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

[2023] SGHC 258

Companies Winding Up No 87 of 2023 (Summons No 1741 of 2023)

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

And

In the matter of Synergy Global
Resources Pte Ltd

Between

Maybank Singapore Limited

… *Claimant*

And

Synergy Global Resources Pte Ltd

… *Defendant*

JUDGMENT

[Insolvency Law — Winding up — Triable issue]
[Contract — Contractual discretion]
[Contract — Contractual terms — Unfair Contract Terms Act]

TABLE OF CONTENTS

Maybank Singapore Ltd
v
Synergy Global Resources Pte Ltd

[2023] SGHC 258

General Division of the High Court — Companies Winding Up No 87 of 2023 (Summons No 1741 of 2023)
Goh Yihan JC
3 August 2023

12 September 2023 Judgment reserved.

Goh Yihan JC:

1 HC/CWU 87/2023 ("CWU 87") is the claimant's application for a winding up order against the defendant. In turn, HC/SUM 1741/2023 ("SUM 1741") is the defendant's application for CWU 87 to be set aside with costs. Both CWU 87 and SUM 1741 are therefore concerned with the same question of whether the defendant should be wound up.

2 After hearing the parties and considering their submissions and relevant documents, I allow CWU 87. I accordingly dismiss SUM 1741. I provide the reasons for my decision below.

Background facts

The basis of the claimant's application under CWU 87

3 The background facts leading to CWU 87 are these. By way of a Letter of Offer dated 19 February 2019, the claimant granted trade facilities to the defendant under the Loan Insurance Scheme (the "LIS") with a total credit line of US$490,000. Separately, by way of a second Letter of Offer dated 17 December 2019, the claimant granted a SME Working Capital Loan of S$100,000 to the defendant.

4 The claimant later issued a third Letter of Offer dated 11 August 2020 to the defendant. This was for trade facilities under the LIS with a total credit line of US$600,000 and a business credit card facility with a total credit line of S$8,000.

5 The claimant then issued a fourth Letter of Offer dated 13 July 2021 to the defendant for trade facilities under the Enterprise Financing Scheme – Trade (the "EFS Trade Facility") with a total credit line of US$600,000 and a business credit card facility with a total credit line of S$8,000.

6 Pursuant to the Letter of Offer dated 13 July 2021, on 9 May 2022, the defendant applied for Trust Receipt Invoice Financing (the "Trust Receipt") from the claimant for pre-shipment financing in respect of the invoice issued by VR International FZC to the defendant for a sum of US$177,450. The claimant approved the defendant's application and disbursed a sum of US$177,450 for the payment of the above-mentioned invoice. The Trust Receipt had an initial financing tenor of 45 days, *ie*, it fell due on 26 June 2022. At the defendant's request, the claimant later extended the financing tenor to 8 August 2022.

7 In addition to the Trust Receipt, the defendant had, on 8 July 2022, applied to the claimant for the issuance of a letter of credit for a sum of US$352,000 in favour of VR International FZC. The claimant issued the letter of credit for this sum on 15 July 2022 (the "Letter of Credit"). The claimant later cancelled the Letter of Credit on 11 October 2022 as the required supporting documents were not presented to it. As such, with the sums extended under the Trust Receipt and the Letter of Credit, the outstanding amount on the EFS Trade Facility was well over US$551,497,98, leaving less than US$50,000 available credit for the defendant to draw down on. In any event, the claimant did not receive any further application from the defendant, especially in respect of the transactions mentioned at [12] below.

8 The defendant defaulted in paying for the Trust Receipt when it fell due on 8 August 2022. The claimant's solicitors, Shook Lin & Bok LLP ("SLB"), issued a letter of demand dated 25 October 2022 to the defendant to recall the entire banking facilities that the claimant had granted to the defendant. In the same letter, SLB, on behalf of the claimant, demanded the repayment of all outstanding sums from all such facilities within seven days. As of 21 October 2022, these sums were: (a) US$182,692.05 in respect of the EFS Trust Receipt Facility; (b) S$50,833.40 in respect of the defendant's SME Working Capital Loan Facility; and (c) S$1,819.42 in respect of the defendant's business credit card facility, together with interest accruing thereon until the date of full payment.

9 When the defendant did not comply with SLB's letter of demand, the claimant instructed SLB to issue a Statutory Demand dated 16 November 2022 (the "SD") against the defendant for full repayment of the sums of US$184,152.63 and S$50,815.29, due under the recalled banking facilities as of

15 November 2022, together with interest accruing thereon until the date of full payment.

10 The defendant failed to comply with the SD within three weeks and has not yet done so at the time of this hearing. Thus, the claimant submits that by virtue of s 125(2)(*a*) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) (the "IRDA"), the defendant is deemed to be unable to pay its debt and may be wound up by the court pursuant to s 125(1)(*e*) of the IRDA. The claimant therefore filed CWU 87 on 12 May 2023.

The defendant's claim against the claimant in OC 338

11 Juxtaposed against the facts which the claimant relies on in CWU 87, are the facts which the defendant relies on in its claim against the claimant in HC/OC 338/2023 ("OC 338"). According to the defendant, in or around July 2022, the claimant requested documents from the defendant to process a fourth trade facility. This was to replace the third trade facility pursuant to the Letter of Offer dated 13 July 2021, which was due to expire on 18 July 2022. Because the third trade facility was about to expire at the time, the defendant kept all its new businesses on hold until the fourth trading facility was approved.

12 On 28 August 2022, the claimant debited a fee of S$6,343.88 from the defendant's account as renewal fees for the EFS Trade Facility, or what the defendant has termed as the "fourth trade facility". The defendant, in reliance of what it says is an agreement between the parties on a fourth trade facility, immediately went to its buyers to conclude the transactions that had been put on hold pending the renewal of the EFS Trade Facility. Thus, on 8 September 2022, the defendant executed a purchase contract with Vijayanagar Foods & Nutraceuticals Pvt Ltd of India for two containers of virgin coconut oil

worth US$292,800 at preferential pricing. On 13 September 2022, the defendant concluded an agreement with its buyer for the sale of two containers of virgin coconut oil worth US$448,350. The defendant claims that the claimant's denial of the use of the EFS Trade Facility deprived the defendant of a profit of at least US$155,500 on these transactions. However, it bears noting that while the claimant recalled all the banking facilities on 25 October 2022, including the EFS Trade Facility, the defendant never applied for any credit in respect of these transactions before that date. The defendant further claims that it was in a position to make at least six of such transactions had the EFS Trade Facility not been wrongfully terminated. As such, the defendant claims to have lost at least US$933,300 as a result of the claimant's wrongful termination.

My decision: CWU 87 is allowed and SUM 1741 is dismissed

The relevant law

13 The relevant law in relation to a court's discretion to dismiss a winding up application is well established. In this regard, the court is generally faced with the following situations in the context of winding up applications:

(a) Where the debtor fails to pay an undisputed debt after being served with a statutory demand by the creditor, it is the duty of the court to direct a winding up (see the Court of Appeal decision of *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268 ("*Metalform*") at [61]). There are exceptional cases where the court may exercise its discretion not to grant a winding up order, such as when public policy considerations are engaged (see the Court of Appeal decision of *BNP Paribas v Jurong Shipyard Pte Ltd* [2009] 2 SLR(R) 949 at [15]–[20]).

(b) Where, however, the debtor rightfully disputes the debt claimed by the creditor, the court will stay or dismiss the winding up application on the ground that the *locus standi* of the creditor is in question and it is an abuse of the process of the court for the creditor to enforce a disputed debt in this way (see *Metalform* at [62]). In assessing whether there is a substantial and *bona fide* dispute over the debt claimed by the creditor, the applicable standard is no more than that for resisting a summary judgment application, *ie*, the debtor would have to raise triable issues (see the Court of Appeal decision of *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") at [16]–[17]).

(c) Where the debtor does not dispute the debt but seeks a stay or dismissal of the winding up application on the ground that it has a genuine and serious cross-claim equal to or exceeding the debt, the court should stay or dismiss the application if the debtor can raise triable issues (see the Court of Appeal decision of *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 ("*AnAn*") at [25]). One such way is for the debtor to show that he has a *bona fide* cross-claim based on substantial grounds and that there is a distinct possibility that the cross-claim may exceed the undisputed debt (see *AnAn* at [25] and *Metalform* at [36] and [82]).

14 More specifically, while the cases appear to show a divergence in the terminology used to describe the standard with which a debtor must raise a triable issue, this has been resolved in more recent cases. Thus, although *Pacific Recreation* and the decisions thereafter have referred to the "triable issue" standard, *Metalform* had referred to the "unlikely to succeed" standard, *ie*, that

the winding up application was unlikely to succeed. However, as I observed in the High Court decision of *Atlas Equifin Pte Ltd v Electronic Cash and Payment Solutions (S) Pte Ltd (Andy Lim and others, non-parties)* [2023] 3 SLR 900 ("*Atlas Equifin*") (at [43]), it has since been clarified that any linguistic divergence between the "triable issues" standard in *Pacific Recreation* and the "unlikely to succeed" standard in *Metalform* was "a distinction without difference" (see the High Court decisions of *Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) v Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd)* [2011] 4 SLR 997 at [26] and *Strategic Construction Pte Ltd v JH Projects Pte Ltd* [2018] 4 SLR 1192 at [20]).

15 Finally, as to how a court should apply the "triable issue" standard, the High Court decision of *BDG v BDH* [2016] 5 SLR 977 is instructive. As the court observed (at [20]), this "would require the court to examine the affidavit evidence, and consider whether on such material, an arguable case could be made meriting the holding of a trial of the issues. That standard would require more inquiry and assessment than a standard requiring only making out that a dispute exists *prima facie*". The following are examples of issues that have satisfied the "triable issue" standard:

(a) whether the board resolution that authorised the company to enter into a guarantee was valid due to arguable questions as to whether the requisite quorum for the relevant meeting was met, and whether the board resolution for the execution of the guarantee was effective (see *Atlas Equifin* at [42], [58], and [59]);

(b) whether an agreement existed between the parties, whether the transaction pursuant to that agreement was genuine, and whether a party

would have standing to bring winding up proceedings based on assigned trade debts if it is found only to be an equitable assignee (see the High Court decision of *Adcrop Pte Ltd v Gokul Vegetarian Restaurant and Cafe Pte Ltd (Rajeswary d/o Sinan and another, non-parties)* [2023] SGHC 152 at [67]–[70]);

(c) whether certain representations were made giving rise to an implied agreement or collateral contract between the parties and whether representations were made without any authority (see the High Court decision of *6DM (S) Pte Ltd v AE Brands Korea Ltd and others and another matter* [2022] 3 SLR 1300 at [138]–[148]); and

(d) whether there was a common understanding on party A's liability to pay party B when it was paid by party C, whether a party failed to present relevant documents under the written contract, and whether there was evidence that a party had obtained good title to cargo (see the High Court decision of *BWF v BWG* [2020] 3 SLR 894 at [57]–[70]).

16 Ultimately, as explained by the High Court in *Founder Group (Hong Kong) Ltd (in liquidation) v Singapore JHC Co Pte Ltd* [2023] SGHC 159 (at [26]), the reason for adopting the "triable issue" standard is because if the creditor can satisfy the insolvency court that a civil court would enter summary judgment in its favour, it would then be a waste of time, costs, and judicial resources to dismiss the winding up application and divert the creditor to the civil court to litigate its dispute in the usual way. However, if the debtor can raise a triable issue, then the insolvency court should dismiss the winding up application and send the parties to a civil court to litigate the dispute at hand. This is because the insolvency court "is generally not in the best position to

adjudicate on the merits of a commercial dispute without a proper ventilation of the evidential disputes through a trial" before the civil court (see *Pacific Recreation* at [16]).

The defendant has not raised triable issues

17 With these principles in mind, I come to the present case. In my judgment, while the claimant has raised a *prima facie* case that the defendant is unable to pay its debts pursuant to s 125(2)(*a*) read with s 125(1)(*e*) of the IRDA, the defendant has not raised any triable issue that would compel me to either dismiss or stay CWU 87.

18 Turning first to the claimant's *prima facie* case, it cannot be seriously disputed that the defendant was well aware that the Trust Receipt was due on 8 August 2022. In this regard, the defendant seemingly challenges the due date of the Trust Receipt by relying on cl 8 of Annex 2 to the Letter of Offer dated 13 July 2021 ("Clause 8"). In this regard, Clause 8 provides as follows:[1]

> The relevant EFS Trade Facilities shall be settled on or before their respective due dates.
>
> Notwithstanding aforesaid, all amounts (whether principal, interest, commission, fees or otherwise) owing under the EFS Trade Facilities shall be repaid in full on the earlier of (i) the date falling 12 months from each utilisation date or (ii) the date falling 18 months from the date of acceptance of this Letter.
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> …

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[1] 2nd Affidavit of Lim Chow Yang dated 30 June 2023 at p 168.

Thus, the defendant argues that since the Trust Receipt was drawn down on 10 May 2022, the effect of Clause 8 is to make the repayment due date to be 9 May 2023, being 12 months from the draw down (or utilisation) date.

19 In my view, this argument is a non-starter. It is quite clear that each Trust Receipt would have its own specified tenor and non-payment by that date would result in consequences, including default interest. It therefore makes no commercial sense, from a bank's perspective, to voluntarily have Clause 8 automatically extend that tenor to 12 or 18 months, as the case may be. Rather, the commercial purpose behind Clause 8 is plainly as an acceleration clause, in that it will accelerate the due date for repayment to either 12 or 18 months if the specified tenor is more than 12 or 18 months, as the case may be. As such, it is clear that the Trusts Receipt was due on 8 August 2022.

20 In any event, the defendant also acknowledged the same in its letter dated 17 October 2022 to SLB that "the outstanding amount with Maybank as on date is USD 177,450 plus all accrued interest" and that "we have full intention to settle this amount and we need some more time to settle this overdue trust receipt".[2] As such, the defendant's reliance on Clause 8 at the hearing before me is clearly an afterthought when it plainly knew, as evidenced by its 17 October 2022 letter, that it was in default of the Trust Receipt as of 8 August 2022.

21 Despite this, the defendant defaulted in paying the Trust Receipt when it first fell due on 8 August 2022, and failed to make payment on two subsequent occasions: (a) when SLB issued a letter of demand dated 25 October 2022; and

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[2] 2nd Affidavit of Lim Chow Yang dated 30 June 2023 at para 16 and p 238.

(b) when SLB issued an SD dated 16 November 2022. This therefore establishes the claimant's *prima facie* case against the defendant. Given this, it would be appropriate to allow CWU 87 unless the defendant can raise any triable issue, which, in the present case, is what the defendant has alleged to be a genuine and serious cross-claim equal to or exceeding the debt.

The claimant did not wrongfully exercise its discretion to recall the banking facilities

22 The defendant's first argument that a triable issue exists is that the claimant had wrongfully exercised its discretion to recall the banking facilities, including the EFS Trade Facility. In this regard, the claimant relies on a number of clauses in the terms and conditions of the various facilities.[3] It is not necessary to go through these clauses, save to say that the claimant relies on them for the effect that it is contractually entitled to recall the entire banking facilities granted to the defendant in view of the defendant's default in making repayment of the overdue Trust Receipt. The defendant argues that the claimant had wrongfully exercised its discretion under these clauses because the claimant had renewed the EFS Trade Facility through the debit of the renewal fee on 28 August 2022. This renewal of the EFS Trade Facility gave rise to the defendant's legitimate expectation that it can continue to utilise the EFS Trade Facility even though it had defaulted on paying for the Trust Receipt *before* this renewal.

23 I reject the defendant's argument that a triable issue exists for the following reasons. First, the defendant has not sufficiently explained *why* the

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[3] 2nd Affidavit of Lim Chow Yang dated 30 June 2023 at paras 27–30.

claimant's exercise of its discretion to recall the banking facilities was done wrongfully. It is important for the defendant to explain this because it is reasonably arguable that the courts have held that contractual discretions, even if framed in absolute terms, need to be exercised within reasonable boundaries (for a comprehensive and masterful summary of the law in this area, see David Foxton QC, "Controlling Contractual Discretion", a presentation given at the Attorney-General's Chambers (9 January 2018)). In this regard, there are two methods a court may use to limit a party's exercise of contractual discretion (see generally Ong Ken Wei, "The Limits to Contractual Discretion" (2021) 33 SAcLJ 919):

(a) The first method is to interpret the scope of the relevant clause and determine whether compliance is to be measured to the objective or subjective standard of reasonableness (see the High Court decision of *ABN AMRO Clearing Bank NV v 1050 Capital Pte Ltd* [2016] 1 SLR 186 at [80]–[85]).

(b) The second is to use implied terms to the effect that: (i) the contractual discretion will be exercised objectively reasonably (see the High Court decision of *Koh Kim Teck and another v Credit Suisse AG, Singapore Branch* [2019] SGHC 82 at [36]–[38], where the court rejected this argument because there was no gap in the contract); or (ii) the contractual discretion will not be exercised arbitrarily, capriciously, or irrationally (see the High Court decision of *TYC Investment Pte Ltd and others v Tay Yun Chwan Henry and another* [2014] 4 SLR 1149 at [217]–[218]). In the context of an employment contract, the UK Supreme Court adopted an expanded default set of implied terms to control the exercise of a contractual discretion (see the

UK Supreme Court decision of *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661, applied by the High Court in *Leiman, Ricardo and another v Noble Resources ltd and another* [2018] SGHC 166 at [112]–[114]).

24 More broadly, the reason for the control of a party's exercise of a contractual discretion is because when two parties contract with each other to confer a discretion on one party, the courts will not allow the other party to be subjected to the first party's uninhibited whim (see the English Court of Appeal decision of *Abu Dhabi National Tanker Co v Product Star Shipping Ltd, The Product Star (No 2)* [1993] 1 Lloyd's Rep 397 at 404, referred to in the recent New Zealand Court of Appeal decision of *Philip John Woolley v Fonterra Co-operative Group Limited* [2023] NZCA 266 at [94]).

25 In the present case, apart from alluding to the claimant's renewal of the EFS Trade Facility, the defendant has not explained why that act of renewal would curtail the claimant from exercising its absolute discretion to recall the banking facilities. This is because the claimant has provided clear reasons why it recalled the banking facilities, this being the defendant's failure to repay, among other things, the sum owing under the Trust Receipt. It is not as if the claimant decided to recall the banking facilities without any reason. In any event, the Appellate Division of the High Court has in *Dong Wei v Shell Eastern Trading (Pte) Ltd and another* [2022] 1 SLR 1318 ("*Dong Wei*") observed, albeit in *obiter* remarks, that the limitations on contractual discretion should not apply to a discretion to terminate a contract, for this would limit the parties' freedom to contract (at [92]). As such, even if the claimant had not provided clear reasons for recalling the banking facilities, the Appellate Division's remarks in *Dong Wei* would preclude a court from even questioning whether

the claimant had exercised its discretion wrongfully, since this was a discretion to terminate the contracts that underlie the various banking facilities.

26 Furthermore, it must be kept in mind that even if the claimant had renewed the EFS Trade Facility, that act of renewal does not entitle the defendant to ignore clear contractual provisions which oblige it (the defendant) to repay sums as they fell due, for which failure to do so may result in the recalling of the entire banking facilities. Hence, put another way, the claimant's act of renewal did not give the defendant a legitimate expectation that it could draw down on the available line of credit without regard to the governing contractual provisions. Rather, the legitimate expectation, if at all, was that the defendant could continue to draw down on the available credit limit, subject to the governing contractual provisions, which include the obligation to repay sums as they fell due or be attended with consequences such as the recalling of the entire banking facilities.

27 Finally, even assuming that the claimant had wrongfully exercised its discretion to recall the banking facilities, the defendant has not properly explained how that led to its alleged loss of at least US$933,300. To begin with, the defendant did not apply for any credit from the claimant in respect of the virgin coconut oil transactions in September 2022, especially in respect of the purchase contract with Vijayanagar Foods & Nutraceuticals Pvt Ltd of India for two containers of virgin coconut oil worth US$292,800. And even if the defendant did apply for credit, the available credit for the defendant to draw down on at that point was less than US$50,000. As such, even if the claimant had wrongfully exercised its discretion to recall the banking facilities on 25 October 2022, it remains that when the defendant entered into the relevant transactions in September 2022, it did not apply for any credit from the claimant,

nor could it have obtained sufficient credit to cover the cost of the transactions concerned. There is thus no causal connection between the claimant's exercise of its discretion to recall the banking facilities with the defendant's purported loss arising from the virgin coconut oil transactions in September 2022. As for further virgin coconut oil transactions that may have occurred after the banking facilities were recalled on 25 October 2022, the defendant has provided no particulars of these supposed transactions and how it suffered losses of at least US$933,300.

The defendant's argument that there was no letter of offer does not assist it

28 While the defendant's counsel, Mr Lim Tean, did not make any submissions on this point in writing or before me, it appears from the defendant's affidavits filed in support of SUM 1741 that it raises a second triable issue. This is that since the claimant never issued a letter of offer in respect of the EFS Trade Facility renewed on 28 August 2022, the claimant was wrong in relying on the various clauses in the Letter of Offer dated 13 July 2021, which had expired by then.

29 This argument is a non-starter because if the defendant recognises that it had not accepted any new letter of offer that governs the EFS Trade Facility that was renewed on 28 August 2022, then there would simply be no trading facility available to the defendant after the expiration of the EFS Trade Facility from the Letter of Offer dated 13 July 2021. In this case, it may well be that the defendant is entitled to a refund of the renewal fee of S$6,343.88, but by the defendant's own assertion that it had not accepted any new letter of offer, it must follow as a matter of law that there was simply no new trading facility that the defendant could draw down on in any event.

Conclusion

30 For the reasons above, I do not find that the defendant has raised any genuine and serious cross-claim equal to or exceeding the debt in the SD. I therefore allow CWU 87 and dismiss SUM 1741.

31 Unless the parties are able to agree, they are to tender their submissions on the appropriate costs order within 14 days of this decision, limited to seven pages each.

Goh Yihan
Judicial Commissioner

Ng Yeow Khoon, Claudia Marianne Frankie Khoo and Tham Xue Yi Fiona (Shook Lin & Bok LLP) for the claimant;
Lim Tean (Carson Law Chambers) for the defendant.