IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2025] SGCA 35

Court of Appeal / Civil Appeal No 47 of 2024

Between

Singapore Commodities Group Co., Pte. Ltd.

… *Appellant*

And

Founder Group (Hong Kong) Limited (in liquidation)

… *Respondent*

In the matter of Companies Winding Up No 120 of 2022 and Summons No 620 of 2024

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

And

In the matter of Singapore Commodities Group Co., Pte. Ltd.

Between

Founder Group (Hong Kong) Limited (in liquidation)

… *Claimant*

And

Singapore Commodities Group
Co., Pte. Ltd.

… *Defendant*

JUDGMENT

[Civil Procedure — Payments into and out of court]

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

[2025] SGCA 35

Court of Appeal — Civil Appeal No 47 of 2024
Steven Chong JCA, Kannan Ramesh JAD and Ang Cheng Hock J
16 May 2025

21 July 2025 Judgment reserved.

Ang Cheng Hock J (delivering the judgment of the court):

1 This appeal concerns the question of whether a sum of moneys that had been paid by a company (the appellant) into court, under an order of court, in the course of legal proceedings against the company, should be paid out to its purported creditor (the respondent). The issue is complicated by the fact that the order for payment into court and the later order for payment out were all made after a winding-up application had been filed against the appellant by the respondent, and which had yet to be heard and determined by the court. The insolvency context and its attendant considerations therefore form the backdrop to the question of whether an order for the payment out of the sum held in court should be made.

2 There is a further issue which lends an added complexity to this appeal – it is argued that the appellant, through its counsel below, had conceded that the order for payment out should be made in favour of the respondent, but now

seeks to resile from the concession in this appeal. The appellant, with new counsel on board for the appeal, disputes that any concession had been made.

3 A judge of the General Division of the High Court (the "Judge") ordered that the sum held in court be paid out to the respondent and granted leave for the respondent to withdraw its winding-up application against the appellant. After a careful consideration of the parties' submissions and the decision below, we have decided to allow the appeal. We proceed to set out the material facts and explain the reasons for our decision.

Facts

4 The appellant is Singapore Commodities Group Co, Pte Ltd ("SG Commodities"), a Singapore-incorporated company, and the respondent is Founder Group (Hong Kong) Limited ("Founder Group"). Founder Group is a company incorporated in the Hong Kong Special Administrative Region ("HKSAR").

5 Prior to 2020, both parties were part of a group of companies that was owned and controlled by Peking University Founder Group Company Limited ("PUFG"), a company incorporated in the People's Republic of China (the "PRC"). In February 2020, reorganisation proceedings were commenced against PUFG in the Beijing First Immediate People's Court. As part of the reorganisation process, a consortium of strategic investors for PUFG's reorganisation was formed. These strategic investors acquired some of PUFG's assets, including SG Commodities. SG Commodities henceforth fell under the ownership and control of the strategic investors, while Founder Group remained under the ultimate ownership of PUFG.

The Alleged Debt and statutory demand

6 On 19 July 2021, Founder Group was wound up by a court of the HKSAR. On 18 October 2021, the liquidators of Founder Group (the "Liquidators") were appointed. The Liquidators reviewed the company's books and discovered that an amount of US$14,117,585.50 in trade debts (equivalent to HK$109,693,639.34 based on the prevailing exchange rate as at 1 December 2021) (the "Alleged Debt") was purportedly due and payable by SG Commodities to Founder Group. The Alleged Debt was said to have arisen from a copper cathode purchase contract between the parties dated 17 December 2015 (the "Purchase Contract"), pursuant to which SG Commodities agreed to purchase 3,000 tonnes (+/- 5%) of copper cathodes from Founder Group. The existence of the Alleged Debt was said to also be evidenced by an invoice issued by Founder Group to SG Commodities in December 2015 for copper cathodes and two audit confirmations sent from SG Commodities' auditors in Singapore and the PRC to Founder Group in January 2019.

7 On or around 1 December 2021, the Liquidators issued a letter to SG Commodities, demanding that the Alleged Debt be paid to Founder Group within 14 days. SG Commodities did not provide a response or make payment for the Alleged Debt.

8 On 18 February 2022, the Liquidators issued a statutory demand to SG Commodities pursuant to s 125 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) (the "IRDA") for the sum of HK$109,580,698.65 (as at 11 February 2022) to be paid within 21 days (*i.e.*, by 14 March 2022). The figure of HK$109,580,698.65 was equivalent to US$14,117,585.50 as at 11 February 2022.

9 On 7 March 2022, SG Commodities requested for copies of the audit confirmations and the underlying contractual documents in support of the Alleged Debt. The Liquidators provided SG Commodities with the relevant supporting documents one day later, and indicated that they would only be willing to give SG Commodities a one-week extension to respond to the statutory demand (*i.e.*, by 21 March 2022). The parties subsequently attempted to negotiate a standstill of all legal proceedings against SG Commodities and amicably resolve the claim, but were ultimately unable to reach any resolution.

10 In this judgment, for easier comprehension, we will use the terms "Founder Group" and the "Liquidators" interchangeably, and any subsequent references to Founder Group taking a certain action or adopting a certain position must be read to refer to the Liquidators of Founder Group taking such action or adopting such position.

The events leading to the payment of moneys into court

11 On 12 April 2022, SG Commodities filed a request for arbitration (the "Arbitration") before the China International Economic and Trade Arbitration Commission ("CIETAC") pursuant to cl 13 of the Purchase Contract. Clause 13 was an arbitration clause which provided that the parties were to attempt to resolve all disputes in connection with the Purchase Contract or the performance of the Purchase Contract through friendly discussion, failing which, the controversy or claim should be submitted to CIETAC for arbitration, to be conducted in Beijing in accordance with CIETAC's arbitration rules. Clause 13 further provided that the governing law of the Purchase Contract was PRC law.

12 In the Arbitration, SG Commodities sought declaratory relief that the Alleged Debt did not exist. SG Commodities disputed the existence of the

Alleged Debt on two bases. First, that the Purchase Contract was "null and void" under Art 146 of the Civil Code of the PRC because the parties had no intention to buy or sell copper cathodes at the time the Purchase Contract was signed. Instead, the Purchase Contract was solely for the purposes of accounting arrangements and bookkeeping. Second, that Founder Group had never delivered any copper cathodes to SG Commodities under the Purchase Contract. Founder Group received a letter from CIETAC enclosing a copy of the request for arbitration on 10 May 2022.

13 On 27 May 2022, Founder Group applied for SG Commodities to be wound up in HC/CWU 120/2022 ("CWU 120"). There were two grounds for the winding-up application. First, that SG Commodities had not made payment for the Alleged Debt as of 27 May 2022. Section 125(1)(*e*) of the IRDA provides that the court may order the winding up of a company if the company is unable to pay its debts. Under s 125(2)(*a*) of the IRDA, a company is deemed unable to pay its debts within the meaning of s 125(1)(*e*) of the IRDA if the company, for three weeks after the service of a statutory demand by a creditor to whom the company is indebted in a sum exceeding $15,000, has neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor. Founder Group thus took the position that SG Commodities should be deemed unable to pay its debt pursuant to s 125(2)(*a*) of the IRDA and should be wound up (the "insolvency ground"). Second, further and/or in the alternative, Founder Group claimed that it was just and equitable for SG Commodities to be wound up within the meaning of s 125(1)(*i*) of the IRDA (the "just and equitable ground"), the particulars of which are not material for the determination of this appeal.

14 The parties filed their written submissions for CWU 120 on 22 September 2022. SG Commodities disputed the existence of the Alleged Debt and further submitted that the winding-up application should be dismissed in light of the CIETAC arbitration clause. Founder Group took the contrary position that SG Commodities had already admitted to the Alleged Debt in terms of both liability and quantum, and that the available documentary evidence before the court proved the existence of the Alleged Debt. Accordingly, Founder Group argued that SG Commodities was abusing the process of the court by trying to get the winding-up application stayed or dismissed on the basis of the arbitration clause. Founder Group further asserted that, if one was to take SG Commodities' case at its highest, *i.e.*, that the Purchase Contract was null and void, that would mean that there was no valid arbitration agreement to justify a stay or dismissal of the winding-up application.

15 On 28 September 2022, before the hearing of CWU 120, SG Commodities applied for leave in HC/SUM 3591/2022 ("SUM 3591") to provide security for Founder Group's claim for the Alleged Debt by way of a payment of an equivalent sum of moneys into court (the "Sum"), pending the determination of CWU 120 and the ongoing Arbitration. In the affidavit filed in support of SUM 3591, SG Commodities took the position that, as it was willing to pay the equivalent sum of moneys into court to secure the disputed Alleged Debt, the Liquidators of Founder Group should not be allowed to rely on the claim to support the winding-up application in CWU 120.

16 The application in SUM 3591 was heard on 29 September 2022. At the hearing, Founder Group agreed that CWU 120 ought to be stayed upon the payment of the Sum into court, notwithstanding the fact that it had alternative

grounds for seeking the winding up of SG Commodities (*i.e.*, the just and equitable ground). The Judge thus ordered that leave be granted to SG Commodities to provide security for Founder Group's claim in the amount of US$14,117,585.50 by payment into court of an equivalent sum, pending the determination of CWU 120 and the ongoing Arbitration (the "Payment In Order"). The Payment In Order reads as follows:

> **IT IS ORDERED THAT:**
>
> 1. Pursuant to Section 130(1) of the Insolvency, Restructuring and Dissolution Act 2018, the [appellant] be and is hereby granted leave to provide security for the [respondent's] claim of US$14,117,585.50, by way of payment of an equivalent sum of monies into Court, pending the determination of HC/CWU 120/2022 and the ongoing arbitration proceedings at the China International Economic and Trade Arbitration Commission arising from or related to such claim.
>
> 2. The security to be provided under paragraph 1 above shall be provided within 5 Singapore business days of the date of this order.
>
> 3. The costs of and incidental to this application shall be costs in the cause.

17 As can be seen from its opening words, the Payment In Order was made pursuant to s 130(1) of the IRDA. Section 130(1) provides that a disposition of the property of the company made after the commencement of the winding up by the court is void unless the court otherwise orders, with such an order being commonly referred to as a validation order. However, during the hearing of SUM 3591, the parties did not make any arguments as to whether the payment in of the Sum amounted to a "disposition" of the SG Commodities' property within the meaning of s 130(1) of the IRDA. The parties also did not make any submissions touching on the well-established considerations for a validation order to be granted under s 130(1) of the IRDA. While this was probably

because there was no serious objection to the Payment In Order by Founder Group, this raises some concerns which we address more fully below.

18 At the same hearing, the Judge also ordered that CWU 120 be stayed until further order, and for SG Commodities to pay Founder Group the latter's costs thrown away as of 29 September 2022.

The Arbitration

19 During this period, the Arbitration proceedings were also underway. On 24 June 2022, Founder Group objected to the jurisdiction of the arbitral tribunal (the "Tribunal"). The basis for Founder Group's jurisdictional objection was that the entire premise of SG Commodities' claim was that the Purchase Contract was fabricated and therefore the arbitration clause contained in the Purchase Contract was, on SG Commodities' own case, invalid. The jurisdiction issue was eventually dealt with by the Tribunal together with the substantive merits of the claim.

20 On 14 March 2023, Founder Group submitted its defence in the Arbitration, which was stated to be without prejudice to its objections to the Tribunal's jurisdiction. Significantly, Founder Group did not file a counterclaim in the Arbitration for a declaration that the Alleged Debt existed or any relief that SG Commodities had to pay the Alleged Debt.

21 The Arbitration hearing took place on 8 June 2023, and the arbitral award (the "Award") was issued on 20 November 2023. In relation to the jurisdictional challenge, the Tribunal observed that Founder Group's jurisdictional objection was premised on SG Commodities' claim that the Purchase Contract was invalid. The Tribunal held that SG Commodities did not

provide sufficient evidence or legal basis for its claim that it did not intend to sign the Purchase Contract and/or that some of the clauses in the Purchase Contract were invalid. Moreover, as the Purchase Contract had been "established and effective in accordance with the law", it could form the basis for the Tribunal's determination of the substantive rights and obligations of the parties. As the Purchase Contract was valid and could be used as the basis for the Tribunal's determination of the rights and obligations of both parties, and Founder Group in fact believed that the contract was valid, the arbitration clause was effective. In any event, Art 19 of the Arbitration Law of the PRC provided that "the arbitration agreement exists independently, and the modification, rescission, termination or invalidity of the contract shall not affect the validity of the arbitration agreement". For these reasons, the Tribunal held that it had jurisdiction over the dispute and dismissed the jurisdictional challenge.

22 Turning to the substantive merits of the case, the Tribunal held that SG Commodities had failed to provide sufficient evidence to prove its case that the Purchase Contract was signed solely for "accounts processing" purposes. The Tribunal therefore rejected SG Commodities' request for declaratory relief that the Alleged Debt did not exist. However, the Tribunal also found that there was reason to doubt Founder Group's case that the Purchase Contract had actually been performed and that there was a creditor-debtor relationship between the parties. This was because: (a) Founder Group had not submitted any relevant evidence regarding the delivery of the copper cathodes (such as a bill of lading or waybill) and had indicated that it was unclear about the delivery location, the country of origin of the copper cathodes and the quality of the copper cathodes purportedly delivered; (b) the Purchase Contract did not stipulate the delivery terms on which the contract price was based and Founder Group did not provide evidence to explain the delivery conditions of the

purported delivery of the copper cathodes; and (c) the audit confirmation letters were insufficient to prove the existence of the Alleged Debt. The Tribunal thus had reason to doubt Founder Group's claim that it had fulfilled its delivery obligations under the Purchase Contract.

23 In the result, the Tribunal expressly concluded that, while it rejected SG Commodities' request for a declaration that the Alleged Debt did not exist, that did not mean that the Tribunal found in favour of, or made any ruling on, Founder Group's position that the Alleged Debt existed. It was of particular importance that Founder Group had not raised a counterclaim in the Arbitration. In this regard, the material portion of the Award reads:

> In summary, the arbitral tribunal court does not support the Applicant's arbitration request. At the same time, the Arbitral Tribunal emphasizes that not supporting the Applicant's arbitration request does not mean that the Arbitral Tribunal has supported or made any of ruling on the Respondent's claim that it has contractual claims against the Applicant. It is worth noting that the Respondent only raised a defence in this arbitration, but did not raise a counterclaim in accordance with Article 16 of the <<Arbitration Rules>>.

The application for payment out of the moneys in court

24 After the Award was issued, SG Commodities wrote to Founder Group on 11 January 2024, indicating that SG Commodities intended to apply to court for: (a) an order that Founder Group be granted leave to withdraw CWU 120 given that the Award did not constitute a finding that Founder Group had a valid contractual claim against SG Commodities for the Alleged Debt under the Purchase Contract; and (b) the Sum held in court as security for the Alleged Debt be released and paid to SG Commodities.

25 On 18 January 2024, Founder Group responded and objected to the proposed orders. On the same day, Founder Group wrote to inform the court that the Tribunal had "rejected the reliefs sought by [SG Commodities]" and "refused to make a declaration that the [Alleged Debt] did not exist". Founder Group further requested that the stay of CWU 120 be lifted and for the Sum to be released to itself.

26 Both parties agreed that the stay of CWU 120 should be lifted. On 1 February 2024, the Judge lifted the stay by consent, and gave directions regarding the filing of affidavits and written submissions for CWU 120. On 29 February 2024, Founder Group applied in HC/SUM 620/2024 for the Sum to be paid out to itself (the "Payment Out Application").

27 In the Payment Out Application, Founder Group sought an order that the Sum be paid out to itself or, alternatively, an order that SG Commodities be wound up on just and equitable grounds in CWU 120. Founder Group's position in its supporting affidavit and written submissions was that the Tribunal's refusal to make a declaration that the Alleged Debt did not exist meant that, under PRC law (based on a legal opinion prepared by Founder Group's Chinese lawyers, Fangda Partners), the Award supported the finding that it was more likely than not that the Alleged Debt existed.

28 In its affidavits and written submissions, SG Commodities' position was that CWU 120 and the Payment Out Application ought to be dismissed. First, SG Commodities submitted that it was entitled to invoke the arbitration agreement between the parties, and that the Award was final and binding on both parties. As the Tribunal had upheld the validity of the arbitration clause, the present case was distinguishable from a separate winding-up application

commenced by Founder Group against a related entity of SG Commodities, Singapore JHC Co Pte Ltd, which formed the subject of this court's decision in *Founder Group (Hong Kong) Ltd (in liquidation) v Singapore JHC Co Pte Ltd* [2023] 2 SLR 554 ("*Founder Group (CA)*"). Second, the Award did not constitute a ruling that SG Commodities was liable to Founder Group for the Alleged Debt. SG Commodities relied on a legal opinion prepared by Zhong Lun Law Firm for its submission that, under PRC law, the Award did not find that it was more likely than not that the Alleged Debt existed. Accordingly, the Payment Out Application should be dismissed.

29 At the first hearing of CWU 120, counsel for Founder Group accepted that, if SG Commodities was correct that the Award did not conclusively determine the existence of the Alleged Debt, it was entirely open for Founder Group to commence fresh arbitration proceedings against SG Commodities in respect of the Alleged Debt. Founder Group's counsel informed the Judge that, according to the advice of its PRC counsel, there would be no abuse of process concerns, akin to the type arising under the common law rule in *Henderson v Henderson* (1843) 67 ER 313, that would preclude Founder Group from commencing fresh arbitration proceedings against SG Commodities in relation to the Alleged Debt.

30 During the hearing, the Judge also raised certain queries as to the nature of the moneys paid into court and the justification for why Founder Group should receive full payment ahead of SG Commodities' other unsecured creditors, if any. After the hearing, the Judge consolidated his concerns into a list of issues for the parties to address through further written submissions and at a further hearing. These issues raised can be briefly summarised as follows:

(a) Assume that a claimant commences a winding-up application against a defendant in reliance on the presumption of insolvency arising from the defendant's failure to satisfy a statutory demand, and the defendant disputes the claimant's debt on substantial grounds and pays money into court to secure a stay of the winding-up application while it challenges the debt. If the defendant "fails in its challenge", should the money paid into court be released to the claimant in satisfaction of its debt and, whether the payment out would operate to the prejudice of the defendant's other creditors.

(b) Whether Founder Group took the position that, if the Payment Out Application was dismissed and if the court declined to wind up SG Commodities on the just and equitable ground, there were reasons for the court to nevertheless allow the winding-up application on the basis that SG Commodities was insolvent.

(c) Whether either party took the position that SG Commodities was insolvent in or after May 2024 and, if so, the justification for such a view.

(d) Various clarifications pertaining to the burden of proof adopted by the Tribunal regarding: (i) the issue of whether the parties had entered into the Purchase Contract without an intention to perform it; and (ii) the issue of whether Founder Group had delivered the copper cathodes to SG Commodities, the nature of the Tribunal's findings on those issues and the effect of the Tribunal's findings on those issues in a potential future arbitration brought by Founder Group or in CWU 120, amongst other things.

31 As directed by the Judge, both parties subsequently filed further affidavits and further written submissions to address these issues.

32 Founder Group maintained its position that SG Commodities had failed to challenge the existence of the Alleged Debt in the Arbitration. Relying on two Hong Kong decisions, Founder Group submitted that the Sum was a "kind of security" for Founder Group's claim. As SG Commodities had "failed in the Arbitration", Founder Group was entitled to the payment out of the Sum, considering that SG Commodities was ostensibly cash flow solvent, and hence the payment out would not prejudice SG Commodities' other creditors. Founder Group also argued that SG Commodities ought to be precluded from raising the same arguments which had already been rejected in the Award, and, as there was no remaining *prima facie* dispute to be referred to arbitration, CWU 120 should not be stayed or dismissed.

33 Founder Group also took the position that, in the event that the Payment Out Application was refused, SG Commodities should be wound up on the basis that it was deemed unable to pay its debts given that: (a) notwithstanding the payment of the Sum into court, SG Commodities had not satisfied or secured the statutory demand within the prescribed timeline under s 125(2)(*a*) of the IRDA; and (b) despite SG Commodities' ostensible cash flow solvency, there remained material uncertainties regarding the company's ability to carry on as a going concern. As a further alternative, Founder Group argued that SG Commodities should be wound up on just and equitable grounds arising from concerns as to the conduct of the company's present management of its financial affairs and bookkeeping, the particulars of which are not of concern in this appeal.

34 As for the Award, Founder Group submitted that the Tribunal had found that the Purchase Contract was valid and binding under PRC law and that there was no evidence of the alleged "accounts processing". These findings were binding and, thus, neither party might relitigate these issues in a future arbitration. However, Founder Group asserted that the Tribunal's observations regarding the adequacy of the documentary evidence adduced by it regarding the Alleged Debt were merely *obiter dicta* and thus not binding in any future arbitration between the parties.

35 In its further written submissions, SG Commodities took the position that CWU 120 should be dismissed because: (a) the Award did not contain any finding that SG Commodities was liable to Founder Group for the Alleged Debt; and (b) in any event, there was no basis to wind up SG Commodities on the insolvency ground because the company remained solvent in and after May 2024, and the deeming provision in s 125(2)(*a*) of the IRDA had not been triggered because SG Commodities had in fact secured the claimed sum by payment of the Sum into court. *In the alternative*, SG Commodities argued that, if the Judge took the view that the Award had indeed established the existence of the Alleged Debt, then the Judge should order the Sum to be paid out to Founder Group instead of ordering the winding up of SG Commodities. In this regard, SG Commodities referred to various English authorities and submitted that Founder Group was in effect a secured creditor by reason of the payment into court. In other words, the Sum paid into court under the Payment In Order was not available for distribution to the general pool of SG Commodities' unsecured creditors.

The 19 July 2024 hearing

36 At the start of the hearing on 19 July 2024, Founder Group's counsel, Mr Sarjit Singh Gill, SC ("Mr Gill SC"), informed the Judge that, if SG Commodities agreed to the Payment Out Application, Founder Group would apply for leave to withdraw CWU 120. Counsel for SG Commodities at the hearing, Mr Tan Chuan Thye, SC ("Mr Tan SC"), replied to say that he had no instructions to consent to this. He then set out SG Commodities' position, namely, that: (a) SG Commodities accepted that the payment in of the Sum was security pending the outcome of the Arbitration; and (b) SG Commodities did not accept that the Tribunal had found that the Alleged Debt was established but accepted that it had "failed in the award".

37 In response, Mr Gill SC submitted that SG Commodities had lost the Arbitration, and that implied that the Alleged Debt existed. Referring to local and English authorities, Mr Gill SC then asserted that there was a general principle that the moneys paid into court would be excluded from the general estate of the payor in an insolvency scenario. Alternatively, if the Payment Out Application was refused, Founder Group's position was that SG Commodities should be wound up.

38 In his oral submissions, Mr Tan SC indicated that he would "keep [his] remarks reasonably brief and to the points … raised [by the Judge] to [Founder Group's counsel]". He began by addressing the issue, raised by the Judge, as to whether moneys paid into court could give rise to a security interest. Much of the submissions by Mr Tan SC was centred on his view that the payment in of the Sum did give rise to a security interest in Founder Group's favour. From the transcript of the hearing, it appears that the Judge was questioning whether it was indeed the case that the Sum was security for Founder Group's claim for

the Alleged Debt. At one point, in the course of his submissions that the payment in of moneys into court could give rise to a security interest, Mr Tan SC said that SG Commodities did not object to the Sum being paid out to Founder Group because SG Commodities had its chance in the Arbitration to prove that the Alleged Debt did not exist, but had failed to discharge that burden.

39 It is fairly evident from our reading of the transcript of the hearing on 19 July 2024 that Mr Tan SC had set out his client's position in a rather confusing and convoluted manner. This has resulted in much dispute in this appeal about what position SG Commodities took during the 19 July 2024 hearing and, more specifically, whether Mr Tan SC had abandoned the position taken in his written submissions and his client's affidavits that the Payment Out Application should be dismissed. Given that this is a key issue arising in this appeal, we address this more fully in our analysis below.

40 At the close of the 19 July 2024 hearing, the Judge made an order for the payment out of the Sum to Founder Group and granted leave for Founder Group to withdraw CWU 120. The order for the payment out of the Sum (the "Payment Out Order") was worded as follows:

> The sum of USD 14,117,585.50 paid into Court by Singapore Commodities Group Co., Pte. Ltd pursuant to HC/DRI 61/2022 filed on 7 October 2022, together with all interest accrued thereon, shall be paid out to Founder Group (Hong Kong) Limited (In Liquidation) in full and final satisfaction of the debt or alleged debt that was the subject matter of the arbitral award dated 20 November 2023, [2023] China International Arbitration Commission Act No. 2974, assigned Case Number M20220966.

41 On 7 August 2024, SG Commodities applied for a stay of enforcement and/or execution of the Judge's orders. The Judge granted a stay of the enforcement and/or execution of both the Payment Out Order and the order

granting Founder Group leave to withdraw CWU 120. The Judge also ordered that (a) the Sum and all interest accrued thereon; and (b) the costs of $85,000, for the Payment Out Application and CWU 120, plus all interest accrued thereon, to be paid out to Shook Lin & Bok LLP (*i.e.*, Founder Group's solicitors). The Judge directed that Shook Lin & Bok LLP was to hold the sums received in interest-bearing deposit on commercial terms upon the firm's undertaking to the court that it shall not deal with those sums otherwise than in accordance with the orders or directions of the court in CA/CA 47/2024. Shortly thereafter, SG Commodities filed this present appeal.

The Grounds of Decision below

42 The Judge issued his grounds of decision on 29 October 2024, which are set out in *Founder Group (Hong Kong) Ltd (in liquidation) v Singapore Commodities Group Co, Pte Ltd* [2024] SGHC 280 (the "GD").

43 The Judge held that it was common ground between the parties that the Payment Out Order was sought on the same procedural basis as the Payment In Order, namely, in the exercise of the court's discretion under O 3 r 2(2) of the Rules of Court 2021 (the "ROC 2021"). According to the Judge, he had therefore granted the Payment Out Order pursuant to an exercise of judicial discretion. This exercise of discretion involved a multifactorial analysis of all the relevant circumstances of the case, including: (a) whether Founder Group had a right to the Sum and, in particular, whether the Sum was security for Founder Group's claim; (b) the intention of the parties; (c) the new position taken by SG Commodities' counsel at the hearing on 19 July 2024; and (d) the rights and interests of third parties (GD at [57]–[61]).

44 In addressing the first factor, the Judge observed that there were three broad purposes for which a litigant might pay money into court. These were: (a) as an offer of compromise; (b) as the price for seeking and obtaining a forensic advantage; or (c) pursuant to a specific procedural rule that expressly prescribed the sum paid into court as "security" (GD at [76]). The Judge took the view that it was only if the moneys paid into court was pursuant to a specific procedural rule that expressly prescribed the sum paid into court as "security" that the payment in would give rise to a true security interest. Absent a legislative mandate, no security interest could arise over moneys paid into court (GD at [78] and [131]). As the Sum was not paid into court pursuant to a procedural rule with such an express stipulation, the payment in of the Sum did not create a security interest in favour of Founder Group for the Alleged Debt (GD at [132]).

45 The second factor involved a consideration of the parties' common intention at the time of the Payment In Order as to when the Sum should be paid out of court and to whom the Sum should be paid to. It was common ground that the parties intended the Sum to be paid out upon the issuance of the Award. However, there was ambiguity as to whether the Sum should be paid out to whoever was the "victor in the Arbitration" or in accordance with the Tribunal's finding as to whether the Alleged Debt existed. Although SG Commodities accepted that the parties' intention was for the Sum to be paid out according to the Tribunal's finding of whether the Alleged Debt existed, the Judge held that he could not give any weight to advancing the parties' intention because their intention had been frustrated by the fact that the Tribunal had expressly declined to find that the Alleged Debt either existed or did not exist (GD at [133]–[138]). As SG Commodities had only sought a negative declaration in the Arbitration (*i.e.*, that the Alleged Debt did not exist) and Founder Group chose not to bring

a counterclaim seeking a contrary positive finding of the existence of the Alleged Debt, the Tribunal had disposed of the dispute by finding, on the burden of proof, that SG Commodities had failed to prove that the Alleged Debt did not exist. This did not exclude the possibility that, in a hypothetical future arbitration commenced by Founder Group, it could also fail to prove the existence of the Alleged Debt (GD at [139]–[140]).

46 As for the third factor, the Judge found that Mr Tan SC had abandoned the position in SG Commodities' written submissions and advanced a new position in his oral submissions at the 19 July 2024 hearing. According to the Judge, Mr Tan SC adopted the new position that an order for the payment out of the Sum could be made simply because Founder Group was the victor in the Arbitration, although the Tribunal did not find that the Alleged Debt existed (GD at [147]). While the Judge expressed initial misgivings about accepting this new position, the Judge was ultimately persuaded to do so (GD at [149]–[154]).

47 Lastly, the Judge found that, without determining whether SG Commodities was solvent, it was highly unlikely that the rights or interests of third parties would or might be adversely affected by an order for the payment out of the Sum (GD at [159]). In the round, the Judge's decision to grant the Payment Out Order was primarily based on the third and fourth factors (GD at [162]).

48 Given the Judge's decision to grant the Payment Out Order, the parties agreed that Founder Group ought to be granted leave to withdraw CWU 120. The Judge therefore granted leave for Founder Group to withdraw CWU 120 (GD at [163]).

The parties' cases on appeal

49 SG Commodities makes three broad arguments in this appeal. First, the condition for payment out was not met. Based on the intentions of the parties at the time the Payment In Order was made, it was envisaged that the Sum would only be paid out if there was a determination in the Arbitration that the Alleged Debt was due and owing to Founder Group. Since there was no such finding in the Award, the court should not have made the Payment Out Order.

50 Second, if the transcript of the 19 July 2024 hearing is closely examined, one could ascertain that Mr Tan SC did not concede that SG Commodities was abandoning its primary position that the Sum should *not* be paid out to Founder Group because Founder Group had not established its legal entitlement to the Alleged Debt in the Arbitration. The statement by Mr Tan SC that SG Commodities did not object to the Sum being paid out to Founder Group, since SG Commodities had lost the Arbitration, should be interpreted as having been made in the context of SG Commodities advancing its *alternative* case that, if the Judge disagreed with SG Commodities' primary position, the Judge should allow the Payment Out Application instead of winding up SG Commodities because the Sum was "security" in favour of Founder Group. Third, if there was any such concession by Mr Tan SC, the court should grant permission to SG Commodities to withdraw that concession.

51 Founder Group argues that there was a clear concession by Mr Tan SC at the hearing on 19 July 2024 that the Sum should be paid out to Founder Group given that SG Commodities had failed in the Arbitration. It argues that SG Commodities' attempt to resile from its earlier concession on appeal amounts to an abuse of process, and there is no legitimate reason to allow SG Commodities to withdraw its concession.

52 As regards the merits of its application for payment out of the Sum, Founder Group suggests that the statement in the Award regarding the inadequacy of the documentary evidence adduced by Founder Group in the Arbitration is *obiter dictum*. In order for the *obiter dictum* to be consistent with the rest of the Award, the Award should logically be interpreted as endorsing the existence of, and SG Commodities' liability for, the Alleged Debt. However, if this statement is to be given the same weight as the finding that SG Commodities failed to prove that the Alleged Debt did not exist, then the Award would be a logical paradox. Founder Group argues that, in this situation, the Judge was correct to find that the parties' intention had been frustrated. Founder Group also takes the view that the Judge had rightly accorded weight to Mr Tan SC's concessions at the 19 July 2024 hearing and the fact that third parties were unlikely to be affected by the Payment Out Order. Founder Group also argues that the Judge should have further accepted that the Sum was security for the Alleged Debt, which is an additional factor in favour of granting the Payment Out Order.

53 At the hearing of the appeal, Mr Gill SC argued before us that, if the court decides to allow the appeal against the Payment Out Order, the court should also allow Founder Group to proceed with CWU 120. In other words, the order granting Founder Group leave to withdraw CWU 120 should be set aside to allow it to proceed with that winding-up application against SG Commodities.

Issues to be determined

54 From our review of the parties' cases, there are three issues that arise for our consideration in this appeal:

(a) First, whether the condition or conditions for the court to order the payment out of the Sum to Founder Group had been met.

(b) Second, whether SG Commodities' counsel had conceded at the hearing on 19 July 2024 that the court should order the payment out of the Sum to Founder Group.

(c) Third, if there was such a concession, whether the court should allow SG Commodities to withdraw the concession in this appeal.

Whether the condition or conditions for the court to order the payment out of the Sum to Founder Group had been met

55 As the Sum had been paid into court pursuant to an order, the question as to when and in what circumstances the Sum can be paid out to Founder Group must depend primarily on the terms of the Payment In Order and whether there are any statutory provisions that govern the entitlement of either party to the payment out of the Sum.

56 An order for the payment of moneys into court would ordinarily set out the condition for a subsequent payment out, either expressly or implicitly in the wording of the order itself or in the procedural rule pursuant to which the order was made. This is because moneys are not paid into court as an end in itself. For example, in the case of security for costs, it is clear that a party may only *prima facie* obtain a payment of the sum held in court if it is awarded costs in the proceedings. Another example would be the payment of money into court under O 14 of the ROC 2021. A payment into court made pursuant to O 14 of the ROC 2021 is made as an offer to settle a claim or counterclaim (*Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2014] 2 SLR 1285 at [24], referring to

the predecessor provision, O 22 of the Rules of Court (Cap 322, R5, 2006 Rev Ed)). Accordingly, O 14 of the ROC 2021 itself stipulates the conditions upon which the money may be accepted by a claimant in satisfaction of its claim or ordered to be paid out. It also stands to reason that an order for the payment in of moneys into court should provide the parties and the judge deciding a subsequent application for the payment out of such moneys a clear indication of the circumstances in which the payment out may be ordered.

57 There are also several English decisions which recognise that the payment out of moneys which are held in court is conditional. For example, see *Ex parte Bouchard, In re Moojen* (1879) 12 Ch D 26; *In re Gordon, Ex parte Navalchand* [1897] 2 QB 516; and *In re Ford, Ex parte the Trustee* [1900] 2 QB 211. The common thread in these cases is the court's view that the payment out of moneys held in court was conditional upon the occurrence of an event. The condition for payment out was either contemplated in the wording of the order for payment in, or in the provision pursuant to which the money was paid in.

The applicable statutory provision

58 The Judge held that, absent a provision in O 27 of the ROC 2021 providing for a defendant company in a winding-up application to pay money into court, the parties were agreed that the appellant paid the Sum into court pursuant to O 3 r 2(2) of the ROC 2021 (GD at [35]–[36]). SG Commodities argues for the first time, on appeal, that the applicable provision should be ss 128(2)(*a*) or 128(2)(*f*) of the IRDA instead. It is clear from the record that SG Commodities had ample opportunity to contest the applicability of O 3 r 2(2) in the hearing below. Nonetheless, as SG Commodities' argument pertains solely to a point of law and not fact, we consider its merits.

59 We are of the view that the applicable statutory provision that would allow the payment of moneys into court, and payment out of moneys from court, in the context of corporate insolvency proceedings, is s 128(2)(*f*) of the IRDA. Winding-up proceedings against SG Commodities had already commenced at the time it sought to pay the Sum into court. As the insolvency proceedings had started, the operative statutory provision should be in the IRDA. Section 128(2)(*f*) of the IRDA provides that:

> (2) The Court may, *on the winding up application coming on for hearing or at any time* on the application of the person making the winding up application, the company, or any person who has given notice that he or she intends to appear on the hearing of the winding up application —
>
> …
>
> (*f*) give such directions as to the proceedings as the Court thinks fit.
>
> [emphasis added]

60 The scope of the directions which the court may grant under s 128(2)(*f*) of the IRDA is extremely wide (see *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] 2 SLR 510 ("*Diamond Glass*") at [108], in relation to s 257(2)(*f*) of the Companies Act (Cap 50, 2006 Rev Ed) which was the predecessor of s 128(2)(*f*) of the IRDA). In *Diamond Glass*, this court held that the court had the power, under the equivalent provision to s 128(2)(*f*) of the IRDA, to order that a stay of a winding-up petition be made conditional upon the sum of the debt claimed in the statutory demand being paid into court (at [108]–[109]). Given that s 128(2)(*f*) of the IRDA applies to the application for the payment of the Sum into court, it should also apply to the Payment Out Application. Order 3 r 2(2) of the ROC 2021 only applies where there is no express provision in the ROC 2021 or any other written law; it is therefore inapplicable. However, as s 128(2)(*f*) of the IRDA is a general empowering

provision for the court to give directions as it thinks fit in winding-up proceedings, there is no specific guidance in that provision on whether payment out of the Sum should be ordered in favour of Founder Group in the circumstances that have arisen.

The terms of the Payment In Order

61 We proceed to examine the terms of the Payment In Order, in the context in which the order was made. By doing so, we can determine the condition (or conditions as the case may be), contemplated at the time of the Payment In Order, that must be satisfied before payment out of the Sum in favour of Founder Group should be made. If the condition is not satisfied, then Founder Group should not be entitled to an order for the Sum to be paid out to it, unless there is some other reason for such an order for payment out to be made, such as if SG Commodities consented to the Sum being paid out. For the reasons set out below, we are of the view that the condition in this case was that Founder Group must have established in the Arbitration that it was legally owed the Alleged Debt. Given that this condition was not satisfied, there is *prima facie* no basis for the Sum to be paid out to Founder Group.

62 The terms of the Payment In Order are that the Sum was paid in as "security" for Founder Group's claim to the Alleged Debt, "pending the determination of" CWU 120 and the Arbitration, both of which were ongoing proceedings at the time the order was made.

63 An examination of the context in which the Payment In Order was made makes clear the purpose of the order. Founder Group was claiming that the Alleged Debt was due and owing from SG Commodities. Founder Group issued a statutory demand in respect of the Alleged Debt, and when that was not

satisfied or secured within the time permitted by s 125(2)(*a*) of the IRDA, it filed CWU 120 based on, amongst other grounds, the deemed insolvency of SG Commodities. To counter the deemed insolvency provision in s 125(2)(*a*), SG Commodities applied for the Payment In Order. In its supporting affidavit, it was explained that the company was providing security for the Alleged Debt, and that it intended to contest the existence of the Alleged Debt in the arbitration that it had commenced. Given this context, when the Payment In Order refers to the Sum being "security" pending the determination of the Arbitration, it appears rather apparent that the parties must have envisaged that the Arbitration would make a finding as to the existence or otherwise of the Alleged Debt.

64 Examining the context also requires the court to objectively ascertain what the parties' intentions must have been at the time of the Payment In Order. In this regard, we agree with the Judge that the parties' intention at the time of the Payment In Order is relevant to a determination of whether the Payment Out Application should be granted (GD at [61] and [133]).

65 The Judge held that SG Commodities had accepted that the parties' intention, at the time of the Payment In Order, was that the Sum should be paid out according to the Tribunal's finding of whether the Alleged Debt did or did not exist. However, as the Tribunal had disposed of the Arbitration by expressly declining to find that the Alleged Debt either did or did not exist, the parties' intention had been frustrated, and no weight could be accorded to such intention (GD at [138]).

66 SG Commodities submits on appeal that, at the time of the Payment In Order, the parties intended that the Sum could only be paid out to Founder Group if the Tribunal made a positive finding that the Alleged Debt existed.

Since the Tribunal had expressly declined to find that the Alleged Debt existed, the Payment Out Order should not have been made. According to SG Commodities, the parties' intention was not frustrated because the outcome of the Arbitration did not render the carrying out of the parties' intention impossible, illegal or fundamentally different from what was originally contemplated in the Payment In Order. Instead, it was entirely in line with the parties' original intention that the Sum would not be paid out to Founder Group absent a positive finding by the Tribunal of the existence of the Alleged Debt.

67 Founder Group accepts that the parties intended at the time of the Payment In Order that the Sum would be paid out according to the Tribunal's finding of whether the Alleged Debt did or did not exist. In other words, the Sum should be paid to Founder Group if the Tribunal found that the Alleged Debt existed. Although Founder Group appears to be suggesting that the Award can be interpreted as endorsing the existence of the Alleged Debt, it submits that, if this is not the case, then the Judge is correct in holding that, absent a definitive finding by the Tribunal that the Alleged Debt exists, the parties' intention is frustrated. Accordingly, no weight should be given to the parties' intention in deciding whether the Sum should be paid out to Founder Group.

68 In our view, it is fairly clear that, when one examines the terms of the Payment In Order as well as the circumstances and context in which the application for payment in had been brought, both parties must have thought at the time the Payment In Order was made that the issue of the disputed Alleged Debt would be resolved one way or the other in the Arbitration. The two possible scenarios likely to have been contemplated by the parties as to what might happen after the Arbitration must have been that:

(a) If SG Commodities obtained its declaratory relief in the Award that the Alleged Debt did not exist, then it will likely be able to persuade the court to order the Sum to be returned, subject to SG Commodities not already being wound up, on other grounds, at the time of any such application for the Sum to be returned. If SG Commodities was in fact wound up, the appropriate recourse would likely be for its liquidators to apply for the Sum to be paid to them as part of SG Commodities' estate for distribution to the general pool of creditors in accordance with the order of priorities under s 203 of the IRDA.

(b) If Founder Group instead obtained an Award that the Alleged Debt ought to be paid to it, or at least some form of declaratory relief that the Alleged Debt was indeed due and owing, then it would likely be able to persuade the court to order the Sum to be paid out to it, provided of course that the court is satisfied that such payment would not prejudice the position of SG Commodities' other unsecured creditors.

69 However, as explained earlier, after the making of the Payment In Order, Founder Group decided not to mount any counterclaim in the Arbitration. Founder Group later explained to the Judge that it did this for tactical reasons, without any further elaboration. Before us, Founder Group explains that it had considered a counterclaim unnecessary, given the nature of SG Commodities' arbitration requests and the binary nature of the existence of the Alleged Debt. As already recounted, while the Tribunal found in the Award that SG Commodities had failed in obtaining its declaratory relief that the Alleged Debt did not exist, the Tribunal went on to expressly state that it was not making a ruling or finding that the Alleged Debt did exist. This was because Founder

Group had not provided evidence of the delivery of the copper cathodes and the terms of the purported delivery.

70 Given that the Tribunal made no finding in the Award that SG Commodities had failed to pay Founder Group under the Purchase Contract, it must mean that Founder Group had failed to establish in the Arbitration that it had an entitlement to the Sum. In its application, Founder Group suggested that the Award may be interpreted as endorsing the existence of the Alleged Debt, but we find that this is contradicted by the plain and unambiguous statement in the Award that the Tribunal's findings did not mean that the Tribunal supported or made any ruling on Founder Group's claim. In short, we find that the Award provided no support for Founder Group's position that it was entitled to payment.

71 We do not agree that there was any frustration of the parties' intention at the time of the Payment In Order. To begin with, the basis upon which the Sum was paid into court is not an agreement between the parties, but a court order. The Judge viewed the analysis as pertaining to the *consensus ad idem* between the parties, falling short of a contract (GD at [133]). However, it is not clear what and whether there was any agreement between the parties. The Payment In Order was not made by consent. Even if the court could discern exactly what the parties had agreed upon, such an agreement could only provide the context in which the terms of the Payment In Order should be understood. The circumstances under which the moneys in court should be ordered to be paid out must ultimately be based on the terms of the Payment In Order.

72 Following from this, we do not think that it is appropriate to characterise the Payment In Order, or the parties' intentions, as having been frustrated. The

doctrine of frustration is generally applied in the context of a contractual relationship between the parties. The basis for the application of the doctrine is where a supervening event occurs after the formation of the contract which renders a contractual obligation radically or fundamentally different from what had been agreed upon in the contract, such that a contracting party may argue that the parties should no longer be bound by their contract (see, *e.g.*, *Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd* [2014] 3 SLR 857 at [33]). On the other hand, a court order may only be discharged if a party applies to set aside the order, and an order can only be set aside in limited circumstances. In any event, there was no such application before the Judge.

73 In our judgment, while the condition for payment out was not expressly set out in the Payment In Order, we find that it is fairly clear that the order, when understood in its proper context, can only be read to mean that Founder Group would only be *prima facie* entitled to an order for the payment out of the Sum if it had established in the Arbitration that it was legally owed the Alleged Debt. The Payment In Order stipulates that the Sum was paid in as "security *for* [Founder Group's] *claim* of US$14,117,585.50" [emphasis added]. This must mean that the Sum may only be paid out to Founder Group if it has established in the Arbitration that it has a valid claim to the Sum. Founder Group's *prima facie* entitlement to an order for the payment out of the Sum is contingent on it obtaining an Award stating that it was legally owed the Alleged Debt. If Founder Group could not do so, the Sum should remain in court pending the outcome of CWU 120 given that the terms of the Payment In Order provide that the moneys were paid in pending the determination of the Arbitration *and* CWU 120. As explained above (at [70]), the Arbitration did not establish Founder Group as a creditor of SG Commodities. We therefore conclude that

there is no *prima facie* basis for any payment out order in Founder Group's favour.

74 As the condition for payment out was not fulfilled, the Payment Out Order should not have been made, unless there was some other reason for the court to have made such an order, such as if SG Commodities had conceded that payment out of the Sum ought to have been made to Founder Group. In fact, the Judge recognised that Founder Group had not established its right to the payment out of the Sum (see GD at [149]–[152]), but eventually did order the payment out because he took the view that SG Commodities' counsel had conceded its case on the payment out. It is to this issue that we now turn.

Whether SG Commodities had conceded at the 19 July 2024 hearing that the Sum should be paid out to Founder Group

75 Founder Group asserts that Mr Tan SC, as SG Commodities' then counsel, had conceded its case on the Payment Out Application during the hearing on 19 July 2024, and/or that he had admitted that the Payment Out Application should be allowed. According to Founder Group, SG Commodities has attempted to change its position or resile from its earlier concession in this appeal, which amounts to an abuse of the process of the court.

76 SG Commodities disputes this. As already mentioned (at [50] above), its position is that, during the hearing on 19 July 2024, Mr Tan SC did not abandon its *primary* position that the Payment Out Application should be dismissed because there was no finding by the Tribunal that the Alleged Debt existed. The statements made by Mr Tan SC that SG Commodities did not object to the Payment Out Application should be understood as part of SG Commodities' *alternative* position, that is, if the court disagreed with its

primary position, the Judge should grant the Payment Out Application instead of winding up the company.

77 Both parties rely on the decision of *Poh Huat Heng Corp Pte Ltd and others v Hafizul Islam Kofil Uddin* [2012] 3 SLR 1003 ("*Poh Huat Heng*"). In *Poh Huat Heng*, this court accepted that there are two possible grounds upon which a party can be precluded from opening up an issue which they had consented or agreed to in the court below: (a) where the agreement between the parties constitutes a consent order, which can only arise if there was a real agreement between the parties as opposed to a scenario where a party merely did not object to a course of action; or (b) where a statement by the counsel of one of the parties constitutes an admission (at [18]–[19]).

78 SG Commodities' position in its affidavits and written submissions in the lead up to the hearing on 19 July 2024 was clear. Its primary position was that Founder Group had not, in the Arbitration, established that it was a creditor of SG Commodities in respect of the debt claimed in the statutory demand. On that ground alone, because the condition for payment out to Founder Group had not been met, the Payment Out Application should be dismissed. However, SG Commodities' alternative position was that, if the court did not agree that Founder Group had not established that it was a creditor of SG Commodities in respect of the Alleged Debt, then the court should not wind up SG Commodities. The court should instead order the release of the Sum to Founder Group and dismiss CWU 120. The question before us is therefore whether SG Commodities had resiled from this position of having two alternative arguments during the 19 July 2024 hearing and merely adopted its alternative argument as its sole position. Put another way, did SG Commodities concede that the Sum should be paid out to Founder Group?

79 Having examined the transcript of the hearing on 19 July 2024, we do not think that SG Commodities had expressly abandoned its primary position that the Payment Out Order should not be made.

80 There are three portions of the 19 July 2024 hearing which the Judge and Founder Group rely on to show that SG Commodities had accepted that the court could order the payment out of the Sum to Founder Group simply because Founder Group was the "victor in the Arbitration". The first exchange took place after Founder Group's counsel, Mr Gill SC, indicated to the court at the outset of the hearing that the parties had, in their further written submissions, referred to authorities which purportedly stood for the proposition that moneys paid into court gave rise to a security interest. Mr Gill SC stated that he would be relying on those authorities in support of his application for the Sum to be paid out to Founder Group. He added that, if SG Commodities was willing to consent to the payment out or if the court ordered the payment out, Founder Group was willing to withdraw CWU 120. In response, Mr Tan SC sought to set out SG Commodities' position on the record:

> TanCT: If I may, Your Honour, just put my client's position on record. *I have no instructions to consent, but I am---certainly accept the authority of the cases which have been placed before Your Honour.*
>
> Court: Yes.
>
> TanCT: *I further accept that the payment in was security pending the outcome of the arbitration*, which had been filed by the time the payment in was made. The outcome of the arbitration is that my---is the company as claimant has paid on that basis where in the---what had as to whether the amount should be paid out. We do take issue with whether the award---
>
> Court: The scope of the award or the effect of the award.
>
> TanCT: *Well, whether the award also says that the contractual debt is established, that---that's---that we don't accept.*

> *But we do accept that we failed in the award.* We can't say again that there---the con---the no enforceable debt created on we---that we accept.
>
> Court: Yes. Yes. Thank you, Mr Tan.
>
> [emphasis added]

81 Reading this, we can discern that Mr Tan SC's submission here was three-fold: (a) he accepted the authorities indicating that a payment of moneys into court gave rise to a security interest; (b) he had no instructions to consent to the Payment Out Application; and (c) SG Commodities did not accept that the Award established the existence of the Alleged Debt, but agreed that it had not succeeded in its application for declaratory relief in the Arbitration.

82 In our view, the submissions by Mr Tan SC in this passage do not show that SG Commodities had consented to the Payment Out Application. Mr Tan SC had only accepted the legal proposition that a defendant's payment of a sum into court conferred a security interest over that sum in favour of the claimant. But the fact that the moneys paid into court are secured for a party's benefit does not necessarily mean that the moneys should be paid out to that party no matter what the circumstances may be. As explained above, the crucial question in an application for the payment out of moneys held in court is whether the condition (or conditions) for payment out is satisfied. The fact that Founder Group may have acquired a security interest over the Sum by SG Commodities paying the moneys into court does not necessarily mean that the condition for payment out is fulfilled. Mr Tan SC's acceptance of the weight of the authorities was therefore only limited to the issue of whether the payment in of the Sum gave rise to a security interest and did not extend to an acceptance that the Payment Out Application should be granted.

83 In any event, SG Commodities' further written submissions were structured such that the issue of the security interest was only discussed in its *alternative* case. This was because, in the event that the court was of the view that Founder Group had established its legal entitlement to the Alleged Debt, SG Commodities was trying to persuade the court that it should order the Sum to be paid out to Founder Group, instead of proceeding to wind up SG Commodities. It was in this context that both parties were in apparent agreement that the Sum was security for Founder Group's claim, and it should be paid out to it. Understood in the light of the written submissions, it cannot be said that SG Commodities had abandoned its primary position that the Payment Out Application should be dismissed. Accordingly, we do not think that the passage cited above (at [80]) indicates a clear acceptance by SG Commodities that the Payment Out Application may be granted.

84 The second passage is reproduced in full below:

> TanCT: I think we certainly saw it as payment in so that we could go to arbitration---
>
> Court: Yes.
>
> TanCT: ---to have the arbitration determine whether they were entitled to the debt that was alleged. In that sense, it was security, and I think the order reflects that.
>
> Court: No---okay, then we have to understand ve---or we have to be clear what we mean by "security". In the traditional sense, "security" means some sort of a proprietary interest which entitles a creditor to look to an asset to answer for a debt.
>
> TanCT: Yes.
>
> Court: It doesn't simply mean a fund out of---against which a creditor may have some personal right. So---
>
> TanCT: And I think we are in the former situation, and the order reflects that position.
>
> …

Gill: The---I'm sorry to interrupt, Your Honour, but in fact, I think Your Honour has over---allowed us to overcome that issue because the order was paid and the payment was validated pursuant to Section 130---

Court: No, that's a different point. That's disposition of the assets of the company.

Gill: Correct, yes. So if any creditors had wanted to oppose the payment into Court, it should have been done at that stage. Because once the Court makes a validation order, I think we fortify our argument about security---it fortifies our argument about security further.

Court: Okay.

Yes, Mr Tan.

TanCT: *Yes. Your Honour, that's our position---our primary posi---that's our position on the application for payment out. If the position is that the arbitration did not establish that the debt is in fact owed, and what---*

Court: That's your case?

TanCT: ***That is---it---that's the alternate, yes.***

Court: Not---

TanCT: Well, what hap---were---we---on the payment out---

Court: Yes.

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

[emphasis added in italics and bold italics]

85 The Judge observed that, in this passage, Mr Tan SC had submitted that SG Commodities did not have a claim to the Sum because it did not succeed in the Arbitration (GD at [145]). However, it is apparent to us that Mr Tan SC had

qualified that this was SG Commodities' alternative position, albeit somewhat ineptly. We acknowledge that the way Mr Tan SC addressed the Judge's queries made his submissions unclear, and this led to confusion and ultimately, misunderstanding. Mr Tan SC had initially stated that this was SG Commodities' "primary position" but later corrected that this was instead its "alternate" position. Given that this clarification was almost immediate, we do not think that this amounted to a clear and express abandonment of the position previously taken by SG Commodities in its written submissions and affidavits. In those submissions, SG Commodities had indicated that its primary position was that the Payment Out Application should be dismissed, but that in the event the court disagreed with its interpretation of the Award, the Payment Out Application should be allowed instead of granting the winding-up application. In our view, it is patently apparent that SG Commodities' main concern was that the Judge might decide to wind up the company in CWU 120, and this was the outcome it was trying to avoid.

86 The exchange in the third passage occurred shortly after the second passage. In response to SG Commodities' (alternative) submission that the Payment Out Application may be allowed, the Judge queried whether the Tribunal's mere refusal to find that the Alleged Debt did not exist was a sufficient basis to grant the Payment Out Application. To this, Mr Tan SC stated that SG Commodities did not object to the payment out of the Sum to Founder Group because SG Commodities had failed to discharge its burden of proof in the Arbitration:

> TanCT: At---it---I think our position is meant to be it's---it can be paid out or it's---rather, it was paid in pending us---at---being able to establish in the arbitration that the debt did not exist.

> Court: No, no. It can't---no, no, no. The money was not paid in as a bet. There was no---
>
> TanCT: No. We don't say that.
>
> …
>
> TanCT: *No---wait, I'm saying that we---the money should be paid---well, rather, we don't object to the money paying out because we had our chance in the arbitration to prove that the debt did not exist. We failed to discharge that burden.*
>
> Court: Then on what legal basis is the money being paid to them, unless it's a wager?
>
> TanCT: It's not a wa---
>
> Court: No, it has to be. Because the only legal basis, to be paid to them, is to satisfy a debt which the Tribunal found to exist. In other words, you could---this money could be paid out to them and leave aside issues of *Henderson v Henderson*.
>
> TanCT: Yes.
>
> Court: They could get an arbitral award that you owed them and they can come back and ask you for the money again.
>
> TanCT: Well, that, I think we expected the Tribunal---we expected the arbitration to be---to resolve positively.
>
> Court: Yes, correct. So that's what I'm saying. It has the triggering condition for payment to them cannot simply be you losing the arbitration. It has to be their debt being established.
>
> TanCT: *I think we---I think my position is, we take the consequences of how the parties chose to present their cases in the arbitration.*
>
> [emphasis added]

87 Given that this exchange followed closely after the discussion in the second passage, our view is that the statement by Mr Tan SC that his client did not object to the Payment Out Application should be understood as an elaboration of SG Commodities' alternative position.

88 In the final analysis, after having reviewed the entire transcript of the proceedings before of the Judge on 19 July 2024, we do not agree that the above passages, when read in context, showed that Mr Tan SC, on behalf of SG Commodities, had unequivocally abandoned its primary position that the Payment Out Application should be dismissed. SG Commodities therefore cannot be said to be abusing the process of the court in adopting its present position in this appeal. Further, as SG Commodities did not concede its case on the Payment Out Application, this is not a basis for granting of the Payment Out Application. Given our views as expressed above, that is, that there was no concession by Mr Tan SC of SG Commodities' primary position at the hearing on 19 July 2024, no issue of the withdrawal of concession arises for our decision.

Conclusion and orders made

89 For the reasons set out above, we allow the appeal. The Payment Out Order and the costs orders below in favour of Founder Group are both set aside.

90 We note that the Sum is presently being held by Shook Lin & Bok LLP, the solicitors of Founder Group, in interest-bearing deposit on commercial terms pursuant to an order made by the Judge on 20 September 2024. We order that Shook Lin & Bok LLP should continue to hold the moneys on interest-bearing deposit on commercial terms, upon the firm's undertaking to the court that it shall not deal with those sums otherwise than in accordance with further directions or orders from the court. As for the costs paid by SG Commodities below and held by Shook Lin & Bok LLP pursuant to the same order made by the Judge, those costs should be refunded to SG Commodities.

91 We also set aside the order granting Founder Group leave to withdraw CWU 120. Founder Group had asked for this order only because the Judge had made the Payment Out Order. Now that the Payment Out Order has been set aside, Founder Group is at liberty to proceed to argue the merits of CWU 120, which we remit to the Judge below for his determination.

92 In so far as Founder Group continues to rely on the Alleged Debt as a basis to wind up SG Commodities in CWU 120, a material consideration is that the Alleged Debt remains disputed. As we have explained above, the Award did not lead to a resolution of the dispute over the existence of the Alleged Debt. In *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") and *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 ("*AnAn*"), this court set out the approach a court should adopt when faced with a winding-up application where there is a dispute as to the defendant company's indebtedness. These principles were recently re-affirmed in *Founder Group (CA)*. In short, if the defendant company has raised triable issues, by showing that there exists a substantial and *bona fide* dispute in relation to a cross-claim or the existence of the debt, the insolvency court cannot determine the underlying dispute and will typically dismiss or, exceptionally, stay the winding-up application (*Pacific Recreation* at [23] and [25]; *Founder Group (CA)* at [28(a)]). If the liability is contested but the dispute is not raised in good faith or disputed on substantial grounds, the application to wind up the defendant company may be granted, subject to the statutorily stipulated conditions for winding up being satisfied (*Founder Group (CA)* at [28(b)]). If, however, the disputed debt is subject to an arbitration agreement, the *prima facie* standard should apply such that the winding-up proceedings will be stayed or dismissed as long as: (a) there is a valid arbitration agreement between the parties, and (b) the dispute falls within

the scope of the arbitration agreement (*AnAn* at [56]). If satisfied, the court will in most cases dismiss the winding-up application, provided that the dispute is not being raised by the defendant company in abuse of the court's process (*AnAn* at [110]).

93 In deciding CWU 120, it will be necessary to determine the validity of the arbitration agreement in the Purchase Contract and whether the dispute over the Alleged Debt falls within the scope of the arbitration agreement (see [92] above). In examining these issues, one key consideration is whether Founder Group is precluded by the doctrine of issue estoppel from taking certain positions regarding the arbitration agreement, given the Tribunal's rejection of Founder Group's argument that the arbitration agreement was invalid, and the Tribunal's findings as to the validity of the arbitration agreement and whether the dispute over the Alleged Debt falls within the scope of the arbitration agreement.

94 After CWU 120 is heard, and if it so transpires that CWU 120 is dismissed, the Payment In Order would have served its intended purpose, as both CWU 120 and the "ongoing arbitration" as per the terms of the Payment In Order would have been determined. In those circumstances, the Sum should be released back to SG Commodities.

95 SG Commodities is awarded the costs of this appeal fixed in the amount of $55,000 (inclusive of disbursements). The usual consequential orders relating to SG Commodities' undertaking as to costs are to follow. We also order that Founder Group pays SG Commodities the costs of the Payment Out Application, to be assessed if not agreed.

Further observations about the Payment In Order

96 As the appeal only pertains to the Payment Out Order and the leave granted for the withdrawal of CWU 120, the above analysis is dispositive of the present appeal. Nonetheless, we find it pertinent to make three brief observations in *obiter* about the Payment In Order.

97 During the hearing for the Payment In Order, the Judge stated that he was making the order as a means to resolve the winding-up application rather than because he accepted that there were no creditors who would be prejudiced by the payment into court.

98 First, in stating that the Payment In Order could be a manner of resolving the winding-up application, the Judge appears to have accepted that the payment in of the Sum would secure the Alleged Debt within the meaning of s 125(2)(*a*) of the IRDA. This is because the main ground for the winding-up application against SG Commodities was that the company was deemed unable to pay its debts under s 125(2)(*a*) read with s 125(1)(*e*) of the IRDA. Section 125(2)(*a*) operates only if the debtor has failed to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor within three weeks after the service of the statutory demand. In the present case, the statutory demand was not satisfied within the three-week window provided for in s 125(2)(*a*) of the IRDA. As such, there was a proper basis for Founder Group to have filed CWU 120 based on the deemed insolvency of SG Commodities. In trying to secure the claimed amount in the statutory demand only after the commencement of the winding up, SG Commodities ought to have applied for an extension of time to do so, but this was not done. If that had been done, the court would have to decide whether it would have been permissible to allow the payment into court as a means of securing the claimed debt beyond the

three-week window, given that CWU 120 had already been filed. This issue was not addressed by the parties and bears further consideration should it arise in an appropriate case in the future. We will simply observe that, as a general rule, when a winding-up application is pending determination, any attempt to pay money into court to secure the claims of an applicant creditor should be treated with some caution. This is because there is always a risk that sanctioning such bilateral arrangements would offend the *pari passu* principle of distribution, if a winding-up order is eventually made.

99 Second, in making the Payment In Order, the Judge relied on s 130(1) of the IRDA. Section 130 of the IRDA reads as follows:

> **Avoidance of dispositions of property and certain attachments, etc.**
>
> **130.**—(1) Any disposition of the property of the company, including things in action, and any transfer of shares or alteration in the status of the members of the company, made after the commencement of the winding up by the Court is, unless the court otherwise orders, void.
>
> (2) Any attachment, sequestration, distress or enforcement order put in force against the estate or effects of the company after the commencement of the winding up by the Court is, unless the Court otherwise orders, void.

100 Section 130(1) of the IRDA renders void any disposition of the property of the company made after the commencement of the winding up. Under s 126(2) of the IRDA, in the case where the court makes an order for winding-up of a company, winding up is deemed to have commenced at the time of the filing of the winding-up application. Hence, any disposition of property by the company after a winding-up application is *filed* is void unless the court orders otherwise.

101 For s 130(1) of the IRDA to apply, there must first be a "disposition" within the meaning of the provision. The provision ensures that the assets of the company are preserved in the company's liquidation, for the purpose of distribution, so as to ensure a *pari passu* distribution of assets to the pre-liquidation creditors (see *Centaurea International Pte Ltd (in liquidation) v Citus Trading Pte Ltd* [2017] 3 SLR 513 ("*Centaurea*") at [24]–[25] in relation to the predecessor provision of s 130 of the IRDA; *DGJ v Ocean Tankers (Pte) Ltd (in liquidation) and another appeal* [2024] 2 SLR 790 at [148]). Under s 130(1) of the IRDA, the court is empowered to validate a disposition that would otherwise be rendered void by that section. The principles governing when a validation order under s 130(1) of the IRDA should be made have been canvassed in previous cases. In general, such validation orders are only given when the court finds that the disposition by the company would benefit or has benefitted the company's unsecured creditors as a whole (see *Centaurea* at [30] and [34]; *Express Electrical Distributors Ltd v Beavis and others* [2016] 1 WLR 4783 at [56] in relation to s 127(1) of the Insolvency Act 1986 (UK) – that provision and s 130(1) of the IRDA are *in pari materia*).

102 Regrettably, the parties never addressed the Judge on whether the payment in of the Sum would amount to a disposition within the meaning of s 130(1) of the IRDA, or the principles to justify a validation order being granted under that provision. We take the view that there should have been a proper consideration of these issues before the court decided whether to grant the Payment In Order under s 130(1).

103 Third, there is the question of whether moneys paid into court will give rise to a security interest. A substantial part of the parties' submissions below, and the GD, considered this issue. SG Commodities does not take issue with the

Judge's decision on this point in its appeal. As a resolution of this question would not be determinative of the present appeal, we are of the view that it is more appropriate to consider this issue on a future occasion, after the benefit of full arguments before this court. It suffices for us to say, for present purposes, that there are authorities, both foreign and local, which appear to support the proposition that moneys which are paid into court in respect of a claim, or as security for a potential adverse costs order, would usually fall outside the pool of assets available for general distribution to the unsecured creditors in the event of the winding-up of the payor. Having said that, it may well be the case that the payment in of moneys into court may *not* always create a security interest, as the Judge pointed out in his grounds of decision (see GD at [68] and [76]–[79]), and much will depend on the precise circumstances of the payment into court in each case. But, as mentioned, this is an issue that is best left to be resolved on another occasion.

Steven Chong
Justice of the Court of Appeal

Kannan Ramesh
Judge of the Appellate Division

Ang Cheng Hock
Judge of the High Court

Ong Boon Hwee William, Koh Zhen-Xi Benjamin and Tang Jia Ding Justin (Allen & Gledhill LLP) for the appellant;
Sarjit Singh Gill *SC*, Hoang Linh Trang, Chu Shao Wei Jeremy and Edwin Yang Yingrong (Shook Lin & Bok LLP) for the respondent.
