-Sun*").[31] In that case, Prakash JA held at [98] that s 340(1) "can be *engaged* only 'in the course of the winding up of a company or *in* any proceedings against a company'" [emphasis added]. She therefore dismissed the plaintiffs' action under s 340(1) against two directors of a company on the basis, amongst others, that the plaintiffs' action in that case was against only the directors and not also against the company (at [99]).

33 In order to analyse this submission, and to understand the import of *Max-Sun*, it is necessary to disentangle the two strands of this submission. The first strand is that s 340(1) of the Act requires an applicant who applies for a declaration under that section to do so in the very same "proceedings against [the] company" from which the fraudulent trading appears. The second strand is that the company is a necessary party to any application for a declaration under s 340(1) of the Act. It was unnecessary to disentangle these two strands in *Max-Sun* because the plaintiff in that case: (a) sought the declaration under s 340(1) of the Act in the very same proceedings as those from which the fraudulent trading appeared; and (b) did not name the relevant company as a party when it commenced those proceedings. The latter point meant that the proceedings could not conceivably be the "proceedings against a company" within the meaning of s 340(1). It is for this reason that the plaintiff in that case failed in its attempt to invoke s 340(1) of the Act. Prakash JA did not therefore have to consider the first strand of this submission.

34 In response, the plaintiff argues that s 340(1) of the Act allows it to apply for a declaration under that section by issuing originating process against the directors alone[32] (*ie*, in separate "proceedings") *and* without naming the

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31 D2OS at paras 17–18.

32 Plaintiff's Opening Statement ("POS") dated 16 November 2020 at para 14.

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company as a defendant in those separate proceedings. The plaintiff thus argues for a broad interpretation of s 340(1) while the second defendant argues for a narrow interpretation of the section.

35 I accept that s 340(1) *permits* an applicant to seek a declaration under that section in the proceedings from which the fraudulent trading appears, either as interlocutory relief or even as final relief. Where an applicant does so, the second strand of this submission does not arise. The company must, by definition, be a party to those proceedings. If that is not the case, then there are no "proceedings against a company" within the meaning of s 340(1) and one of the two conditions precedent for s 340(1) would not be satisfied. That is why the plaintiff's attempt to invoke s 340(1) in *Max-Sun* failed.

36 What I do not accept is that s 340(1) of the Act *requires* an applicant to seek a declaration under that section in the proceedings from which the fraudulent trading appears. In my view, therefore, the broad interpretation is correct. An applicant may also seek a declaration under s 340(1) of the Act by originating process. And it is not necessary for the company to be joined as a party to that originating process. I arrive at this conclusion for five reasons.

The underlying purpose of s 340(1)

37 First, the narrow interpretation would defeat at least part of the purpose of s 340(1) of the Act. The immediate purpose of s 340(1) is to bring home personal liability for a company's debts to those who are knowingly a party to the company's fraudulent trading. That is a wholly exceptional species of liability, with the potential to subvert or abrogate entirely several fundamental doctrines of company law and the law of obligations: separate legal personality, limited liability, privity of contract, the duty of care analysis and the

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opposability of fiduciary obligations. Section 340(1) does this in order to achieve its ultimate purpose, which is to set and maintain standards of commercial morality by deterring natural persons from using the corporate form to trade fraudulently.

38 Many examples can be posited as to how the narrow interpretation would frustrate the operation of s 340(1). I give only one. Requiring an applicant to invoke s 340(1) of the Act in the proceedings from which the fraudulent trading appears would mean that s 340(1) could not apply when fraudulent trading is revealed in the course of an arbitration. The problem with the narrow interpretation is not the word "proceedings" in s 340(1). The drafting convention adopted in the Act distinguishes between an "action" and an "arbitration" (see *Kiyue Co Ltd v Aquagen International Pte Ltd* [2003] 3 SLR(R) 130 and the subsequent amendments to s 216A of the Act). But the Act draws no such distinction between the more general word "proceedings" and "arbitration". Section 340(1) uses the word "proceedings". That general word is capable of covering, at the very least, any binding dispute-resolution process. This obviously includes litigation of any type. But it equally obviously includes arbitration.

39 The problem with the narrow interpretation is that s 340(1) expressly and exclusively vests the power to grant a declaration under that section in the court. It is thus impossible to apply to an arbitral tribunal for relief under s 340(1) of the Act simply because the tribunal cannot grant it. On the narrow interpretation, therefore, it would be impossible to make an application under s 340(1) if the fraudulent trading is revealed in an arbitration. Given the proliferation of arbitration clauses in modern commerce, the narrow interpretation would frustrate significantly the underlying purpose of s 340(1). Indeed, the narrow interpretation would give natural persons who intend to use

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a company to trade fraudulently a perverse incentive to adopt arbitration agreements in all of the company's fraudulent contracts.

Textual analysis of s 340(1)

40 The second reason I accept the broad interpretation is that there is nothing in the textual analysis of s 340(1) of the Act which mandates the narrow interpretation. Ignoring the alternative of winding up as irrelevant for present purposes, the words in s 340(1) which are critical to the second submission on the procedural point are the following:

> If … *in any proceedings against a company*, it appears that [the company has traded fraudulently] … *the Court … may … declare* that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible … for all … of the debts … of the company ….
>
> [emphasis added]

41 It is true that the words "in any proceedings … the Court … may … declare …" implies a connection between the "proceedings" and the declaration under s 340(1). That also necessarily implies that the company is a party to those proceedings. But this is only a weak implication. On its face, s 340(1) requires only that the fraudulent trading appear in the course of "proceedings against a company". The language and structure of s 340(1) do not expressly require any connection between the "proceedings against [the] company" and the proceedings in which the declaration is sought. Section 340(1) does not, for example, provide "… the Court … may … declare *in those proceedings* …". Nor can it be said that reading these words into s 340(1) is necessary to advance its underlying purpose. Indeed, as I have shown, reading those words into s 340(1) would frustrate its underlying purpose. As such, there is no bar in the words of s 340(1) against an applicant seeking a declaration under that section by separate proceedings commenced by fresh originating process. There is also

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no bar against the applicant doing so without naming the company as a defendant.

O 88 r 2 of the Rules of Court

42 The third reason I accept the broad interpretation is the effect of O 88 r 2(1) of the Rules of Court read with O 1 r 2(2). These provisions show that, where a company is not being wound up, an application under the Companies Act is to be made by originating summons. Order 88 r 2(1) reads:

> Unless otherwise provided in the Act [*ie*, the Companies Act] or this Order, every application under the Act must be made by originating summons and these Rules shall apply subject to this Order.

At the very least, the effect of O 88 r 2(1) is to establish an originating summons (*ie*, an originating process) as the default procedure by which to invoke s 340(1) of the Act: see *Woon's Corporations Law* (LexisNexis, 1999, June 2018 release) ("Woon's Corporations Law") at para 6554.

Consistency with the authorities

43 The fourth reason I accept the broad interpretation is that it is consistent with the authorities cited to me.

44 The facts of the Malaysian case of *Tang Eng Iron Works Co Ltd v Ting Ling Kiew & Anor* [1990] 2 MLJ 440 ("*Tang Eng*") (appeal allowed on other grounds) are strikingly similar to the facts of the present case. In *Tang Eng*, the plaintiff obtained an arbitral award against a company. The plaintiff then secured leave to enforce the award as a judgment. The company failed to pay the judgment debt. The plaintiff obtained an order to examine the defendants as officers of the judgment debtor. It appeared from the examination that the

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company had traded fraudulently. The plaintiffs commenced fresh proceedings against the defendants seeking a declaration under the Malaysian equivalent of s 340(1) that they be personally liable for the company's judgment debt. The court granted the declaration. In so doing, the court relied on the Malaysian equivalent of O 88 r 2(1) to reject the defendants' submission that the plaintiff could not invoke the Malaysian equivalent of s 340(1) by originating process.

45 The plaintiff also cites the Malaysian case of *Chin Chee Keong v Toling Corp (M) Sdn Bhd* [2016] 3 MLJ 479 ("*Chin Chee Keong*") as authority for the broad proposition.[33] In that case, the court held that an applicant under the Malaysian equivalent of s 340(1) of the Act would necessarily have to proceed by separate originating process. The reason given by the court for its holding is that, where the fraudulent trading appears in the course of proceedings against a company, the plaintiff acquires standing to seek a declaration as a creditor of the company only upon securing judgment against the company in those proceedings. But when that happens, those proceedings are concluded (at [23] and [43]).

46 With respect, I have difficulty with this reason on two grounds. First, there is no requirement in s 340(1) of the Act that a plaintiff who seeks an order under s 340(1) be a *judgment* creditor of the company. Certainly, if a person commences proceedings against a company and those proceedings are *dismissed*, that person cannot thereafter apply for a declaration under s 340(1) of the Act. That is because it has been judicially determined that the person is *not* a creditor of the company.

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[33] Plaintiff's Closing Submissions ("PCS") dated 11 January 2021 at para 10.

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47 But s 340(1) of the Act requires only that an applicant be a liquidator, a *creditor* or a contributory of the company. A person has the status of a creditor of a debtor whether or not he has a judgment in his favour against that debtor. As *Max-Sun* ([32] *supra*) envisages, it is possible for a plaintiff to commence action against a company and for it to appear to that plaintiff in the course of those proceedings, for example as a result of discovery, that the company has traded fraudulently. In those circumstances, it should be possible for the plaintiff to join the knowing parties to the fraudulent trading to the existing action and to amend its statement of claim to seek relief under s 340(1) of the Act against them. The alternative would be either to: (a) require the plaintiff to litigate its action against the company to a conclusion and then commence separate proceedings against the knowing parties under s 340(1) of the Act; or (b) to commence separate proceedings against the knowing parties under s 340(1) of the Act in parallel with the original proceedings and have both proceedings consolidated or tried together. Both of those alternatives would waste time, costs and judicial resources.

48 The second difficulty I have with the reason in *Chin Chee Keong* is that a civil court does not become *functus officio* for all purposes upon entering judgment. No doubt, entering a judgment on the merits of the parties' dispute renders the court *functus officio* for that purpose. But the court is not *functus officio* for the purposes of enforcement. It remains seised of the matter for those purposes. And an application under s 340(1) of the Act can legitimately be seen as an aspect of the court's enforcement jurisdiction just as much as levying execution, taxing a bill of costs or committing a recalcitrant party for contempt of court.

49 As a result, I do not accept *Chin Chee Keong* as correct in so far as it suggests that an applicant under s 340(1) *must necessarily* proceed by issuing

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originating process. Nevertheless, *Chin Chee Keong* is at least authority for the proposition that an applicant under s 340(1) *may* proceed by issuing originating process. To this extent, therefore, I accept that the result in *Chin Chee Keong* and its adoption of the broad interpretation to be correct.

Empirical support

50 The fifth reason I adopt the broad interpretation is because it is supported empirically by the procedure actually adopted in the cases cited to me. In the Singapore cases cited to me in which liquidators of a company made an application under s 340(1) of the Companies Act while the company was in the course of being wound up, the application was made by originating process: *Liquidator of Leong Seng Hin Piling Pte Ltd v Chan Ah Lek and others* [2007] 2 SLR(R) 77 ("*Leong Seng*"); *M+W Singapore Pte Ltd v Leow Tet Sin and another* [2015] 2 SLR 271 ("*M+W Singapore*"); *Traxiar Drilling Partners II Pte Ltd (in liquidation) v Dvergsten, Dag Oivind* [2019] 4 SLR 433 ("*Traxiar Drilling Partners*"). Originating process is also used in England: *Morris and others v Bank of America and others* [2002] All ER (D) 435 (Jul).

51 It is true that – as in the Singapore cases cited to me – this plaintiff has made its application under s 340(1) of the Act by writ instead of by originating summons. But that is not the ground on which the second defendant argues that the plaintiff's application is procedurally defective. And, given the allegations of fraud and the substantial disputes of fact in this application, any originating summons which the plaintiff would have filed would inevitably have been converted into a writ action under O 28 r 8 of the Rules of Court. As Woon's Corporations Law puts it (at para 6554):

> **Procedure** Where the company is not being wound up an application under this section should be made by originating summons: Rules of Court (Cap 322, R 5, 2006 Ed) O 88 r 2(1).

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> However, where there are conflicts of affidavit evidence, and in particular when fraud is alleged, it would be more appropriate to continue the proceedings as if they were begun by writ; the court has discretion under the Rules of Court O 28 r 8(1) to so order. In *Ting Ling Kiew v Tang Eng Iron Works Co Ltd* [1992] 2 MLJ 217, the Supreme Court of Malaysia held that it was inappropriate to proceed summarily under this section where fraud was the central issue, and ordered that pleadings should be filed and that the proceedings be continued as if they had been begun by writ.

Conclusion on the procedural point

52 For these five reasons, therefore, I hold that an applicant may invoke s 340(1) of the Act by any one of three alternative means: (i) in existing proceedings against the company, by issuing an interlocutory summons seeking a declaration under s 340(1); (ii) in existing proceedings against the company, by amending its pleadings to seek a declaration under s 340(1) as final relief in addition to the other relief sought; or (iii) in fresh proceedings, by issuing originating process seeking a declaration under s 340(1), whether alone or in addition to other relief.

53 On the first of these three alternatives, the applicant will have to satisfy the court that it is appropriate to exercise its exceptional jurisdiction to make a final declaration on an interlocutory application: *International General Electric Company of New* York *Ltd and another v Commissioners of Customs and Excise* [1962] Ch 784 at 789–790. On both the first and second alternatives, the applicant may have to join the knowing parties to the existing proceedings so that they are properly before the court and can be heard and will be bound. On the third alternative, there is no requirement for the applicant to name the company as a defendant in the originating process.

54 For all these reasons, I reject the second defendant's procedural objection.

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Three preliminary points

55 Before I turn to consider the substance of the plaintiff's claim, I make three preliminary points.

Relevance of insolvency

56 First, liability under s 340(1) of the Act does not turn on whether the company which an applicant alleges was trading fraudulently was also insolvent at the material time. The touchstone for liability under s 340(1) of the Act is fraud. A company may be trading fraudulently even though it is unquestionably solvent on any conceivable test. So too, a company may not be trading fraudulently even though it is hopelessly insolvent on every conceivable test.

57 A notable feature of the Act is that it imposed no civil liability on directors who cause a company to continue trading while it is insolvent. Insolvent trading was a criminal offence under s 339(3) of the Act. But as far as liability to compensate creditors was concerned, all that the Act did was to vest the court with the power to declare under s 340(2) of the Act that a person convicted of the offence of insolvent trading under s 339(3) of the Act was to be personally responsible for the debts so incurred.

58 General civil liability for directors who cause a company to continue trading while it is insolvent was introduced for the first time in our insolvency law with effect from 30 July 2020 by s 239 of the IRDA, where it is now known as "wrongful trading". But of course, that provision was not in force when IL entered into the main charterparties or when the plaintiff commenced this action. And the plaintiff brings this action against the defendants under s 340(1) of the Act, not under s 239 of the IRDA. I therefore need say no more wrongful trading.

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59 The factual issue of insolvency nevertheless has assumed central importance in this action. That is because the plaintiff relies on IL's insolvency in or around July 2015 as circumstantial evidence that: (a) IL was trading fraudulently when it entered into the main charterparties in July 2015;[34] and (b) that both the defendants were knowing parties to IL's fraudulent trading.

Burden of proof

60 The second preliminary observation I make is on the burden of proof. In this action, it is the plaintiff who asserts: (a) that IL was trading fraudulently in or around July 2015, when it entered into the main charterparties; (b) that IL was insolvent at that time (as circumstantial evidence); and (c) that the defendants were each knowingly a party to IL's fraudulent trading.

61 The burden of proving each of these principal assertions – and of proving each subsidiary assertion that these principal assertions entail – rests on the plaintiff under s 103 of the Evidence Act (Cap 97, 1997 Rev Ed). The plaintiff cannot rely on s 108 of the Evidence Act to argue that the burden of *disproving* any of these principal or subsidiary assertions lies on the defendants on the basis that these assertions involve facts especially within the defendants' knowledge. Section 108 applies only in "very limited circumstances" because, if "[w]idely construed and lifted out of its context, it will reverse the burden of proof of the essential ingredients of the [claimant's] case which by section 103 [of the Evidence Act] is cast on the [claimant]": *Phosagro Asia Pte Ltd v Piattchanine, Iouri* [2016] 5 SLR 1052 ("*Phosagro Asia*") at [68], citing Chen Siyuan and Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 2016) at paras 3.055−3.056.

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[34] SOC at paras 5–6.

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62 Thus, the starting point in my analysis of the factual issues in this case is that the burden rests on the plaintiff to prove each of the principal and subsidiary assertions which form a part of its case against each defendant. That is so even though virtually all of the contested facts which underlie these assertions are entirely within at least the first defendant's personal knowledge and completely outside the plaintiff's knowledge.

The weight of the first defendant's evidence

63 The final preliminary observation I make is on the quality and weight of the first defendant's evidence. On the first day of trial, first defendant's counsel adduced a medical report on the first defendant condition issued by a doctor at the Singapore General Hospital.[35] Although the medical report was not proved in the usual way, the plaintiff does not contest its admissibility as evidence of the truth of its contents.[36]

64 The report records the following points about the first defendant's medical condition. The first defendant was diagnosed with Alzheimer's dementia based on a history of gradual memory loss over the previous five years. Although the first defendant "was alert and forthcoming", he "had difficulty communicating his thoughts, and displayed word finding difficulties" during his mental state examination. He also tried to answer questions but "could not do so at times" and "was not fully oriented to time". Importantly, "[a]t this point, everything [the first defendant] says has to be corroborated with a family member who can verify the accuracy of his account".[37]

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35 Notes of Evidence ("NE") 24 November 2020 at p 3, line 30–p 4, line 3.

36 NE 26 November 2020 at p 60, line 31–p 61, line 2 and p 61, lines 13–20.

37 Exhibit D1 dated 11 November 2020 at pp 2–3.

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65 On the basis of the report, the plaintiff initially argued that the first defendant's evidence should be "disregarded completely" because he lacks competence to testify.[38] The plaintiff subsequently clarified that it does not dispute the first defendant's competence to give evidence under s 120 of the Evidence Act but is instead attacking the weight which I should attach to his evidence.

66 The first defendant gave evidence over the course of one day, in both the morning and the afternoon sessions. The plaintiff argues that (a) the first defendant's evidence in the morning session should be given little or no weight because he suffered from some disability at the time; and (b) his evidence in the afternoon session should be disregarded or given little weight because he showed himself not to be a credible witness by deliberately evading questions.

67 The common position of both defendants is that the first defendant was fit to testify.[39] But the first defendant's counsel acknowledges that his client's difficulties in answering questions may affect the weight which I attach to his evidence.

68 I do not accept the plaintiff's submission that there is a neat demarcation in the first defendant's ability to understand and answer questions between the morning and afternoon sessions of his cross-examination. At some points in the morning session, when asked questions in simple language, he could understand them and answer accurately. For example, he could state his educational qualifications, albeit with some difficulty – as foreshadowed by the medical

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38 PCS at para 121.1.

39 NE 26 November 2020 at p 29, lines 8–10 and p 65, lines 1–24; D1CS at para 120.

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report – in finding the right words.[40] He could also explain through a series of answers that this action is about the plaintiff, saying that IL did not pay for boats that IL had chartered from the plaintiff.[41]

69 Even in the morning session, however, the first defendant appeared to have great difficulty understanding and answering questions. This can be seen from the following exchange towards the end of the morning session, where I attempted to clarify his evidence in non-technical language:[42]

> Court: And does anybody else help you and Mr Chin Chee Chien run the company?
>
> Witness: (No audible answer)
>
> Court: Does anybody help you and Mr Chin Chee Chien run the company?
>
> Witness: I know that a lot of people are talking about me, okay? But I'm not---I'm not listening to them either, okay? Now---alright---I---I got a---I even---just a few weeks ago, I got a friend who---who come and tell me that he had paid a---a money of $200, alright, to somebody. Alright? For me, alright? So I---if I give---come to my office and talk to me, alright---he just didn't turn up, okay? Then, later then I found out that actually he is a friend.

70 As for the afternoon session, the plaintiff relies on a particular exchange in the first defendant's cross-examination as an illustration of his deliberate evasiveness.[43] In the first part of this exchange, the plaintiff's counsel showed the first defendant IL's journal entries in the bundle marked BDD in this action. Plaintiff's counsel asked who prepared them. The first defendant said, "I don't know". Plaintiff's counsel then asked who helped the first defendant to prepare

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40 NE 26 November 2020 at p 4, lines 3–10.

41 NE 26 November 2020 at p 17, lines 5–23.

42 NE 26 November 2020 at p 43, lines 20–32.

43 PCS at paras 113.3–113.4.

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IL's accounts. The first defendant answered, "My secretary". When asked again who prepared the journal entries, he said, "My secretary".[44] According to the plaintiff, this demonstrates that the first defendant was willing to deny knowledge only to change his answer later.[45] I do not accept that the first defendant was deliberately evasive or untruthful here. Instead, he immediately corrected his initial answer when the plaintiff's counsel helped him link the documents before him to the way he ran IL.

71 Next, after the first defendant said that the documents were prepared by a "secretary" who was not from IL, he did not give the name of the "secretary" when prompted by the plaintiff's counsel:[46]

> Q: So who prepares these documents?
>
> A: Huh?
>
> Q: A name?
>
> A: My secretary.
>
> Q: A name?
>
> A: Huh?
>
> Q: Name?
>
> A: Alright, she is from Caltron. Caltron.

He gave her name when asked soon after:[47]

> Court: What is the name of the accountant at Caltron?
>
> Witness: Shirley Chua.

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44 NE 26 November 2020 at p 93, line 7–p 94, line 11.

45 PCS at para 113.3.

46 NE 26 November 2020 at p 94, lines 8–15.

47 NE 26 November 2020 at p 96, lines 3–4.

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72 The plaintiff argues that this too illustrates the first defendant's evasiveness.[48] An alternative explanation – given that he had just clarified that the documents were prepared by a person who was not from IL – is that he thought counsel was asking for the name of the company whose employee prepared the accounts. I do not accept the plaintiff's submission[49] that the first defendant evaded questions during cross-examination and lied on oath.

73 It is also true, as the plaintiff submits, that the first defendant at some points during his cross-examination did not appear to understand his own affidavit of evidence-in-chief.[50] He did not accurately summarise a two-sentence paragraph in his affidavit when he read it during cross-examination.[51] But I decline to draw the inference, advocated by the plaintiff,[52] that the first defendant either did not understand his affidavit when he swore it or was deliberately evasive during cross-examination. At trial, the first defendant had difficulty answering questions phrased in complex language but showed that he could answer the same questions if they were rephrased in simple language. So, I do not accept that the substance of the first defendant's affidavit was based on anything other than his own recollection.

74 I find that the deficiencies in the first defendant's evidence in both the morning and the afternoon sessions were consistent with the clinical observations recorded in his medical report: he had difficulty communicating

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48 PCS at para 113.4.

49 PCS at para 115.

50 PCS at para 113.1.

51 NE 26 November 2020 at p 68, lines 4–25.

52 PCS at para 115.

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his thoughts, he mixed up facts and he was not fully oriented to time. All of this meant that he was unable at times to respond meaningfully to questions.

75 I do not accept the plaintiff's submission that the first defendant was a deliberately evasive witness, whether in the morning or the afternoon session. But I agree with the plaintiff that I should give the first defendant's evidence little or no weight overall. The end result is that there is little difference in how I analyse the case against the first defendant (who did give evidence on his own behalf) and against the second defendant (who elected to call no evidence on his behalf).

76 Having made these preliminary points, I now turn to consider the substance of the plaintiffs' case against the defendants. I shall first analyse the issue of fraudulent trading.

Fraudulent trading

77 For the reasons which follow, I find that the plaintiff has failed to prove that IL was trading fraudulently in or around July 2015, when it entered into the main charterparties with the plaintiff. The plaintiff has proved that IL's liabilities exceeded its assets at that time. But the plaintiff has failed to prove that IL was unable to pay its debts as they fell due at that time. I also consider that the first defendant's conduct after IL entered into the main charterparties is wholly inconsistent with an intent to defraud.

Insolvency

78 I first address the centrepiece of the plaintiff's claim: that IL was insolvent in or around July 2015.

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79 The two main tests for insolvency are the cash flow test and the balance sheet test: *Kon Yin Tong and another v Leow Boon Cher and others* [2011] SGHC 228 ("*Kon Yin Tong*") at [33]. A company is insolvent if it is insolvent on either of these two tests.

80 A company is insolvent on the cash flow test if it is unable to pay its debts as they fall due. A company is insolvent on the balance sheet test if its liabilities exceed its assets: *Seah Chee Wan and another v Connectus Group Pte Ltd* [2019] SGHC 228 at [63]; *Living the Link Pte Ltd (in creditors' voluntary liquidation) and others v Tan Lay Tin Tina and others* [2016] 3 SLR 621 at [31].

81 In applying both the cash flow test and the balance sheet test, the court must take into account the contingent and prospective liabilities of the company (see s 254(2)(*c*) of the Act). A contingent liability is a liability which arises out of an existing legal obligation, but which will be incurred only if an uncertain event occurs in the future: *Kon Yin Tong* at [40].

Balance sheet test

82 I find that IL was balance sheet insolvent in July 2015. The largest liability shown in IL's balance sheet as at 30 September 2014 is an "[a]mount due to a director", *ie*, the first defendant,[53] of $67,879 that was payable on demand.[54] This sum had decreased to $64,879 in IL's balance sheet as at 30 September 2015.

83 This liability is either a contingent liability or a current liability. It is a contingent liability if IL was under no legal obligation to repay the first

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53 SOC at para 11; D1 Defence at para 17.

54 AB at p 662, Note 10.

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defendant unless and until he made a demand for repayment. It is a current liability if IL was legally obliged to repay the first defendant, but the first defendant had extended an indulgence to IL by not demanding repayment. On either alternative, I must take this liability into account in assessing IL's solvency on the balance sheet test. On that basis, IL's liabilities exceeded its assets by $25,237 as at 30 September 2014 and by $7,283 as at 30 September 2015.[55]

84 IL was therefore insolvent on the balance sheet test in or around July 2015.

Cash flow test

85 I find that IL was not insolvent on the cash flow test in or around July 2015.

86 As at 30 September 2014, IL had cash and cash equivalents of $13,085. As at 30 September 2015, this had increased slightly to $15,326.[56] Over the same period, IL's debts due to creditors other than the first defendant (see [82] above) amounted to less than $5,000.[57] IL had sufficient cash and cash equivalents to pay these debts in or around July 2015.

87 I have excluded IL's debt to the first defendant in analysing IL's cash flow solvency. That is because there is no evidence that the first defendant demanded repayment of his debt in or around July 2015. I therefore accept the

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55 AB at p 650.

56 AB at pp 652 and 662, Note 8.

57 AB at p 662, Note 10.

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defendants' submission that the plaintiff has failed to prove that IL was unable to pay its debts as they fell due in or around July 2015.[58]

88 The plaintiff submits that the defendants cannot make this argument because they did not plead that IL's debt to the first defendant was not due in or around July 2015. But it is the plaintiff who makes the principal assertion that IL was insolvent in or around July 2015. And it is the plaintiff who makes the subsidiary assertion that the first defendant's debt must be accounted for in the cash flow test. For the reasons I have given (see [60]–[62] above), the burden of proving these principal and subsidiary assertions rests on the plaintiff.

89 The plaintiff cannot rely on s 108 of the Evidence Act to argue that the burden of disproving this fact lies on the defendants. To invoke s 108, a party must first establish a *prima facie* case that the fact in question is true; a mere allegation will not suffice: *Surender Singh s/o Jagdish Singh v Li Man Kay* [2010] 1 SLR 428 at [221], cited in *Phosagro Asia* at [71]. The plaintiff has failed to establish a *prima facie* case that the company's debt to the first defendant had fallen due in or around July 2015. There is no evidence whatsoever of this. The plaintiff cannot avail itself of s 108 of the Evidence Act to shift the burden of proof on this subsidiary issue to the defendants.

90 There is admittedly evidence that IL repaid *part* of its debt to the first defendant in September 2015.[59] But I do not consider this to be evidence that the first defendant had demanded repayment of the *entirety* of his debt in or around July 2015. In *Bumi Armada Offshore Holdings Ltd and another v Tozzi Srl (formerly known as Tozzi Industries SpA)* [2019] 1 SLR 10, evidence that a

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58 D1CS at para 56; D2CS at paras 38–42.

59 AB at p 253.

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defendant had subcontracted services for *some* modules in a facility did not establish a *prima facie* case that it had subcontracted services for the *other* modules in the same facility (at [36]). Likewise, IL's repayment of part of its debt to the first defendant in September 2015 is not *prima facie* evidence that the first defendant had demanded repayment of the whole of his debt in September 2015, let alone in or around July 2015. At most, it suggests only that the first defendant demanded repayment of only that part of his debt as IL actually repaid in September 2015. That does not suffice to tip IL into cash flow insolvency.

91 The burden of proving that the first defendant demanded repayment of the entire debt which IL owed him in or around July 2015 is on the plaintiff. The plaintiff has failed to discharge this burden. No omission in the defendants' pleadings precludes the defendants from making this submission or precludes this submission from succeeding.

92 As the plaintiff's expert witness, Mr Yiong Kok Kong, conceded, once the debt owed to the first defendant is excluded, IL had enough cash to pay its expenses in 2014 and 2015.[60] Further, although Mr Yiong said that IL operated on a "very tight cash flow" and "would have encountered cash flow problems in the course of running its business",[61] this assessment appears to assume that IL was trading in or around July 2015. But, as the plaintiff itself and Mr Yiong highlight, IL had been "a dormant entity" from 2013 until it entered into the charterparties in July 2015.[62] For the financial years ended 30 September 2013

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60 NE 25 November 2020 at p 66, lines 1–5.

61 Yiong Kok Kong's AEIC dated 8 October 2020, Exhibit YKK-1 at para 9.2.10; NE 25 November 2020 at p 62, lines 28–29.

62 PCS at para 19.1; Yiong Kok Kong's AEIC, Exhibit YKK-1 at para 11.2.

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and 30 September 2014, IL's sole expense consisted of administrative expenses of just over $2,000 per year.[63] IL was well able to meet these expenses.

93 I therefore find that IL was not insolvent on the cash flow test in or around July 2015. It was able to pay its debts as they fell due. It remains the fact, however, that IL was insolvent on the balance sheet test at that time. And a finding of insolvency on just one test suffices for an overall finding of insolvency. IL was therefore insolvent in or around July 2015.

Intent to defraud

94 The next question is whether IL was trading fraudulently in or around July 2015, *ie*, whether it was trading at that time with intent to defraud its creditors or the creditors of any other person or for any fraudulent purpose. As IL had been dormant from 2013, answering this question does not require analysis of the pattern of IL's trading activity in or around July 2015. IL's only trading activity at that time was entering into the charterparties in July 2015. It is of course correct that even a single transaction can amount to fraudulent trading (*In re Patrick and Lyon, Limited* [1933] Ch 786 ("*Patrick Lyon*")). The question to be analysed therefore is whether IL entered into the main charterparties with intent to defraud the plaintiff.

The law

95 The standard of proof for an intent to defraud is the usual civil standard of the balance of probabilities, bearing in mind that the more serious the allegation, the more the plaintiff must do to establish his case: *Tang Yoke Kheng*

63 AB at pp 635 and 649.

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(trading as Niklex Supply Co) v Lek Benedict and others [2005] 3 SLR(R) 263 ("*Tang Yoke Kheng*") at [14].

96 As for the substance of an intent to defraud, Lord Lane CJ observed in the English criminal case of *R v Grantham* [1984] QB 675 at 681 that a debtor has an intent to defraud a creditor if the debtor obtains credit intending that the creditor will never be paid or obtains credit or carries on obtaining credit to the prejudice of the creditor in a manner which the debtor knows is generally regarded as dishonest:

> … A man intends to defraud a creditor either if he intends that the creditor shall never be paid or alternatively if he intends to obtain credit or carry on obtaining credit when the rights and interests of the creditor are being prejudiced in a way which the defendant himself knows is generally regarded as dishonest … [A] trader can intend to defraud if he obtains credit when there is a substantial risk of the creditor not getting his money or not getting the whole of his money and the defendant knows that that is the position and knows he is stepping beyond the bounds of what ordinary decent people engaged in business would regard as honest.

The Court of Appeal cited this passage with approval in *Tang Yoke Kheng* (at [7]), while acknowledging the futility of "attempting to cast a legal definition of something as amorphous as 'fraud'" and conceding that Lord Lane CJ's words are "merely an account of an instance in which fraud might manifest itself".

97 Nevertheless, it is the case that even knowingly being a party to a company's trading on credit while it is insolvent will not, in itself, warrant a declaration of personal liability under s 340(1). To establish fraudulent trading, it is necessary to show that the creditor was deceived or misled and that the

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defendant intended to gain an advantage: *Leong Seng* ([50] *supra*) at [17]. As the Court of Appeal said in *Tang Yoke Kheng* (at [7]):

> To defraud someone is to cheat him, but what is cheating? The best that one can say is that it is an act or omission in which the fraudster deceives the innocent party so as to enrich the fraudster, or cause the innocent party to suffer a loss or detriment. But the fraudster or cheat may achieve his objective in any number of ways. The only invariable element is the element of dishonesty on the part of the fraudster or cheat.

98 There can be no intent to defraud, therefore, unless there is dishonesty resulting in deception of an innocent party: *M+W Singapore* ([50] *supra*) at [103]. Dishonesty is a subjective state of mind. What must be proven is that the defendant held subjectively a dishonest intent: *Leong Seng* at [13]. Of course, it is impossible to see into a defendant's mind and thereby to prove conclusively that it held a subjective dishonest intent. Therefore, as a practical forensic necessity, an intent to defraud can be proven only by circumstantial evidence, not by direct evidence.

99 Thus, where a plaintiff alleges fraud, it is necessary to test the allegation against all the available evidence. The more a plaintiff shows that a defendant's conduct deviated from what an honest person would have done in his circumstances, the more easily it can be inferred that the defendant's subjective state of mind in the course of that conduct was a dishonest intent (*Tang Yoke Kheng* at [9]).

100 Unlike insolvent trading under s 339(3) of the Act and wrongful trading under s 239(12) of the IRDA, a finding that a company incurred a debt or other liability without reasonable prospect of meeting it in full is not a necessary or even a sufficient condition for a finding of fraudulent trading. Nevertheless, such a finding may be circumstantial evidence from which it is legitimate to

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draw an inference of an intent to defraud: *Loose & Griffiths on Liquidators* (Peter Loose, Andrew Clutterbuck & Paul Greenwood gen eds) (LexisNexis, 9th Ed, 2019) ("*Loose & Griffiths*") at para 6.96. But it must be remembered that an intent to defraud and the dishonesty that it entails cannot be proven simply by showing that the defendant failed to comply with some objective standard of reasonable commercial behaviour (*Tang Yoke Kheng* at [9]). An intent to defraud must involve real moral blame according to notions of fair trading amongst commercial men (*Tang Yoke Kheng* at [7], citing *Patrick Lyon* at 790).

The circumstantial evidence

101 The plaintiff pleads that IL had an intent to defraud the plaintiff on two slightly different grounds. First, the plaintiff submits that IL entered into the main charterparties with no intent of paying the plaintiff the hire which would fall due under them: "the aim of entering into the [main charterparties] with the [p]laintiff had been to fraudulently charter the [v]essels … without any intention whatsoever of paying for [*sic*] the charter hire from the outset".[64] Second, the plaintiff alleges that IL had a dishonest intent because it knew that there was no reasonable prospect of IL being able to pay the plaintiff the hire due under the main charterparties.[65] As I have mentioned, this second ground is in itself neither a necessary nor a sufficient condition for liability under s 340(1). It is only the first ground which is both a necessary and a sufficient to establish liability. I therefore treat the plaintiff's case on the second ground as circumstantial evidence from which it invites me to draw the inference necessary to sustain the first ground.

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64 POS at para 4.

65 SOC at para 12; PCS at paras 66–67.

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102 The plaintiff relies on the following six points as circumstantial evidence that IL intended to defraud the plaintiff when it entered into the main charterparties:

(a) IL was insolvent when it entered into the charterparties.[66]

(b) BMI had no reasonable prospect of paying IL enough for IL to discharge its contractual obligations to the plaintiff.[67]

(c) IL used some of the payments it received from BMI under the subcharterparties to repay its loans to the first defendant instead of paying the plaintiff under the main charterparties.[68]

(d) IL failed to make full and timely payments to the plaintiff under the main charterparties.[69]

(e) IL did not participate in the arbitrations.[70]

(f) The first defendant caused difficulties for the plaintiff in the examination of judgment debtor proceedings.[71]

103 It is undoubtedly the case that IL was running hand-to-mouth from the time it became dormant in 2013. Entering into the charterparties in July 2015 and intending to resume trading at that time while running hand-to-mouth may well be commercially naïve or even recklessly imprudent. But it is not in itself

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66 SOC at paras 12 and 15.2.

67 SOC at para 26.

68 SOC at para 14; PCS at paras 75 and 79.

69 SOC at para 23; PCS at para 50.

70 AB at p 89, para 2.3 and p 132, para 2.3.

71 SOC at para 29; PCS at para 92.

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fraudulent. For it to be fraudulent, the plaintiff must prove by adducing sufficiently cogent evidence that the first defendant, as IL's controlling mind and will, dishonestly intended never to pay the plaintiff under the main charterparties. This the plaintiff has singularly failed to do.

104 Even looking at all of these six points in the round, I find that the plaintiff has failed to adduce sufficiently cogent evidence which distinguishes this case from the case of an overly (and perhaps even unreasonably) optimistic and undercapitalised company which incurs a substantial liability by entering into a contract and is then caught out by supervening events beyond its control.

105 I now consider each of these six points in turn.

(1) IL's insolvency

106 The plaintiff case on the first point is as follows. The defendants knew that IL was insolvent when they signed IL's financial statements for the financial year ended 30 September 2014 as IL's directors.[72] The charterparties in July 2015 were IL's only trading activity in or around that period. IL therefore had no sources of revenue other than the hire it expected to receive from BMI under the subcharterparties.[73] When IL entered into the main charterparties, it had less than $17,000 in its bank accounts. Yet the defendants failed to ensure that IL had financial arrangements in place to enable it to pay the deposits and hire to the plaintiff under the main charterparties even if BMI failed to pay the deposit and hire to IL under the subcharterparties.[74] The inference must be that

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72 SOC at paras 25–26; PCS at para 33.

73 PCS at para 27.

74 SOC at paras 14.6 and 15.2; PCS at paras 33 and 73.

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IL had no intent to pay the plaintiff if BMI failed to pay IL. IL therefore entered into the main charterparties with an intent to defraud the plaintiff.

107 It is, of course, true that IL's only source of revenue to pay the plaintiff under the main charterparties was the hire to be received from BMI under the subcharterparties. It is also true that IL made no arrangements to secure alternative sources of loan or share capital with which to pay the plaintiff if BMI failed to pay IL. None of this supports a finding that IL intended to defraud the plaintiff.

108 The first defendant's evidence is that IL planned to use the hire it received from BMI under the subcharterparties to meet its payment obligations to the plaintiff under the main charterparties.[75] I accept his evidence. It is supported by the documents. It is true, as the plaintiff points out, that there is no independent evidence to support the first defendant's oral evidence that the plaintiff, IL and BMI had some sort of a three-way agreement or understanding that IL intended to enter into this back-to-back arrangement.[76] But that does not take the plaintiff's case very far. The contemporaneous objective evidence is that IL did have a back-to-back arrangement upstream with the plaintiff and downstream with BMI. This is proven by the terms of the main charterparties and the subcharterparties, all of which were in evidence.

109 I therefore accept that the main charterparties and the subcharterparties formed, from IL's perspective, a single back-to-back transaction. In other words, I accept that IL entered into the main charterparties only because it was

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75 Chin Kwek Chong's AEIC at paras 23 and 48; NE 26 November 2020 at p 23, lines 1–29.

76 PCS at paras 37–43.

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entering at the same time into the subcharterparties back to back. And I also accept that IL entered into the subcharterparties only because it was entering at the same time into the main charterparties back to back. I also accept that this back-to-back charter arrangement meant that the first defendant, as IL's controlling mind and will, subjectively believed that IL would earn enough under the subcharterparties not only to pay the plaintiff under the main charterparties but also to yield IL a gross profit of US$16,000 per 30 days.[77] Further, even the plaintiff accepts that IL used at least some of the money it received under the subcharterparties to pay the plaintiff.[78]

110 The plaintiff submits that *Chin Chee Keong* ([45] *supra*) is authority for the proposition that it is legitimate to infer an intent to defraud from the fact that a company has no profit-generating business and no access to funds to pay the aggrieved creditor. I reject this submission for two reasons.

111 First, whether a particular set of circumstances amounts to fraud is a question of fact (*Tang Yoke Kheng* ([95] *supra*) at [7]). Citing precedent is of no assistance in determining a question of fact.

112 Second, *Chin Chee Keong* is distinguishable from the present case. In *Chin Chee Keong*, the company was in financial difficulty, had no profit-generating business and knew that it could not pay for its purchases from the plaintiff (at [48], [50], [58]). Yet it placed unusually large orders with the plaintiff. When the plaintiff issued the company a letter of demand, the company took immediate steps to dissipate its assets by selling its business premises (at [47]). The Malaysian Court of Appeal agreed with the trial judge that these facts

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77 AB at pp 170–229.

78 SOC at para 26.

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supported a finding that there was an intent to defraud (at [47]–[48]). But the court also placed great weight on the fact that the defendants did not dispute that the company was unable to pay its creditors (at [49]) and could not explain how the company intended to honour its obligations to the plaintiff and did not suggest that there was a reasonable prospect of paying the plaintiff (at [58]).

113 Unlike the defendants in *Chin Chee Keong*, I accept that the first defendant, as IL's controlling mind and will, subjectively believed in July 2015 that the back-to-back arrangements would enable IL to pay the plaintiff.[79] I cannot infer an intent to defraud from the fact that IL had no existing profit-generating business and no funds sufficient to pay the plaintiff when it entered into the charterparties. The charterparties themselves were to constitute its profit-generating business.

114 My finding that IL was balance sheet insolvent in or around July 2015 does not take the plaintiff's case on intent to defraud very far. I have also found that IL was not cash flow insolvent at that time (see [93] above). It is also significant that IL's balance sheet insolvency arose only because of a debt owed not to an arm's length trade creditor but to the first defendant, a person who had every interest and every incentive *not* to press for repayment and *not* to precipitate IL's financial collapse.

115 The plaintiff contends that the first defendant admitted that IL had no money in July 2015. The plaintiff quotes the following exchange in cross-examination:[80]

> Court: In July 2015, there's no money in Island Logistic, right? There's no money; it's negative.

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79 D1CS at para 101.

80 PCS at para 71, quoting NE 26 November 2020 at p 109, lines 21–23.

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> Witness: No, no---yes, you're right.

116 I reject this contention. This "admission" by the first defendant is of doubtful weight. It contradicts the first defendant's evidence given in a later part of his cross-examination:[81]

> Court: By the time of these charters in July 2015, there is no money in Island Logistic. It---
>
> Witness: But we have money, yes.
>
> Court: ---owes more than it has, right?
>
> Witness: We have money.

In any event, the first defendant's evidence on whether IL had money in July 2015 is little or no basis from which to infer that, in or around July 2015, he subjectively believed that IL could pay the plaintiff under the main charterparties.

117 The plaintiff also submits that the defendants, as directors of an insolvent company, owed the plaintiff a fiduciary duty to take into account its interest as a creditor when IL entered into the main charterparties.[82] This submission does not assist the plaintiff. I say that for three reasons.

118 First, I accept that directors have a fiduciary duty to take into account the interests of IL's creditors when making decisions for a company which is insolvent or nearing insolvency (see *Liquidators of Progen Engineering Pte Ltd v Progen Holdings Ltd* [2010] 4 SLR 1089 ("*Progen Engineering*") at [48]). But this duty is owed not to the creditors but to the company (*Progen*

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81 NE 26 November 2020 at p 111, lines 9–13.

82 SOC at paras 13 and 30.

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Engineering at [52]). The plaintiff is therefore in no position to complain of a breach of this duty.

119 Second, it is not helpful to conflate the question of whether a director has breached his fiduciary duties to the company with the question of whether a company was trading fraudulently within the meaning of s 340(1) of the Act. The question at this point in the analysis is whether IL was trading fraudulently, not whether the first defendant was knowingly a party to IL trading fraudulently. As such, any breach of duty within the company is irrelevant to the question of whether the company traded fraudulently as regards outsiders to the company.

120 Third, the plaintiff was not a creditor of IL until *after* it entered into the main charterparties with IL. As in *Prima Bulkship Pte Ltd (in creditors' voluntary liquidation) and another v Lim Say Wan and another* [2017] 3 SLR 839 (at [71]), the plaintiff was not a creditor of IL at the material time; it became a creditor only by virtue of IL entering into the main charterparties. IL's directors could not, therefore, have owed any duty to IL to take the plaintiff's interests into account when they caused IL to enter into the main charterparties with the plaintiff.

(2) No reasonable prospect of BMI paying IL

121 The plaintiff's second point is that BMI had no reasonable prospect of paying IL enough for IL to discharge its contractual obligations to the plaintiff.[83] For this point, the plaintiff relies on the following subpoints: (a) IL wrote off in its financial statements for the year ended 30 September 2016 a trade debt of $35,568.75 which BMI had owed IL since 2008;[84] and (b) IL failed to issue a

[83] SOC at para 26.

[84] AB at p 766.

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letter of demand or sue BMI to recover the sums due to IL under the subcharterparties.[85]

122 The first defendant argues that IL had no reason to believe that BMI would not pay IL under the subcharterparties or that there was a commercially significant risk that BMI would default under the subcharterparties and leave IL unable to pay the plaintiff under the main charterparties.[86]

123 On the first subpoint, there is a dispute as to whether the trade debt which had been outstanding from 2008 and which IL wrote off in 2016 was in fact owed by BMI. IL's general ledger for 2016 does not identify the debtor as BMI.[87] But the journal adjustment papers which IL's accountants prepared and which the defendants signed in 2016 do identify the debtor as BMI.[88] In analysing this point, therefore, I assume in the plaintiff's favour that BMI did owe IL a trade debt of $35,568.75 which IL wrote off in 2016. I nevertheless reject the plaintiff's submission for two reasons.

124 First, I do not accept that the first defendant signed the main charterparties and the subcharterparties knowing that BMI had not paid its existing debt. As the first defendant says,[89] the debt dated from 2008. There is no evidence that the first defendant remembered this stale debt in July 2015. The financial statements available in July 2015, which both defendants had signed, do not identify by name the debtors who owe IL its trade receivables.

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85 PCS at paras 58, 72 and 83.

86 D1CS at para 101.

87 Bundle of Disputed Documents ("BDD") dated 16 November 2020 at p 642.

88 AB at p 774.

89 D1CS at para 89.

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125 Second, I also do not accept that IL writing off the debt in 2016 goes towards establishing that IL had an intent to defraud the plaintiff. IL wrote off the debt over a year after entering into the charterparties. There is no evidence that BMI had been unwilling to pay this debt before the three companies' relationships soured as a result of this transaction.

126 On the second subpoint, IL may have had any number of reasons for not taking legal action to recover payment from BMI after it defaulted under the subcharterparties. The failure to take legal action in 2016 and 2017 does not raise the inference that IL was trading fraudulently in July 2015. In any event, the first defendant gave some evidence that he did take steps to try and get payment from BMI. He said that he did ask BMI to pay, albeit orally and not in writing.[90] Although I give the first defendant's evidence little weight, I accept his evidence on this point as it is consistent with his evidence that he was "quite close friends"[91] with one of BMI's directors.

(3) IL repaid loans to the first defendant

127 The third point that the plaintiff relies on is that IL used some of the money it received from BMI under the subcharterparties to repay its loans to the first defendant instead of paying the plaintiff under the main charterparties.[92]

128 IL's payment vouchers do indeed show that it made seven payments to the first defendant between September 2015 and February 2016.[93] These sums

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90 Chin Kwek Chong's AEIC at para 41; NE 26 November 2020 at p 70, line 17–p 71, line 7.

91 NE 26 November 2020 at p 5, line 10.

92 SOC at para 14; PCS at paras 75 and 79.

93 AB at pp 253, 255–257, 259 and 261–262.

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total about $50,000. The first defendant's case is that these payments were repayments of a loan which the first defendant had extended to IL. The plaintiff does not assert positively that there were no such loans. Its response is simply that the first defendant has failed to prove that there were any such loans. In any event, the plaintiff submits that it was dishonest for the first defendant to cause IL to repay his loans when IL was in default of its payments to the plaintiff.[94]

129 The plaintiff's submission on this point contains two subpoints: (a) the first defendant has failed to prove that he lent IL sums which correspond to IL's repayments to him; [95] and (b) the first defendant should not have caused IL to repay him in preference to paying the plaintiff.[96] I reject the plaintiff's submission on both subpoints.

130 On the first subpoint, the plaintiff pleads its case as follows: (a) the loans do "not correspond to" the payment vouchers or IL's bank statements;[97] (b) IL's financial statements record amounts due to the first defendant of $3,000 and $22,398 in the financial years ended 30 September 2015 and 30 September 2016 respectively;[98] and (c) IL's bank statements show "no transaction or money that had been credited into the company account for the period from 2014 to 2016".[99] On this basis, the plaintiff submits that there is no evidence that the first defendant in fact lent these amounts to IL.[100]

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94 SOC at para 14.

95 SOC at para 14; PCS at para 78.

96 PCS at para 77.

97 SOC at para 14.

98 SOC at paras 14.2–14.3.

99 SOC at para 14.3.

100 SOC at paras 14, 14.1–14.3.

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131 It is true that the first defendant has not adduced any documents – such as loan agreements, IOUs or even credit advices – to prove these loans. But I do not accept the plaintiff's argument on this subpoint. It is based on a misapprehension of the cash flow statements that record *cash outflows* of $3,000 and $22,398.[101] These cash outflows show only that IL paid the first defendant these amounts that were allegedly due to him – not that the first defendant lent IL these amounts in the financial years ended 30 September 2015 and 30 September 2016, or that these amounts represented the entirety of the first defendant's loans to IL. Further, IL's bank statement for April 2014 does record a deposit of $5,000 with the description "TRF FROM MR CHIN KWEK CHONG".[102]

132 I therefore find that IL's payments to the first defendant between September 2015 and February 2016 were in fact loan repayments. Not only do the payment vouchers describe the payments as "loan returns", but the plaintiff's own pleaded case is that IL owed the first defendant $64,879 in July 2015.[103] This sum exceeds the total of the seven sums which IL paid to the first defendant between September 2015 and February 2016.

133 On the second subpoint, I find that the first defendant's conduct in causing IL to repay its debts to him instead of paying its debts to the plaintiff does not show that IL entered into the main charterparties in July 2015 with an intent to defraud the plaintiff. A company's intent to prefer one creditor *ex post* does not in itself establish that the company incurred its debts to other creditors *ex ante* with intent to defraud those other creditors (see *Leong Seng* ([50] *supra*)

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101 AB at p 673.

102 AB at p 423.

103 SOC at para 11.

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at [25]). This is the position even where the preferred creditors are insiders such as directors and shareholders of the company (*Leong Seng* at [25]).

134 It is not the plaintiff's case that the first defendant dishonestly caused IL to enter into the main charterparties *intending* to use BMI's payments under the subcharterparties to repay IL's debts to him rather than to pay the plaintiff under the main charterparties. Its case is merely that, *after* IL entered into the charterparties in July 2015, the first defendant wrongfully and opportunistically benefited himself by "tak[ing] the little price differential [IL] had made from BMI".[104] IL's payments to the first defendant when IL was in default of its payments to the plaintiff do not show an intent to defraud.

135 Even if I am wrong in finding that IL's payments to the first defendant were repayments of a loan, these payments do not establish that IL was trading fraudulently in or around July 2015. Even where a director causes a company to pay money in breach of his fiduciary duties to the company, that will not in itself justify a finding of an intent to defraud. In *Traxiar Drilling Partners* ([50] *supra*), a director caused a company to borrow money from two lenders to buy a rig. Over the next two years, the director caused the company to pay the borrowed money to his own companies instead of using it to buy the rig. Aedit Abdullah J found that, by paying his own companies to the prejudice of lenders, the director had breached his duty to the company to take into account the interests of creditors (at [93]–[95]). But this did not, in itself, lead to the conclusion that the director had intended to defraud the lenders when he caused the company to borrow the money within the meaning of s 340(1) of the Act.

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104 SOC at para 14.

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136 Looking at all of the other evidence, Aedit Abdullah J held that there was insufficient evidence that the director had no intention of repaying the loan at the time he caused the company to borrow the money from the lenders (at [119] and [127]). For one lender, this was partly because the plaintiff repaid that lender close to half of its loan (at [127]). As for the other lender, the director had charged his personal assets as security for that lender's loan (at [126]). Further, the director had worked to secure contracts to buy the rig and caused the company to sign contracts to buy it. This made it more likely that the company genuinely intended to fund the purchase of the rig rather than to allow the director to siphon off the funds at the time it borrowed the money (at [125]).

137 Similarly, the first defendant's conduct after IL entered into the charterparties is at odds with an intent to defraud. First, if the defendants intended from the outset not to pay the plaintiff under the main charterparties, as the plaintiff alleges, it is wholly inconsistent with that intent for IL to make payment of the first month's hire to the plaintiff.

138 Second, when disputes arose over the condition of the vessels, the first defendant travelled to Maldives to, as he saw it, help resolve the issues between the plaintiff and BMI.[105] This conduct is wholly inconsistent with an intent to defraud the plaintiff. The first defendant's efforts in this regard are reflected in contemporaneous documents showing that he travelled to Maldives in 2016 and discussed the charter arrangements with the plaintiff and BMI.[106] I reject the plaintiff's suggestion that the first defendant in fact travelled to the Maldives to attend to other business matters. Although the first defendant accepted that he did have other business in the Maldives, the plaintiff has adduced no evidence

105 D1CS at paras 91–92, 104 and 107.

106 AB at pp 792 and 840–841.

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that the first defendant had other business in Maldives in 2016 or that that other business was the reason for his travels there in 2016.[107]

139 The plaintiff submits also that the first defendant did not try to help resolve the issues between BMI and the plaintiff.[108] Instead, as the arbitral tribunal found in its awards,[109] the first defendant detained the passports of the crew, which prevented the plaintiff from taking their own vessels out of Maldives. The first defendant accepts these findings in the awards.[110] The first defendant's conduct nevertheless does not assist the plaintiff's case. It is not necessarily the case that any action by the first defendant which causes difficulties for the plaintiff is not directed at resolving the issues.

(4) IL failed to pay the plaintiff

140 The plaintiff submits that IL's failure to make full and timely payments to the plaintiff after entering into the main charterparties shows that IL intended to defraud the plaintiff at the time it entered into the charterparties. I do not accept this submission. It is, of course, legitimate to draw an inference as to whether IL was trading fraudulently in or around July 2015 from IL's conduct after July 2015: *Rahj Kamal bin Abdullah v Public Prosecutor* [1997] 3 SLR(R) 227 at [30]; *Halsbury's Laws of Singapore* vol 13 (LexisNexis) at para 150.723, n 4. But I find it impossible to draw that inference on the facts of this case.

141 There is simply no evidence to support the plaintiff's assertion that IL had no intent from the outset of paying the hire under the charterparties. The

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107 NE 26 November 2020 at p 5, line 6–p 8, line 8.

108 Plaintiff's Further Written Submissions dated 19 March 2021 at paras 4–5.

109 AB at p 95, para 3.3.8 and p 150, para 6.3.4.

110 Index to AB at items 6 and 7.

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plaintiff has failed to adduce any evidence that IL's failure to pay the plaintiff is distinguishable from business failure arising from BMI's failure to pay IL, let alone cogent evidence to show that it was the result of an intent to defraud. I therefore accept the first defendant's submission that the plaintiff's reliance on IL's late payments and non-payment to show dishonesty is based on hindsight.[111]

(5) IL did not participate in the arbitrations

142 The plaintiff submits that IL's failure to participate in the arbitration supports a finding that IL entered into the charterparties with intent to defraud the plaintiff. According to the plaintiff, this shows that the defendants "were content to hide themselves behind the corporate veil".[112]

143 This submission is a *non sequitur*. It does not follow that, if IL entered into the main charterparties with the plaintiff with an intent to defraud the plaintiff, IL would thereafter fail to participate in the arbitrations which the plaintiff commenced against IL. IL was a dormant company from 2013 to 2015. It was insolvent on the balance sheet test. It had enough cash only to cover its administrative expenses. Once the disputes with BMI arose and BMI stopped paying hire for the vessels, IL had no revenue and no means of earning any revenue. All of this is, to my mind, a more cogent and compelling explanation for IL's failure to participate in the arbitrations which the plaintiff commenced in July 2016 than an intent to defraud the plaintiff in July 2015.

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111 D1CS at para 86.

112 PCS at para 90; SOC at para 15.5.

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(6) The first defendant's conduct in the examination of judgment debtor proceedings

144 The first defendant refused to comply with orders made in the examination of judgment debtor proceedings and failed to produce IL's financial documents. The plaintiff submits that he did so deliberately to prevent the plaintiff from discovering the parlous financial state of IL at the time it entered into the main charterparties.[113] This, the plaintiff submits, supports a finding that IL entered into the main charterparties with an intent to defraud the plaintiff.

145 This point too is a *non sequitur*. It does not follow that, if IL entered into the main charterparties with the plaintiff with an intent to defraud the plaintiff, the first defendant would thereafter fail to comply with court orders in examination of judgment debtor proceedings. In any event, the first defendant did not conceal IL's financial state in the examination of judgment debtor proceedings. He gave IL's financial documents to the second defendant, who produced them to the plaintiff in the examination.[114]

Conclusion on fraudulent trading

146 For these reasons, I find that IL had no intent to defraud the plaintiff when it entered into the main charterparties with the plaintiff in July 2015. IL did not therefore trade fraudulently in doing so.

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113 SOC at para 29; PCS at para 92.

114 Lim Jing Xiang's AEIC dated 7 October 2020 at p 145.

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Knowing participation in fraudulent trading

147 My finding that IL was not trading fraudulently in or around July 2015 suffices to dispose of the plaintiff's action against both the first defendant and the second defendant. It is therefore unnecessary to analyse the second element for liability under s 340(1): whether each defendant knowingly participated in fraudulent trading.

148 But each defendant stands in a different position on this second element. The first defendant was IL's controlling mind and will at all material times. As such, if I had found that IL was trading fraudulently by entering into the main charterparties, the first defendant could not conceivably have denied that he was knowingly a party to that fraudulent trading. If I am wrong in my finding on fraudulent trading, therefore, the first defendant's liability under s 340(1) of the Act follows as a matter of course.

149 The second defendant stands in quite a different position. His pleaded defence has put in issue whether he was knowingly a party to IL's fraudulent trading. If I am wrong in my finding on fraudulent trading, the second defendant may still escape liability if the plaintiff fails to prove knowing participation as against him.

150 As I have mentioned, the second defendant elected to call no evidence.[115] As a result, I disregard all of the evidence which the first defendant intended to adduce in this matter. The first defendant accepts, however, that I may take into account the first defendant's evidence in analysing the plaintiff's case against the second defendant. Furthermore, I must also have regard to the second

[115] NE 25 November 2020 at p 77, lines 6–8 and 17–31.

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defendant's pleaded case. The second defendant's pleadings identify the points of contention as between the plaintiff and the second defendant, and therefore identity principal and subsidiary assertions which form part of the plaintiff's case against the second defendant which the plaintiff bears the burden of proving as against the second defendant.

151 Despite the second defendant's election to call no evidence, I dismiss the plaintiff's action against him. I accept the second defendant's submission that the plaintiff has failed, on its own evidence, to establish that the second defendant was knowingly a party to carrying on IL's business with intent to defraud. The analysis proceeds from this point forward on the basis that, contrary to my finding, IL was indeed trading fraudulently in or around July 2015.

The second defendant adduces no evidence

152 The standard of proof which the plaintiff must meet in a civil action is the same – *ie*, proof on the balance of probabilities – whether or not the defendant elects to call evidence: *Ma Hongjin v SCP Holdings Pte Ltd* [2021] 1 SLR 304 at [32].

153 Whether or not a defendant elects to call evidence in a civil action, a plaintiff will succeed if, after all the evidence has been received (*Ma Hongjin v SCP Holdings Pte Ltd and another* [2019] SGHC 277 at [28] and [39]):

> (a) The plaintiff satisfies the court, on the balance of probabilities, that the evidence which the plaintiff has adduced at trial has proved the facts on which it relies for the essential elements of its case to be true; and

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(b) The plaintiff satisfies the court that applying the law to those facts yields an outcome in its favour.

154 I do not accept the plaintiff's submission that an adverse inference should be drawn against the second defendant simply because he has elected to call no evidence. *Thio Keng Poon v Thio Syn Pyn and others and another appeal* [2010] 3 SLR 143 (at [44]–[45]) is authority contrary to the plaintiff's submission.

155 I now explain why I hold that the plaintiff has not proved the element of knowing participation against the second defendant on the balance of probabilities.

The law

156 The element of knowing participation has two aspects: "participation" and "knowledge" (*Loose & Griffiths* at para 6.103, citing *Re Bank of Credit and Commerce International SA (in liquidation) (No 14); Morris and others v State Bank of India* [2004] 2 BCLC 236 ("*BCCI (No 14)*") at [11]).

157 Participation requires a defendant to take positive steps to take part in the fraudulent trading. An omission to prevent fraudulent trading, though it may in some circumstances constitute a breach of a duty, does not make a defendant knowingly a party to the fraudulent trading within the meaning of s 340(1): *Re Maidstone Buildings Provisions Ltd* [1971] 3 All ER 363 at 368–369.

158 As for knowledge, the defendant must personally know that the transactions are intended to defraud creditors or are in some other way fraudulent. Actual knowledge is required: *Tan Hung Yeoh v Public Prosecutor* [1999] 2 SLR(R) 262 at [26]–[27]. A failure to appreciate that the company was

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trading fraudulently does not suffice to establish knowledge no matter how negligent the failure: *BCCI (No 14)* at [11]. So too, the knowledge of one director cannot be attributed to another director simply by virtue of the fact that both hold office as directors in order to establish the requisite degree of knowledge.

The plaintiff's case against the second defendant

159 The plaintiff's case against the second defendant is that he knowingly participated in IL's fraudulent trading.[116] In support of its case, the plaintiff relies on the fact that the second defendant was a shareholder, a director and the company secretary of IL. On that basis, the plaintiff submits that the second defendant "would be fully aware of the company's dealings".[117] The plaintiff also relies on the first defendant's equivocal evidence that the second defendant helped the first defendant run IL but "[was] not really running the show either".[118]

160 The mere fact that a person is a director or other officer of a company or holds an executive position in the company does not mean that he is knowingly a party to everything that the company does. In *Tong Tien See Construction Pte Ltd (in liquidation) v Tong Tien See and others* [2001] 3 SLR(R) 887, Tay Yong Kwang JC (as he then was) held some directors personally liable for the company's debts under s 340(1) of the Act. They had used false accounts to project a false image of profitability to creditors. They knew that creditors could be paid only by using funds from new projects to pay debts incurred in old projects. They also knew that, at any given time, some creditors would not be

116 PCS at paras 103 and 106.

117 PCS at para 106.

118 NE 26 November 2020 at p 43, lines 12–19 and p 115, lines 4–10.

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paid. As the directing minds of this fraudulent scheme, these directors were knowingly a party to the company carrying on its business with intent to defraud its creditors (at [64]).

161 But Tay JC found two other directors, the fourth and fifth defendants, not liable under s 340(1) of the Act (at [102]). Given Tay JC's finding that the company was trading fraudulently, the only way these two directors could have escaped liability was if the plaintiff failed to show that they were knowingly a party to the fraudulent trading. Both directors were also employed by the company (at [22], [27]). Both directors signed the company's false accounts in their capacity as directors (at [59]). But these two directors were not the ones with the requisite knowledge of how the company was faring over the years and the ins and outs of its money (at [64]). The fraud lay in the scheme of "rob[bing] Peter to pay Paul". So these two directors were not liable under s 340(1) because they had no personal knowledge of the company's finances to the extent needed to know of the scheme.

162 So too in the present case, the mere fact that the second defendant was a shareholder, a director and the company secretary of IL does not in itself establish his subjective knowledge of IL's fraudulent trading in July 2015, let alone that he was a party to it. The fraud which I have assumed (contrary to my finding) lies in IL dishonestly entering into the main charterparties with no intention of paying the plaintiff. The plaintiff has not adduced any evidence which shows that the second defendant knew anything about the main charterparties before or at the time the first defendant signed them on IL's behalf, let alone that the second defendant was a knowing party to IL entering into them.

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163 As the second defendant points out, the plaintiff accepts that only the first defendant signed the main charterparties for IL.[119] Further, Mr Lim Boh Tee testified that the second defendant was not even present when he and the first defendant signed the main charterparties.[120] It is therefore not part of the plaintiff's case that the second defendant was involved in executing the main charterparties.

164 It is true the second defendant, as a director, signed IL's financial statements.[121] But as the second defendant's counsel submits,[122] these financial statements make no reference to the main charterparties. In any event, the knowledge which s 340(1) requires is knowledge contemporaneous with the fraudulent trading. Subsequent knowledge based on hindsight does not suffice to engage liability under s 340(1) of the Act (*Re Bank of Credit and Commerce International SA (in liquidation) (No 15); Morris and others v Bank of India* [2004] 2 BCLC 279 at [13]).

165 Further, the plaintiff does not identify any positive steps which the second defendant took in causing IL to enter into the main charterparties. Instead, Mr Lim Boh Tee says that the second defendant's fault lay in an omission: in "not do[ing] any action to stop or prevent the first defendant from entering IL into" the main charterparties.[123] An omission does not in law amount to being a party to fraudulent trading within the meaning of s 340(1) of the Act.

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119 PCS at para 100.

120 NE 25 November 2020 at p 27, lines 19–25 and p 27, line 30–p 28, line 7.

121 PCS at para 101.

122 D2CS at para 44.

123 Lim Boh Tee's AEIC at para 45. See also NE 24 November 2020 at p 59, lines 16–22 and p 60, lines 1–7.

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166 The plaintiff analogises this case with *Chin Chee Keong* ([45] *supra*). In that case, the Malaysian High Court found that the entire business of the company, which ran a factory, could not have been carried on by an elderly lady (at [55]). The plaintiff says that the second defendant must have helped the first defendant carry on IL's business because it is virtually impossible for the first defendant, at the age of 74, to manage IL's business on his own.[124] But the analogy with *Chin Chee Keong* fails. On the plaintiff's own case, IL has been "a dormant entity" since 2013.[125] In short, apart from the charterparties in July 2015, there was at all material times no business of IL for the first defendant to manage. And I accept that the first defendant was perfectly capable of negotiating and entering into the charterparties by himself, *ie*, without the assistance of any other person.

Conclusion on the second defendant

167 The plaintiff has adduced no evidence that the second defendant knew of the main charterparties before IL entered into them or that he took any steps to carry on IL's business with intent to defraud. The plaintiff's claim against the second defendant fails despite the second defendant's election to call no evidence.

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124 PCS at para 108.

125 PCS at para 19.1.

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Conclusion

168 For these reasons, I dismiss the plaintiff's claim. I will hear the parties on costs.

Vinodh Coomaraswamy
Judge of the High Court

Navinder Singh and Farah Nazura Binte Zainudin (KSCGP Juris LLP) for the plaintiff;
Anil Changaroth and Lim Muhammad Syafiq (ChangAroth Chambers LLC) for the first defendant;
Amos Cai, Lim Ying Ying and Tian Keyun (Yuen Law LLC) for the second defendant.

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