IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2023] SGCA 40

Court of Appeal / Civil Appeal No 41 of 2022

Between

Founder Group (Hong Kong) Limited (in liquidation)

… *Appellant*

And

Singapore JHC Co Pte Ltd

… *Respondent*

In the matter of Companies Winding Up No 121 of 2022

Between

Founder Group (Hong Kong) Limited (in liquidation)

… *Claimant*

And

Singapore JHC Co Pte Ltd

… *Defendant*

GROUNDS OF DECISION

[Insolvency Law — Winding up — Disputed debt]
[Insolvency Law — Winding up — Standing]
[Insolvency Law — Winding up — Contingent creditor]
[Arbitration — Agreement — Separability]

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

[2023] SGCA 40

Court of Appeal — Civil Appeal No 41 of 2022
Sundaresh Menon CJ, Steven Chong JCA and Kannan Ramesh JAD
8, 22 September 2023

28 November 2023

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 This was an appeal against the decision of a judge of the General Division of the High Court ("the Judge") dismissing an application brought by the appellant, Founder Group (Hong Kong) (in liquidation) ("FGHK"), to wind up the respondent, Singapore JHC Co Pte Ltd ("JHC"). FGHK claimed to be a creditor of JHC in a sum of around US$47.43m and maintained that JHC was unable to pay its debts and/or that it would be just and equitable for JHC to be wound up. While the Judge accepted that JHC was unable to pay its debts, the Judge found that FGHK had not established its standing as a creditor because the debt it relied on was disputed by JHC and that dispute was subject to a valid arbitration agreement. The Judge considered that by reason of the arbitration agreement, the dispute over the debt first had to be resolved in arbitration before FGHK could take any steps to enforce it.

2 FGHK appealed on the basis that the Judge should have found that it had the requisite standing at least as a contingent creditor, and further that JHC had not raised the dispute over the debt in good faith and on substantial grounds and, in fact, was abusing the court's process. For the reasons that follow, we disagreed that FGHK could be considered a *contingent* creditor. However, we were satisfied that JHC could not invoke the arbitration agreement in the present circumstances, and there was no real dispute over the debt. It followed that FGHK had the requisite standing as a creditor to bring a winding-up application. As there was no dispute that JHC was insolvent, we allowed the appeal and ordered that JHC be wound up.

Facts

Parties to the dispute

3 The appellant, FGHK, is a company incorporated in the Hong Kong Special Administrative Region ("Hong Kong") of the People's Republic of China ("PRC"). The respondent, JHC, is a company incorporated in Singapore and is in the business of the general wholesale trade of metals and metal products, among other things.

4 Prior to 2020, FGHK and JHC were part of the same group of companies and were owned and controlled by Peking University Founder Group Company Limited ("PUFG"). PUFG is a company incorporated in the PRC.

5 In February 2020, a creditor of PUFG commenced reorganisation proceedings against it in the Beijing First Intermediate People's Court. PUFG's creditors subsequently consented to a reorganisation plan in May 2021, and this was approved by the Beijing First Intermediate People's Court in June 2021.

Pursuant to the plan, ownership and control of JHC were transferred from PUFG to a consortium of investors.

6 FGHK continued to be owned by PUFG, but it was ordered to be liquidated by the Hong Kong Court of First Instance on 19 July 2021, following a winding-up application made by one of its creditors. Liquidators of FGHK were appointed on 18 October 2021 (the "Liquidators").

7 According to the Liquidators, they discovered upon a review of FGHK's books and records that a sum of approximately US$47.43m was due and payable by JHC to FGHK. This sum pertained to an alleged sale of copper cathodes by FGHK to JHC pursuant to three contracts dated 11 December 2015, 22 December 2015 and 6 January 2016, respectively (the "Contracts"). Each of the Contracts stated that any disputes which could not be resolved amicably would be submitted to the China International Economic and Trade Arbitration Commission ("CIETAC") for arbitration in Beijing, and that the governing law of the Contracts was Chinese law. The relevant provision was as follows:

> 13. ARBITRATION
>
> The buyer and seller agree to attempt to resolve all disputes in connection with the contract or the performance of the contract through friendly discussion. Any controversy or claim that cannot be settled amicably between Buyer and Seller Shall be submitted to China International Economic and Trade Arbitration Commission for arbitration which shall be conducted in Beijing in accordance with the Commission's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties.
>
> 13. GOVERNING LAWS
>
> This Contract shall be governed and construed by the laws of the People's Republic of China (exclude Hong Kong, Macao, Taiwan areas) and INCOTERMS 2010.

8 On 1 December 2021, the Liquidators issued a letter of demand to JHC demanding payment of US$47.43m within 14 days. On 18 February 2022, the

Liquidators issued a statutory demand to JHC for the same sum, pursuant to s 125 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA"). In March and April 2022, the parties engaged in negotiations to fully and finally settle the outstanding debts, but no agreement was reached.

HC/CWU 121/2022

9 On 27 May 2022, the Liquidators (acting on behalf of FGHK) filed HC/CWU 121/2022 ("CWU 121"), seeking an order that JHC be wound up on the basis that (a) it was unable to pay its debts within the meaning of s 125(1)(*e*) of the IRDA; or (b) it was just and equitable to wind up the company pursuant to s 125(1)(*i*) of the IRDA.

10 The Liquidators claimed that the debt of US$47.43m was presently owed by JHC to FGHK and was evidenced by, among other things, an audit confirmation request that had been issued by JHC's external auditors to FGHK on 26 February 2019 (the "FY2018 Audit Confirmation Request"). In the FY2018 Audit Confirmation Request, JHC's external auditors, Dexin Assurance ("Dexin"), had stated that JHC's books reflected a sum of US$47.43m that was owed to FGHK, and requested FGHK's confirmation that this was correct as at 31 December 2018. JHC had clearly and unequivocally admitted its liability for the debt. Further, given that the statutory demand issued on 18 February 2022 remained unsatisfied, JHC was deemed unable to pay its debts pursuant to s 125(2)(*a*) of the IRDA. Alternatively, JHC's financial statements showed that it was in fact unable to pay its debts.

11 As for the second ground (namely, that it would be just and equitable to wind the company up), this was based on JHC's stated position that it had entered into contracts (these being the Contracts) that were not meant to be enforced (see [12] below). There was no further explanation for why this had

been done, and this suggested a lack of probity or the possibility of fraudulent conduct on its part. It was therefore said to be in the interests of JHC's and PUFG's creditors and contributories that the company be wound up and liquidators be appointed, so that they could investigate whether there had been any wrongful conduct on the part of JHC or its directors.

12 JHC resisted CWU 121 on the following grounds:

(a) First, it disputed the debt of US$47.43m. As mentioned above, JHC's position was that the ostensible payment obligations arising under the Contracts were not meant to be enforced. JHC claimed that this had arisen from transactions *within* the PUFG group. No copper cathodes had in fact been delivered under the Contracts. The Contracts were consequently null and void under their governing law, which was Chinese law. Notably, nothing was said about why these arrangements had been entered into.

(b) Second, the dispute over JHC's liability for the debt fell within the scope of the arbitration agreements contained in the Contracts and this dispute should therefore be referred to arbitration before the CIETAC. It was not appropriate in such circumstances for the insolvency court to make a winding-up order in a summary way.

(c) Third, the threshold for a just and equitable winding up had not been met.

13 At the time CWU 121 was filed, the Liquidators also filed a separate application in HC/CWU 120/2022 ("CWU 120") on behalf of FGHK. CWU 120 was an application to wind up another subsidiary of PUFG, Singapore Commodities Group Co Pte Ltd ("SG Commodities"). Similar to the

proceedings in CWU 121, the Liquidators alleged that SG Commodities owed FGHK a debt arising from the sale of copper cathodes. SG Commodities disputed the debt on the basis that the payment obligation was not meant to be enforced, and the dispute was subject to ongoing arbitration proceedings before the CIETAC in Beijing. Following an offer from SG Commodities to provide security for FGHK's claim against it, the Liquidators consented to CWU 120 being stayed pending the outcome of the CIETAC arbitration proceedings.

Decision below

14 On 29 September 2022, the Judge dismissed CWU 121: see *Founder Group (Hong Kong) Ltd (in liquidation) v Singapore JHC Co Pte Ltd* [2023] SGHC 159 (the "GD").

15 The Judge began by considering whether FGHK had established that it was a "creditor" of JHC within the meaning of s 124(1)(*c*) of the IRDA. The Judge observed that where a defendant disputes the debt on which the claimant relies, a court may take two approaches (GD at [22]–[44]):

> (a) the "general approach", under which the court considers whether the defendant disputes the debt in good faith and on substantial grounds; and
>
> (b) where the claimant asserts that it is a creditor of the defendant based on a debt arising under a contract containing an arbitration agreement and the defendant disputes the debt or raises a cross-claim arising out of such a contract, the court must apply the test set out by this court in *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 ("*AnAn*"). In this setting, the court must consider whether:

(i) there is an arbitration agreement between the parties that appears *prima facie* to be valid (*AnAn* at [56]);

(ii) the dispute or cross-claim which the defendant raises appears *prima facie* to fall within the scope of the arbitration agreement (*AnAn* at [56]); and

(iii) upon a consideration of factors which do not relate to the merits of the dispute in respect of the debt or the merits of the cross-claim, the court is satisfied that the defendant is not abusing the court's process by raising the dispute or cross-claim (*AnAn* at [99]–[100]);

(collectively, the "*AnAn* requirements").

If the *AnAn* requirements are satisfied, then the insolvency court will ordinarily dismiss the winding-up application or, in exceptional circumstances, grant a stay of the proceedings (*AnAn* at [110]–[112]).

16 Given that the Contracts all contained arbitration clauses, the Judge considered that the *AnAn* approach was applicable, and that the *AnAn* requirements had been satisfied on the facts (GD at [53]–[71]). It followed that FGHK had failed to establish that it had standing as a creditor, and the winding-up application therefore failed and was dismissed (GD at [73]–[76]). In any event, FGHK had not shown sufficient reason to warrant the proceedings being stayed instead of being dismissed (GD at [88]).

17 For completeness, the Judge went on to consider the merits of FGHK's winding-up application on the assumption that FGHK had established that it was a creditor. The Judge accepted that JHC was, as a matter of fact, unable to pay its debts based on its audited financial statements (GD at [111]–[122]). We

mention in passing that this has not been appealed. The Judge rejected FGHK's alternative ground that it was just and equitable to wind up the company, essentially because FGHK had not proved that its interests as a creditor were adversely affected by the alleged lack of probity in the conduct of the company's affairs (GD at [123]–[136]).

18 The Judge therefore dismissed FGHK's winding-up application (GD at [139]).

The parties' cases

19 In this appeal, FGHK contended that the Judge had erred because:

(a) FGHK did have standing to present a winding-up application as a creditor, or alternatively as a *contingent* creditor of JHC under s 124(1)(*c*) of the IRDA. The latter point was a new argument pursued by FGHK on appeal, given that its position in the court below was that it was a creditor in respect of a debt *presently* due and owing (see [10] above). Further, FGHK submitted that the test in *AnAn* related to whether it should succeed in its winding-up application, and not to whether it had standing to present such an application.

(b) JHC's dispute over the US$47.43m debt was an abuse of process and the third *AnAn* requirement was therefore not met. JHC had not provided clear and convincing evidence to displace its documented admission of the debt.

(c) It would be just and equitable for JHC to be wound up.

For these reasons, FGHK sought to reverse the decision of the Judge and that JHC be wound up.

20 In response, JHC submitted that the present appeal should be dismissed because:

(a) The Judge had correctly found that the *AnAn* requirements were satisfied and consequently that FGHK had not established that it was a creditor. Further, given that JHC's liability for the US$47.43m debt fell to be determined in arbitration, FGHK was not even a *contingent* creditor under s 124(1)(*c*) of the IRDA.

(b) The high threshold for establishing an abuse of process under the third *AnAn* requirement had not been met.

(c) There was no basis to wind JHC up on just and equitable grounds.

21 We pause here to note that on *both* parties' cases, it was not in dispute that the *AnAn* test was applicable. The points of disagreement were over whether the *AnAn* requirements had been satisfied, and specifically whether the third *AnAn* requirement (that JHC's asserted dispute was not an abuse of process) had in fact been made out. It appeared to us, however, that it was relevant as a threshold matter to consider whether, given the stance taken by JHC in relation to FGHK's claim, JHC could even assert the existence of an arbitration agreement that appeared to be *prima facie* valid and enforceable and which encompassed the asserted dispute to begin with. This inquiry was *anterior* to the application of the *AnAn* framework, though it is related to the first and second *AnAn* requirements. As will be seen from [51]–[61] below, this proved significant to our analysis.

Preliminary observations

22 With respect, we were not greatly assisted by the submissions which seemed to somewhat miss some of the key issues. We therefore begin with some preliminary observations that might help clarify the law for the benefit of counsel and parties concerned with this area of the law. In particular, it seemed to us that there was some confusion over how and when the *AnAn* requirements would apply in a given case, and over the question of standing to present a winding-up application. We first make some observations on the questions of standing before we turn to the *AnAn* requirements. We will then turn to our substantive analysis.

Standing

23 The question of standing to present a winding-up application is dealt with in s 124 of the IRDA. Section 124(1) sets out a list of persons or entities that may make such an application, while s 124(2) sets out some qualifications or limitations on the right of some of those parties or entities to make the application. This, however, is a preliminary or threshold requirement. The court can only grant the order winding up a company if one or more of the grounds set out in s 125(1) of the IRDA are met.

24 It is important to note that the requirement of standing to make an application and the grounds on which the application may be granted are distinct inquiries. There is a tendency to conflate this, perhaps because the most common ground on which liquidation is sought tends to be the inability of the company to pay its debts. Disputes over whether the indebtedness has been established can affect both parts of the inquiry. It clearly has a bearing on whether the claimant is in fact a creditor if that is the capacity in which the claimant makes the application. It will often also have a bearing on whether the

company is or should be deemed to be insolvent because the company's alleged inability to answer for its debts can sometimes only be assessed once a particular debt has been established and the company's inability to pay that debt has been demonstrated. Nonetheless, the two inquiries are distinct and for conceptual clarity, they need to be addressed separately.

25 In the present case, FGHK sought to establish that it had standing as a creditor, and also (or in the alternative) as a contingent creditor. FGHK's case, in both respects, was based on its allegation that the debt under the Contracts was due and payable. We will assess its case on standing later in these grounds of decision and as we shall explain, FGHK was mistaken in its submission that it was a *contingent* creditor.

26 As for the grounds on which FGHK sought the liquidation of JHC, FGHK primarily relied on JHC's failure to pay that debt to show that it was insolvent. This rendered FGHK's alternative case internally inconsistent, in that *if* FGHK was a contingent creditor for the purpose of establishing that it had standing to make the application as noted in the previous paragraph, FGHK would only be entitled to payment of the US$47.43m debt upon the happening of some *future* event; whereas, as we have just noted, FGHK's case in seeking to establish the grounds for the application to be granted was that the sum of US$47.43m was *presently* due under the Contracts, that JHC had not paid it despite FGHK's demand, and on that basis it claimed JHC was insolvent. If FGHK was correct that the debt was presently due, then there was no question of it being a contingent creditor and it would also have established that it had standing as a creditor. On the other hand, *if* FGHK was only able to show that it was a contingent creditor, it had to establish that based on the *contingent* liability, JHC was in fact unable to pay its debts. Alternatively, FGHK may have

pursued the application on some other ground, such as that JHC was in fact insolvent, quite apart from any liability owed to FGHK.

27 The observations in the last two paragraphs are made to illustrate the potential conceptual and analytical pitfalls that can needlessly bedevil a case if each of the inquiries is not carefully and distinctly pursued.

The relevance of the AnAn requirements

28 We have observed above that in a given case, establishing the indebtedness may be relevant to the questions both of standing to bring the application as well as of whether the grounds for winding up are made out. Where the indebtedness is disputed, this can give rise to potential difficulties. In our judgment, these disputes can very broadly be categorised into three classes for ease of analysis:

(a) *Where the facts and the liability are heavily contested and cannot be summarily disposed of*: The approach the insolvency court takes in such circumstances is to determine whether there is a dispute raised in good faith and on substantial grounds. This is akin to the approach taken when a court is faced with an application for summary judgment (see *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 at [23]). The inquiry is whether the debtor-company has raised a "triable issue", meaning an issue that ought to be tried and is not fit to be disposed of in a summary way. Where that is found to be the case, the insolvency court cannot determine the underlying dispute and will typically dismiss or exceptionally stay the winding-up application, because the claimant would usually be found to have established neither its standing as a creditor to bring the application nor its grounds for obtaining the order it seeks.

(b) *Where though the liability is contested, the court is satisfied that the dispute is not raised in good faith and on substantial grounds*: On the other hand, where the dispute is found not to raise any triable issues, then the application to wind up the company may be granted.

(c) *Where the dispute in question is governed by an arbitration agreement:* When a party brings proceedings in court in breach of an arbitration agreement, the defendant may apply for the court proceedings to be stayed to compel the dispute to be referred to arbitration. A stay will typically be granted if the court is satisfied on a *prima facie* basis that there is a valid arbitration agreement between the parties, and the dispute falls within the scope of that agreement: *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 ("*Tomolugen Holdings*") at [63]; *Sim Chay Koon and others v NTUC Income Insurance Co-operative Ltd* [2016] 2 SLR 871 at [5]. The *prima facie* standard was adopted in recognition of the arbitral tribunal's jurisdiction to determine its own jurisdiction (also known as the "*kompetenz-kompetenz* principle") and the principle of judicial non-intervention in arbitral proceedings: *Tomolugen Holdings* at [67]. As we will explain further below at [34], this need to defer to the parties' choice of arbitration as their means of dispute resolution accounts for the development of the *AnAn* requirements in the context of winding-up applications.

29 Against the backdrop of those observations, we turn to consider the issues before us.

The applicability of the *AnAn* test to the question of standing

30 As noted above, FGHK contended that the Judge erred in finding that the *AnAn* test is determinative of its *standing* as a creditor. According to FGHK, the *AnAn* test is not relevant to the question of a creditor's standing to bring a winding-up application but *only* to the merits of its assertions that the company is unable to pay its debts. It seems to us that FGHK took this course because if it succeeded on this point, standing to bring the application could be established and it could then seek a winding-up order on the seemingly uncontroversial basis that JHC was in fact insolvent.

31 We did not agree with this argument. In our judgment, once *AnAn* is properly appreciated in its context, it is clear that if there is an applicable arbitration agreement between the parties, the *AnAn* requirements will typically be relevant not only to the question of whether the application should be granted, as FGHK contends, but also to the question of standing to bring a winding-up application.

32 FGHK's contention that the *AnAn* requirements do not apply to the question of standing is mistaken. The starting point of the analysis, as we have noted already, is that where the debt that the claimant relies on arises out of a contract that is *not* subject to an arbitration agreement, it is well established that a finding that the debtor disputes the debt in good faith and on substantial grounds will mean that the claimant has no standing *as a creditor* to present a winding-up application. This is for the straightforward reason that a claimant who relies on a disputed debt has yet to establish himself as a creditor. As this court observed in *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268 at [62]:

> 62 The law is equally well established where the company disputes the debt claimed by the creditor. ***In such a case, the court will restrain a creditor from filing a petition to wind up the company, or if the petition has been filed, to stay or dismiss it on the ground that the* locus standi *of the petitioner as a creditor is in question,*** and it is an abuse of process of the court for the petitioner to try to enforce a disputed debt in this way. In *Mann v Goldstein* [1968] 1 WLR 1091, Ungoed-Thomas J said, at 1093–1094:
>
> > It is well established that this court has jurisdiction to restrain the presentation or advertising of a winding-up petition and restrain all further proceedings on it. That jurisdiction is a facet of the court's inherent jurisdiction to prevent an abuse of the process of the court. It will be exercised where a winding-up application is presented, or prosecuted otherwise than in accordance with the legitimate purpose of such process.
>
> At 1098–1099, he said:
>
> > For my part I would prefer to rest the jurisdiction directly on the comparatively simple propositions that a creditor's petition can only be presented by a creditor, ***that the winding-up jurisdiction is not for the purpose of deciding a disputed debt (that is, disputed on substantial and not insubstantial grounds), since, until a creditor is established as a creditor he is not entitled to present the petition and has no locus standi in the Companies Court***; and that, therefore, to invoke the winding-up jurisdiction when the debt is disputed (that is, on substantial grounds) or after it has become clear that it is so disputed is an abuse of the process of the court. … Indeed, the prevention of the abuse of the process of the court is the very essence of the whole of this court's jurisdiction to restrain the presentation of a winding-up petition.
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> [emphasis added in bold italics]

33 As we have already noted, whether a debt is disputed in good faith and on substantial grounds is usually determined by reference to whether the debtor-company is able to raise triable issues, that being the same standard that is applicable when considering an application for summary judgment.

34 In *AnAn*, this court decided that instead of the triable issue standard, a *prima facie* standard of review should be adopted where the dispute is subject to an arbitration agreement, so as to promote coherence with the law concerning applications for a stay in favour of arbitration. If there was a different standard, this would incentivise creditors to bypass the arbitration agreement and present a winding-up application as a means of obtaining a summary determination by the insolvency court of a matter that in fact fell within the ambit of the arbitral tribunal's jurisdiction. This would be an abuse of the winding-up jurisdiction of the court (at [61]–[63]).

35 While the court in *AnAn* did not expressly state that the *AnAn* requirements are relevant to the question of standing, there is simply no principled basis for thinking that they are not. In the same way that a claimant who relies on a debt that is disputed in good faith and on substantial grounds has not proved himself to be a *creditor*, a claimant who relies on a disputed debt that is subject to arbitration cannot claim to have status as a creditor either. This conclusion is also reflected in the court's discussion in *AnAn* of how the arbitration regime interacts with the insolvency regime when the disputed debt is subject to an arbitration agreement. The court observed that the insolvency regime is not engaged at the point when a dispute arises in relation to a debt that is subject to an arbitration agreement. At that point, it cannot be assumed that the company is in fact a debtor, that being the precise question that the parties have agreed to refer to arbitration. Rather, it is only when the debt has been established by way of arbitration, and remains unsatisfied, that the insolvency regime is engaged (at [71]):

> 71 As a matter of principle, in an application to stay or dismiss a winding-up application on the ground that the dispute involving pre-insolvency rights and obligations ought to be determined by arbitration, the policies underpinning the arbitration and insolvency regime are not necessarily at odds.

> As Mr Lee submitted, the view that adopting the *prima facie* standard of review deals a blow to the insolvency regime begs the question, ***as it assumes that the company is in fact a debtor, when that question is precisely what the company and the creditor have agreed to refer to arbitration***. A statutory demand that is unsatisfied merely leads to the *presumption* that the debtor is insolvent; it does not determine that the debtor is in fact insolvent. ***Hence, when a dispute arises in relation to a debt that is subject to an arbitration agreement (as opposed to a claim which arises under the insolvency regime), the policy concerns of the insolvency regime are strictly not engaged.*** It is only when the debt is established to be due and owing to the creditor by way of arbitration, and that debt remains unsatisfied, that it can be said that the company is insolvent, such that the collective interest of the insolvent company's creditors becomes a relevant consideration. ***In other words, the arbitration of the dispute vis-à-vis the debt is a necessary precondition to bringing the insolvency regime into the equation.*** There is thus strictly speaking no conflict of policy interests between the two regimes under such circumstances. This is especially so in a case such as the present appeal where there is only a single disputed claim against the debtor-company which is subject to arbitration.
>
> [emphasis added in bold italics]

36 Accordingly, where a debt is subject to a dispute that falls within the scope of an applicable arbitration clause (those being the first and second *AnAn* requirements), the claimant cannot be considered to be a creditor of the defendant *until* that dispute has been resolved by arbitration in the claimant's favour. The claimant will therefore have no standing to present a winding-up application as a creditor until then. In our judgment, it is for that reason that the court will ordinarily dismiss, or exceptionally stay the application, provided that there has been no abuse of process on the defendant's part (that being the third *AnAn* requirement): *AnAn* at [56].

37 It follows from this that the test in *AnAn* does pertain to a claimant's standing as a creditor to present a winding-up application. We therefore did not agree with this aspect of FGHK's submission.

Whether FGHK is a contingent creditor

38 Before we consider whether FGHK has standing as a creditor based on the *AnAn* requirements (if they are applicable), or if they are not, whether JHC disputes the US$47.43m debt in good faith and on substantial grounds, we consider FGHK's argument that the Judge should in any case have found that it had standing to present a winding-up application as a contingent creditor under s 124(1)(*c*) of the IRDA. We take this point out of sequence in that this was an alternative argument advanced in the event we did not accept FGHK's primary contention that it was a creditor. For the reasons set out below and on the assumption that FGHK was not able to succeed on its primary case, we disagreed with FGHK that it is a *contingent* creditor.

39 Section 124(1)(*c*) of the IRDA provides that a winding-up application may be brought by a contingent creditor:

> **Application for winding up**
>
> **124.**—(1) A company, whether or not it is being wound up voluntarily, may be wound up under an order of the Court on the application of one or more of the following:
>
> …
>
> (*c*) any creditor, including a contingent or prospective creditor, of the company;
>
> …

40 The term "contingent or prospective creditor" is not defined in the IRDA. In *Re People's Parkway Development Pte Ltd* [1991] 2 SLR(R) 567 ("*People's Parkway*") at [10], the High Court adopted the following definition of a "contingent creditor" set out in *Re William Hockley Ltd* [1962] 1 WLR 555 ("*Re William Hockley*") at 558:

> The expression 'contingent creditor' is not defined in the Companies Act 1948, but must, I think, denote a person

> towards whom under an existing obligation, the company may or will become subject to a present liability on the happening of some future event or at some future date.

41 FGHK contended that it was at least a contingent creditor, based on the asserted obligation under the Contracts for JHC to make payment to FGHK of the outstanding amount of US$47.43m, even though JHC disputed this obligation. Since JHC could be found liable to pay the debt if the arbitration were decided in FGHK's favour at some future date, FGHK submitted that JHC is presently subject to a contingent liability that may or will crystallise upon the conclusion of the arbitration in FGHK's favour. In support of this, FGHK cited various local and Australian cases in which claimants with disputed debts were allegedly held to be contingent creditors. We did not accept FGHK's submission.

42 To begin with, the definition applied in *People's Parkway* contemplates that there is an "existing obligation" which will or may become payable on a future event. An existing obligation to make payment under a guarantee or bond upon a given event taking place would be a paradigm example of this. But as noted above at [12(a)], JHC's position was that the payment obligation was never meant to be enforced and that the Contracts were null and void. The very *existence* of a payment obligation was in dispute. There was nothing contingent about the obligation in this case. It either existed, as FGHK contended, or it did not, as JHC contended. It was a disputed liability and not a present obligation that was contingent upon the happening of a stipulated event. As a matter of logic, it could not be said that FGHK came within the definition of a "contingent creditor" set out in *People's Parkway*.

43 Turning to the cases that FGHK relied on, these were as follows:

(a) In *Community Development Pty Ltd v Engwirda Construction Co* (1969) 120 CLR 455 ("*Community Development*"), the High Court of Australia adopted the definition of a "contingent creditor" set out in *Re William Hockley* (see [40] above). That case concerned a petition brought by a building contractor to wind up the building owner on the basis that the latter had failed to make full payment for works carried out under a building contract. The owner claimed that it had paid part of the contract price, and that it was not required to pay the balance because the architect had declined to issue a final progress certificate. Notwithstanding that the contract provided for the arbitration of disputes as a condition precedent to court proceedings, the court found that the builder was a contingent creditor of the company. Kitto J reasoned as follows (at 459):

> … there must be an existing obligation and that out of that obligation a liability on the part of the company to pay a sum of money will arise in a future event, whether it be an event that must happen or only an event that may happen. A building contract creates, as soon as it is entered into, an obligation upon the building owner to pay the contract price, either as a whole upon a future event or, more usually, by progress and final payments each of which is to be made on a future event. The event or events may not happen, but if and when one of them does happen the building owner, by force of the contractual obligation, must pay the builder a sum of money. It is, I think, nothing to the point that the event may be complex, as where the payment is agreed to be made when the whole or some part of the work has been done to the satisfaction of an architect as expressed in a certificate or to the satisfaction of an arbitrator as expressed in an award: the building owner is bound from the time the contract is made to pay money to the builder upon a contingency; and that in my opinion makes the builder a contingent creditor of the owner.

(b) Next, in *National Mutual Life Association of Australasia Ltd v Oasis Developments Pty Ltd* [1983] 2 Qd R 441 ("*National Mutual Life*"), the Supreme Court of Brisbane cited *Community Development* as authority for its observation (made *in obiter*) that "in the case of a debt

that is wholly, and not merely in part, disputed, the petitioner may nevertheless remain a 'contingent creditor'" (at 447B).

(c) Finally, in *RCMA Asia Pte Ltd v Sun Electric Power Pte Ltd (Energy Market Authority of Singapore, non-party)* [2020] SGHC 205 ("*Sun Electric (HC)*"), the plaintiff, RCMA Asia Pte Ltd ("RCMA"), submitted that it had standing to present a winding-up application (i) as a contingent or prospective creditor for around S$7.4m, that being the sum that it had claimed against the debtor-company, Sun Electric Power Pte Ltd ("SEPPL"), in a pending suit for breach of an agreement that the parties had entered into (the "Agreement"); and (ii) as a creditor for S$8,973.41, that being the amount of costs and accrued interest that the court had ordered SEPPL to pay RCMA in related legal proceedings. The High Court Judge found that RCMA had standing on either of those grounds (at [24]). In particular, the Judge referred to the definition of a "contingent creditor" set out in *Re William Hockley*, and noted that under its obligations in the Agreement, SEPPL might "become subject to a judgment debt" upon the pending suit being decided in favour of RCMA. RCMA was therefore a contingent or prospective creditor. On appeal, the question of RCMA's standing was not before this court because the parties did not dispute it: *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd (formerly known as Tong Teik Pte Ltd)* [2021] 2 SLR 478 at [17].

44 FGHK pointed to these authorities and submitted that they stood for the proposition that a claimant of a debt that was disputed may nonetheless be considered to be a contingent creditor. In our judgment, FGHK is mistaken and the observations in *Sun Electric (HC)* are incorrect and should not be followed. While the court in *Sun Electric (HC)* referred to the same definition of a

"contingent creditor" adopted in *People's Parkway*, it seems to us to have adopted an unduly broad interpretation of what an "existing obligation" entails, such that a claimant for damages for breach of an agreement may be considered to be a contingent creditor *even if* the liability in question is disputed by the defendant company and is subject to pending litigation or arbitration.

45 In our judgment, a disputed liability may in principle be considered a contingent liability where the liability itself is not disputed and the only dispute is over whether the contingency that crystallises the liability has occurred. This is the effect of the passage from Kitto J's judgment in *Community Development* that we have referred to at [43(a)] above. That would equally be the case if there was a dispute over whether a valid demand had been timeously made under a bond or guarantee. That would *not* be the case in the situation that arose in *Sun Electric (HC)* where the claim was for damages for breach and the breach was disputed. That was not a case of a present liability that would crystallise upon a future contingency. It was simply a liability, the very existence of which was disputed. That liability either existed or it did not, and the point of the litigation was to determine its existence. This had nothing to do with any contingency.

46 So too in the present case, FGHK is not a contingent creditor. If it failed in its primary claim that it was a creditor in the sum of US$47.43m, JHC would have no liability at all because JHC would have succeeded in challenging the very existence of the liability. That liability could not in any sense be described as a contingent liability because it was not a present liability payable upon a future event taking place. JHC's position was that there was never a liability to begin with. If FGHK brought proceedings and succeeded in establishing that JHC was wrong, that would not be a contingency in the sense in which that word is used in s 124(1)(*c*) of the IRDA. Instead, that is simply the outcome of the process that the parties had to follow to resolve their dispute.

47 That is sufficient to dispose of this point, but we take the opportunity to reiterate that there remains the separate inquiry into the merits of the application. A contingent creditor, so understood, may have standing in principle to present a winding-up application; but even so, it will not be able to establish grounds for winding up if it relies on a debt that is disputed by the defendant in good faith and on substantial grounds. This is because, as we have explained, the inquiries are distinct and the court, in the exercise of its insolvency jurisdiction, will not ordinarily deal with disputes that ought to be dealt with otherwise than in its insolvency jurisdiction. Thus, for instance, where there is a dispute raised in good faith and on substantial grounds over whether a demand has been timeously made under a bond, the bondholder may have standing as a contingent creditor (as explained above at [45]), but the bondholder cannot *also* rely on that contingent debt for the purposes of proving that the company is or should be deemed to be insolvent. Instead, the bondholder may well be able to establish some of the other grounds for winding up as set out in s 125(1) of the IRDA and obtain a winding-up order on alternative bases. We stress, however, that those grounds must not depend on the assertion that a disputed sum is presently owed to it.

48 At the hearing before us, counsel for FGHK, Mr Sarjit Singh Gill SC ("Mr Gill"), accepted that the law is clear that an application presented on the basis of a debt disputed substantively and in good faith cannot be granted, but could not assist us beyond pointing to what he thought was the effect of the cases we have referred to above. As we have explained, those cases were either wrong or concerned the different question of whether a claimant has standing as a contingent creditor notwithstanding a dispute over whether a contingency had occurred. Those cases did not deal with the *separate* question of determining whether grounds for winding up had been established despite a dispute over the debt, and therefore did not assist us in this regard.

49 FGHK finally pointed to *SAAG Oilfield Engineering (S) Pte Ltd (formerly known as Derrick Services Singapore Pte Ltd) v Shaik Abu Bakar bin Abdul Sukol and another and another appeal* [2012] 2 SLR 189 ("*SAAG Oilfield*"), where this court accepted that the term "creditors" under s 210 of the Companies Act (Cap 50, 2006 Rev Ed) (the "Companies Act") included persons with unproven tort claims for an unliquidated sum. FGHK contended that adopting a broad definition of the term "contingent creditor" would therefore be consistent with the interpretation of the word "creditor" as used in the Companies Act. We did not consider *SAAG Oilfield* to be relevant to the question before us because that case concerned a scheme of arrangement, rather than a winding-up application. In so far as the term "creditors" might carry a broader meaning in the context of schemes of arrangement, that may be justified by the fact that the policy concerns underpinning a scheme of arrangement are different from those in a winding-up application. As we observed in *SAAG Oilfield* at [48]:

> 48 … The whole purpose of s 210 of the Companies Act is to facilitate compromises and arrangements with a company's creditors as a practical and more sensible alternative to liquidation, and, as industrial disease litigation has revealed, tort claimants may form a substantial (or even the entire) class of a company's creditors. As the *Re Midland Coal* [[1895] 1 Ch 267] line of cases has noted, to exclude such claimants from the ambit of the term 'creditors' would render s 210 of the Companies Act rather pointless. …

In short, the underlying purpose of a scheme of arrangement as a means of compromising claims against the company weighs in favour of a broader interpretation of the term "creditors". By contrast, as explained above at [47], the concern in a winding-up application is different. It follows that a claimant who relies on a debt, the existence of which is subject to a substantive dispute, cannot be said to have established its standing as a creditor for the purposes of a winding-up application.

50 For these reasons, we rejected FGHK's submission that it was a contingent creditor. We turn next to FGHK's primary submission which was that a sum of money was *presently* said to be due and that it was therefore a creditor.

Whether the *AnAn* requirements were satisfied

51 JHC disputed the debt and we first considered whether the resolution of this dispute was subject to the *AnAn* test at all. On the one hand, FGHK asserted that the Contracts were valid and the arbitration agreements were contained within the Contracts. However, FGHK had presented a winding-up application because it considered that the debt under the Contracts was due and payable and that JHC was unable to pay it. JHC responded to this by contending that the debt was not payable because the Contracts were not meant to be enforced. No copper cathodes had in fact been delivered, and according to JHC, the Contracts were consequently null and void under Chinese law. At the hearing before the Judge, counsel for JHC submitted that the Contracts were in fact *sham* transactions. JHC's position was therefore that there had never been any genuine intent on JHC's part to enter into the Contracts, or to be bound by any of the obligations set out therein, and in our judgment, *this must logically include the arbitration agreements*. If this was indeed the case, then JHC would not be entitled to invoke the arbitration clauses contained in the very agreements that it said were not intended to give rise to valid obligations.

52 The Judge rejected this and held that the doctrine of separability operated to prevent a party from evading an obligation to arbitrate by denying the existence or validity of the contract containing the arbitration agreement. The Judge considered that where a party alleges that a contract containing an arbitration agreement is null and void, the arbitration agreement continues to be

prima facie valid and enforceable, unless and until a duly constituted arbitral tribunal finds that the contract is indeed null and void (GD at [57]). In any event, the Judge observed that SG Commodities had mounted a similar defence in the winding-up proceedings commenced by FGHK against it and had maintained that the debt allegedly owed by SG Commodities to FGHK arose out of contracts that were null and void. The contracts between SG Commodities and FGHK contained arbitration agreements that were identical to those in the Contracts. Notwithstanding SG Commodities' defence, the CIETAC had accepted the request for arbitration filed by SG Commodities. The Judge found that this indicated that the CIETAC accepted the foregoing analysis on the doctrine of separability and considered the arbitration agreements between FGHK and SG Commodities to be *prima facie* valid, notwithstanding that they were contained in contracts which SG Commodities alleged were null and void (GD at [59]).

53 In our judgment, the Judge erred in his application of the doctrine of separability. First, the arbitration agreements in the Contracts were likely to be governed by Chinese law (that being the governing law of the Contracts, as noted at [7] above), given that the implied choice of law for the arbitration agreement is likely to be the same as the expressly chosen law of the substantive contract, unless there are clear indications to the contrary: see *BCY v BCZ* [2017] 3 SLR 357 at [49], followed by this court in *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] 1 SLR 349 at [69]. No evidence was adduced to suggest that as a matter of Chinese law, the doctrine of separability indeed operated to enable JHC to invoke the arbitration agreements, notwithstanding its assertion that the Contracts in which they were contained were null and void. While the Judge referred to the CIETAC's acceptance of the request for arbitration filed by SG Commodities, this was neither a finding nor even evidence of the validity of the arbitration agreements contained in the

Contracts as a matter of Chinese law. In particular, there is nothing to suggest that the CIETAC *had* reviewed the validity of the arbitration agreements between SG Commodities and FGHK, before accepting the request for arbitration in question. The procedure for accepting a request for arbitration is found in Arts 12–13 of the CIETAC Arbitration Rules, which state as follows:

> Article 12 Application for Arbitration
>
> A party applying for arbitration under these Rules shall:
>
> 1. Submit a Request for Arbitration in writing signed and/or sealed by the Claimant or its authorized representative(s), which shall, inter alia, include:
>
> (a) the names and addresses of the Claimant and the Respondent, including the zip code, telephone, fax, email, or any other means of electronic telecommunications;
>
> (b) a reference to the arbitration agreement that is invoked;
>
> (c) a statement of the facts of the case and the main issues in dispute;
>
> (d) the claim of the Claimant; and
>
> (e) the facts and grounds on which the claim is based.
>
> 2. Attach to the Request for Arbitration the relevant documentary and other evidence on which the Claimant's claim is based.
>
> 3. Pay the arbitration fee in advance to CIETAC in accordance with its Arbitration Fee Schedule.
>
> Article 13 Acceptance of a Case
>
> 1. Upon the written application of a party, CIETAC shall accept a case in accordance with an arbitration agreement concluded between the parties either before or after the occurrence of the dispute, in which it is provided that disputes are to be referred to arbitration by CIETAC.
>
> 2. Upon receipt of a Request for Arbitration and its attachments, where after examination the Arbitration Court finds the formalities required for arbitration application to be complete, it shall send a Notice of Arbitration to both parties together with one copy each of these Rules and CIETAC's Panel of Arbitrators. The Request for Arbitration and its attachments submitted by the Claimant shall be sent to the Respondent under the same cover.

…

54 Nothing in these provisions suggests that the CIETAC would review the validity of an arbitration agreement before accepting a request for arbitration. While Art 6 of the CIETAC Arbitration Rules refers to a decision on the *prima facie* validity of an arbitration agreement, this appears to be engaged only in the event of an objection to the validity of the arbitration agreement, and no objection was raised to SG Commodities' request for arbitration:

> Article 6 Objection to Arbitration Agreement and/or Jurisdiction
>
> 1. CIETAC has the power to determine the existence and validity of an arbitration agreement and its jurisdiction over an arbitration case. CIETAC may, where necessary, delegate such power to the arbitral tribunal.
>
> 2. Where CIETAC is satisfied by prima facie evidence that a valid arbitration agreement exists, it may make a decision based on such evidence that it has jurisdiction over the arbitration case, and the arbitration shall proceed. Such a decision shall not prevent CIETAC from making a new decision on jurisdiction based on facts and/or evidence found by the arbitral tribunal during the arbitral proceedings that are inconsistent with the prima facie evidence.

55 In the absence of proof of the position under foreign law, we consider the matter under our law. As a matter of *Singapore* law, this court has taken the position that a party is not entitled to invoke an arbitration clause that is contained in a contract which that party maintains is not valid or binding. In *Marty Ltd v Hualon Corp (Malaysia) Sdn Bhd (receiver and manager appointed)* [2018] 2 SLR 1207 ("*Marty*"), the respondent commenced arbitration proceedings pursuant to an arbitration clause contained in a contract known as the "Revised Charter", whilst simultaneously taking the position that the Revised Charter was invalid for lack of authority. This court held that the respondent was not entitled to take such a position, because separability does

not shield an arbitration clause from a challenge that affects the underlying contract as a whole (at [43]):

> 43 The Judge held, and the parties accept, that the respondent cannot rely on the arbitration clause while challenging the validity of the Revised Charter as a whole for lack of authority. Briefly, we consider that this position is correctly taken. ***Although the principle of separability generally insulates an arbitration clause from challenges to the underlying contract, it cannot shield the arbitration clause from a challenge that affects the underlying contract as a whole.*** One such example is an allegation that the entire contract was entered into without authority, because this amounts to saying that each and every clause within the contract, including the arbitration clause, was entered into without authority.
>
> [emphasis added in bold italics]

56 This is consistent with the approach taken in *Fiona Trust & Holding Corporation and others v Privalov and others* [2007] 4 All ER 951 ("*Fiona Trust*"). Lord Hoffmann (writing for the House of Lords) observed that notwithstanding the principle of separability, there will be circumstances where an attack on the main agreement is an attack on the validity of the arbitration agreement as well (at [17]–[18]):

> [17] The principle of separability enacted in s 7 [of the English Arbitration Act 1996 (c 23) (UK)] means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a 'distinct agreement' and can be void or voidable only on grounds which relate directly to the arbitration agreement. ***Of course there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid.*** For example, if the main agreement and the arbitration agreement are contained in the same document and one of the parties claims that he never agreed to anything in the document and that his signature was forged, that will be an attack on the validity of the arbitration agreement. But the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, as a 'distinct agreement', was forged. Similarly, if a party alleges that someone who purported to sign as agent on

> his behalf had no authority whatever to conclude any agreement on his behalf, that is an attack on both the main agreement and the arbitration agreement.
>
> [18] On the other hand, if (as in this case) the allegation is that the agent exceeded his authority by entering into a main agreement in terms which were not authorised or for improper reasons, that is not necessarily an attack on the arbitration agreement. It would have to be shown that whatever the terms of the main agreement or the reasons for which the agent concluded it, he would have had no authority to enter into an arbitration agreement. Even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement remained to be agreed) that is not necessarily an attack on the arbitration agreement. If the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration.
>
> [emphasis added in bold italics]

57 Similarly, in Gary B Born, *International Commercial Arbitration* vol 1 (Wolters Kluwer, 3rd Ed, 2020), it is noted as follows at p 487:

> At the same time, virtually all national courts have also recognized the limits of the separability presumption, holding that, in at least some cases, defects affecting the underlying contract may also impeach the associated arbitration clause. These decisions have typically involved so-called 'doubly-relevant' facts or 'identity of defects', in which a lack of consent, capacity, or authority vitiate both the underlying contract and the arbitration agreement.

58 The principle of separability cannot guarantee the survival of the arbitration clause in all circumstances. Instead, where a challenge to the validity of the underlying contract is raised, it will be crucial to determine if this is also an attack on the arbitration agreement. This will necessarily be a fact-sensitive exercise, and much will depend on the *nature* of the challenge mounted against the underlying contract. For instance, as noted in *Marty* at [43] and *Fiona Trust* at [17], if the allegation is that the entire contract was entered into without authority, this may well be an attack on both the underlying contract and the arbitration agreement, as the implication would be that every clause in the

contract including the arbitration agreement was entered into without authority. On the other hand, where the challenge is that the underlying contract is void or voidable for misrepresentation, the arbitration agreement may survive because the parties' intention to arbitrate may not be affected by the misrepresentation. Similarly, in *Fiona Trust*, it was held that an allegation that the underlying contract had been procured by bribery did not mean that the arbitration agreement was similarly the result of bribery. Accordingly, by operation of the principle of separability, the arbitration agreement remained in effect and the dispute was referred to arbitration (at [19]).

59 It is unnecessary for us to determine the limits of the doctrine of separability. For instance, would the position have been different if FGHK had commenced arbitration proceedings in respect of the debt and JHC had sought to avoid the arbitration by making the same allegation it made before the Judge? It may be; but that simply does not arise on the present facts because JHC is the only party invoking the arbitration agreement and it does so while maintaining that the whole of the Contract is a sham and is thus null and void. We are satisfied that that is something JHC cannot do.

60 At the hearing before us, counsel for JHC, Mr Tan Chuan Thye SC ("Mr Tan"), suggested that JHC's position was that the arbitration agreements remained intact because it was only the *payment obligation* that was not meant to be enforced, rather than the entirety of the underlying Contracts. It was not clear how this could be so, but in any case, we rejected this argument for the simple reason that there was no evidence to support it. In the affidavit filed by JHC in the proceedings below, JHC's position was that the *Contracts* were null and void. JHC could not and did not offer an explanation as to how the arbitration agreements nevertheless survived on its case, nor did it set out the circumstances under which the Contracts were entered into, from which it might

be inferred that the parties had intended to be bound by the arbitration agreements but not by the payment obligation. JHC's argument was therefore wholly without merit.

61 In the final analysis, we were satisfied that JHC was not in a position to mount a case that the dispute in question fell within the scope of an arbitration agreement between the parties that appeared to be *prima facie* valid, those being the first two *AnAn* requirements. Further, JHC could not invoke the arbitration clause and with it, import the *AnAn* framework because this would be an abuse of process and so would offend the third *AnAn* requirement. As this court observed in *BWG v BWF* [2020] 1 SLR 1296 at [56], an abuse of process may arise where the debtor adopts an inconsistent position in the same or related proceedings, in the absence of a clear and convincing reason to do so:

> 56 Another example of abuse of process might be where a debtor adopts an inconsistent position as regards a defence which it raises to dispute the debt to restrain a winding-up application. The debtor may have taken an inconsistent position in the same proceedings or in related proceedings. This is analogous to the situation where a debtor had previously admitted that it owes the debt, but subsequently disputes it. The assertion of inconsistent positions may be treated as an abuse of process in order to protect the integrity of the judicial process and to safeguard the administration of justice. Similarly to the paradigm example in [*AnAn*] mentioned above, if the debtor takes an inconsistent position in the same or related proceedings, the court may, in the absence of a clear and convincing reason for the debtor's inconsistency, deny the debtor relief as its conduct might amount to an abuse of process.

62 JHC's position was manifestly inconsistent in that it claimed that the Contracts were null and void on the one hand, but then sought to rely on the arbitration agreements that were contained therein. No explanation was provided for the inconsistency in JHC's position. Indeed, as we explain further below at [65]–[66], JHC was not even able to account for *why* the Contracts

were entered into, if the parties had never intended to enforce them in the first place. In our judgment, it was plain in these circumstances that the real reason for JHC's inconsistent position was its desire to delay enforcement of the debt arising under the Contracts, by insisting that there was a dispute over the debt that had to be arbitrated first. This was clearly an abuse of process, and we were wholly unwilling to condone that.

63 We were therefore satisfied that JHC could not invoke the arbitration agreement in these circumstances and the *AnAn* requirements therefore did not apply at all. It remained to be determined whether JHC could demonstrate that it had raised a dispute over the debt in good faith and on substantial grounds, and we turn to address that question next.

Whether the dispute over the debt had been raised in good faith and on substantial grounds

64 FGHK contended that the debt of US$47.43m was evidenced by, among other things, the three Contracts, corresponding invoices for the sale of copper cathodes by FGHK to JHC, and the FY2018 Audit Confirmation Request. After the Judge's decision in CWU 121, FGHK adduced further evidence to show that sometime around February 2022, JHC's auditor, Dexin, had attempted to send another audit confirmation request to FGHK, seeking confirmation that the debt of US$47.43m in JHC's books was accurate as at 31 December 2021 (the "FY2021 Audit Confirmation Request"). The Liquidators did not receive the FY2021 Audit Confirmation Request and therefore did not respond. Subsequently, on 23 May 2023, Dexin sent yet another audit confirmation request to FGHK, seeking confirmation that the US$47.43m debt was accurate as at 31 December 2022. FGHK submitted that the various audit confirmation requests showed that the US$47.43m debt had been consistently carried in JHC's books and accounts and this amounted to an admission of the debt.

65 As already mentioned, JHC's defence in the face of this evidence was that the Contracts were not meant to be enforced and were consequently null and void. As the Judge below observed in the GD at [66], this was not an attractive argument for JHC to make. In the affidavit filed on behalf of JHC in the proceedings below, JHC did not explain *why* it claimed that the Contracts were not meant to be enforced, or *why* the Contracts were entered into at all. Its position was set out in brief terms and consisted of bare allegations. We reproduce the material paragraphs of the affidavit below:

> The Company disputes that it is liable for the Alleged Claim
>
> 28. There are genuine and bona fide disputes over FGHK's Alleged Claim which fall within the scope of the arbitration clauses.
>
> 29. First, the Company take the position that FGHK has not delivered any copper cathodes pursuant to the aforementioned contracts and the Company is therefore not liable for the Alleged Claim.
>
> 30. Second, any payment obligations under these inter-Group transactions are not meant to be enforced. This is underscored by the fact that the aggregate Alleged Claim, arising from the inter-Group transactions, was never enforced between the Company and FGHK even though the transactions date back at least 4 years prior to the reorganisation of PUFG and the liquidation of FGHK.
>
> 31. Third, it should be highlighted that these copper cathode contracts are governed by Chinese law. I am advised and verily believe that the copper cathode contracts and any claims which arise from them (including the Alleged Claim) are null and void. A copy of the legal memorandum as prepared by Zhong Lun Law Firm, is annexed and exhibited hereto as Tab-5 of 'LIY-1'. A copy of the relevant English translation of the legal memorandum by Zhong Lun Law Firm will be exhibited in a subsequent affidavit once the translation has been completed.

66 The weaknesses of JHC's case were brought into even starker relief at the hearing before us. When asked why JHC had taken the position that the Contracts were not meant to be enforced, Mr Tan informed us that this argument was based solely on the fact that the debt of US$47.43m had sat on JHC's books

for several years with no steps being taken by FGHK to enforce it. Mr Tan accepted that he was in fact asking us to draw the inference from this fact that the Contracts were not meant to be enforced at all, but he was unable to explain *why*, if this was so, JHC had issued various audit confirmation requests. Nor was he able to explain why the Contracts were entered into in the first place. When we probed this further, Mr Tan confirmed that it was *not* JHC's case that the Contracts were part of a scheme to defraud creditors or some other similar illegal arrangement, which meant that there really was no explanation before us as to why JHC claimed that the Contracts were not meant to be enforced. In short, the only fact relied on by JHC was that FGHK had not demanded payment of the US$47.43m debt for several years.

67 In our judgment, this was a wholly unsatisfactory state of affairs. The fact that payment is not sought for a time simply does not mean that the sum in question is not payable at all. There may be any number of reasons why a creditor withholds promptly enforcing a debt. Here, the fact that FGHK had not demanded repayment prior to December 2021 could easily be explained by the fact that before that, FGHK and JHC were part of the same group of companies (see [4]–[5] above). Given that control of FGHK had subsequently passed to the Liquidators, there was nothing surprising in the fact that the demand was only recently made. We make this observation not as a finding of fact but simply to illustrate why there was no basis at all to draw the inference that we were invited to draw.

68 In fairness to JHC, FGHK's case was not flawless, in the sense that FGHK did not produce any contemporaneous documents to show that the copper cathodes had in fact been sold or delivered to JHC. As we indicated to Mr Gill during the hearing, one might have expected there to have been delivery notes or similar documents evidencing the sale and delivery of nearly

US$50m worth of copper cathodes to JHC. These documents were not placed before us. The Contracts and the corresponding invoices had also been exhibited by JHC, rather than FGHK. Nevertheless, the burden is on JHC, as the party seeking to resist the application, to show that it had raised a dispute in good faith and on substantial grounds, in the face of the audit confirmation requests that had been issued on its behalf. It was immaterial that according to Mr Tan, there was allegedly no one in JHC who could speak to why the Contracts were entered into or why the audit confirmation requests were issued because ownership of the company had changed in 2021. In the final analysis, the question before us was whether on the *available* evidence, JHC had raised a dispute in good faith and on substantial grounds over its liability for the US$47.43m debt. For the reasons we have discussed above, we were satisfied that JHC had not done so.

Whether JHC should be wound up

69 It followed from this conclusion that FGHK did have standing as a creditor to bring a winding-up application. There was no real dispute over JHC's indebtedness. As mentioned above at [17], the Judge had found that JHC was in fact unable to pay its debts based on its audited financial statements. JHC did not challenge this, and we saw no reason to disturb the Judge's finding in this regard. We therefore allowed the appeal and ordered that JHC be wound up. It also followed from our decision that it was unnecessary to consider the parties' arguments on whether it was just and equitable for JHC to be wound up.

Appointment of liquidators

70 After the hearing, the parties wrote to the court regarding the appointment of liquidators for JHC. While FGHK proposed the appointment of liquidators from Alvarez & Marsal (SE Asia) Pte Ltd ("A&M (SE Asia)"), FGHK's Liquidators were from Alvarez & Marsal Asia Ltd, which is part of the

same Alvarez & Marsal ("A&M") global network of offices as A&M (SE Asia). Given the potentially conflicting interests between FGHK and JHC in the winding-up of the latter, we declined to appoint FGHK's proposed liquidators and directed the parties to nominate alternative liquidators from a firm outside the A&M global network. FGHK subsequently nominated liquidators from Grant Thornton Singapore Pte Ltd ("Grant Thornton"). While JHC objected to this proposal, it did not state the reason for its objection, and we did not see any sound basis for it. In the circumstances, we directed that FGHK's proposed liquidators from Grant Thornton were to be appointed as the joint and several liquidators of JHC.

Costs

71 Following the hearing, the parties also filed written submissions on the question of costs. In its submissions, FGHK seeks an order that costs be ordered against JHC's directors, rather than JHC itself. FGHK contends that this is justified because:

(a) JHC's directors were solely responsible for mounting JHC's ill-conceived defence to the winding-up application.

(b) The main consequence of JHC resisting the winding-up application was that its directors were able to delay an independent investigation into their own conduct.

(c) There was a clear lack of good faith in JHC's defence.

(d) In raising an unmeritorious defence, the directors caused JHC to incur costs that it could have avoided, thereby depleting the assets available to JHC's unsecured creditors.

72 JHC submits that costs should not be ordered against its directors because:

(a) None of the grounds for making adverse costs orders against a non-party under O 21 r 5(1) of the Rules of Court 2021 ("ROC 2021") are made out.

(b) JHC pursued a legitimate line of resistance in arguing that any dispute arising out of the Contracts was subject to arbitration.

Whether costs orders should be made against JHC's directors

73 Order 21 r 5 of the ROC 2021 provides for the court's power to make adverse costs orders against non-parties, as follows:

> **Adverse costs orders against non-party (O. 21, r. 5)**
>
> **5.**—(1) Where it is just to do so, the Court may order costs against a non-party if the non-party has —
>
> (*a*) assigned the non-party's right in the action to a party in return for a share of any money or property which that party may recover in the action;
>
> (*b*) contributed or agreed to contribute to a party's costs in return for a share of any money or property which that party may recover in the action; or
>
> (*c*) contributed or agreed to contribute to a party's costs and actively instigates or encourages that party to continue with the action.
>
> (2) Before the Court makes an order under paragraph (1), the Court must give the non-party a reasonable opportunity to be heard, either by way of an oral hearing or by written submissions.

74 While O 21 r 5 of the ROC 2021 specifies certain situations in which the court may order costs against non-parties, we are satisfied that the court's power to do so is not confined *only* to those specified situations. As the authors of *Singapore Civil Procedure 2022* (Cavinder Bull SC gen ed) (Sweet & Maxwell,

2022) observe at para 21/5/2, this court has previously recognised a general power to award costs against non-parties under the previous O 59 r 2(2) of the Rules of Court (2014 Rev Ed) ("ROC 2014"): see *DB Trustees (Hong Kong) Ltd v Consult Asia Pte Ltd and another appeal* [2010] 3 SLR 542 ("*DB Trustees*") at [24]. Order 59 r 2(2) of the ROC 2014 is preserved in O 21 r 2(1) of the ROC 2021, which provides as follows:

> **Powers of Court (O. 21, r. 2)**
>
> **2.**—(1) Subject to any written law, costs are in the discretion of the Court and the Court has the power to determine all issues relating to the costs of or incidental to all proceedings in the Supreme Court or the State Courts at any stage of the proceedings or after the conclusion of the proceedings.

75 Further, there is nothing in the language of O 21 r 5 of the ROC 2021 that suggests it is meant to constrain the wide discretion of the court that is provided for in O 21 r 2(1), or to otherwise limit the court's power to order costs against non-parties to the specific situations mentioned there. In our judgment, the court retains a broad power to order costs against a non-party where it is just to do so, in line with the cases decided prior to the coming into effect of the ROC 2021.

76 In *DB Trustees*, this court observed that two particular factors ought to "almost always" be present for it to be just for costs to be ordered against a non-party, although such factors were not "indispensable prerequisites" (at [29]–[35]):

> (a) First, there had to be a close connection between the non-party and the proceedings. It was sufficient that the non-party either funded or controlled the legal proceedings with the intention of ultimately deriving a benefit from them.

(b) Second, the non-party must have caused the incurring of the costs. It would not be just to order a non-party to pay costs if the litigant would have incurred the legal costs regardless of the non-party's role.

77 Further, in the context of cost orders sought against directors and shareholders of litigant companies, this court made the following points in *SIC College of Business and Technology Pte Ltd v Yeo Poh Siah and others* [2016] 2 SLR 118:

(a) The fact that the non-parties are the only shareholders and directors of a company and would therefore be the real and only beneficiaries of any successful outcome in the litigation should not be the overriding factor in consideration, for otherwise "any court which rules against any closely-held company would have to order costs against its shareholders and directors personally" and "drive a coach and horses through the doctrine of the separate liability of the company" (at [91(a)]).

(b) It is not a principle of law that where a corporate litigant is unable to pay costs, the successful party will be able to look to any person with a close connection to that company for costs. The corporate veil is usually only lifted where there is fraud or highly unconscionable conduct (at [91(b)]).

(c) That said, while impropriety or bad faith on the directors' or shareholders' part in causing the company to bring proceedings is an important factor in deciding whether they should be made personally liable for costs, there is no strict requirement that this needs to be made out before an adverse costs order can be made against them (at [93]).

(d) The controlling director of a one-man company might be made liable for costs if the company's defence is found not to be advanced in good faith, as, for example, where the company has been advised that there is no defence, and the proceedings are defended out of spite or for the sole purpose of causing the plaintiffs to incur irrecoverable costs (at [105]).

78 In the present case, we consider it appropriate to order JHC's directors to bear costs jointly and severally with JHC, for the reasons set out below.

79 First and most importantly, we agree with FGHK that there is a clear lack of good faith in JHC's defence. As we have explained at [66] above, it became apparent at the hearing before us that the *sole* basis on which JHC's defence was developed was that the US$47.43m debt had remained on its books for several years without any enforcement action being taken. JHC was not able to say *for a fact* that the Contracts were not meant to be enforced, or otherwise explain why the Contracts were entered into. In these circumstances, it must have been clear to JHC's directors that JHC had no sound basis to dispute the debt, and a decision nonetheless to resist the winding-up application suggests a clear lack of good faith. While JHC contends that it pursued a "legitimate defence" in arguing that disputes arising out of the Contracts were subject to arbitration, we have explained at [62] above that JHC's position was fundamentally inconsistent and in fact amounted to abusing the court's process.

80 Second, we agree with FGHK that it can reasonably be inferred that JHC's directors were closely connected to the proceedings, in that they were in control of JHC's resistance to the winding-up application and intended to derive a benefit from the proceedings. JHC's directors are responsible for the way its case strategy was run because they are responsible for the operation of the

company. We also note that the affidavits filed on JHC's behalf in the proceedings were affirmed by Li Ying, one of JHC's three directors.

81 Third, JHC's directors caused the incurring of costs. Had JHC's directors decided against resisting the winding-up application when there were no grounds for doing so, FGHK would not have incurred the extent of costs that it did.

82 Fourth and finally, we find it relevant that JHC is unlikely to be able to satisfy any costs orders against it, given that it has been unable to meet its debts for several years. While the inability of a company to satisfy an adverse costs order is not in itself sufficient reason to order costs against a non-party (as noted at [77(b)] above), it may nevertheless be a relevant factor in determining whether it is just in all the circumstances to order costs against a non-party: see *DB Trustees* at [42]. In the present case, we consider that JHC's inability to satisfy an adverse costs order weighs in favour of ordering costs against its directors, when taken together with the factors discussed at [79]–[81] above.

The appropriate quantum of costs

83 Turning to the appropriate quantum of costs, FGHK seeks (a) S$25,000 for the costs of the proceedings below; (b) S$67,000 for costs of this appeal; and (c) S$11,999.05 for disbursements incurred in this appeal.

84 JHC does not dispute that the costs order made for the proceedings below should be set aside. As for costs of the appeal, we are of the view that a sum of S$50,000 would be appropriate to account for the fact that FGHK was unsuccessful on some of its arguments, including whether it was a contingent creditor under s 124(1)(*c*) of the IRDA. Considerable time was spent on this point despite it being devoid of merit for the reasons we have explained above.

A sizable portion of FGHK's written submissions was also devoted to the contention that it would be just and equitable for JHC to be wound up, but this point was ultimately not pursued by FGHK nor did it arise for our consideration. As for disbursements, we see no issue with this.

Conclusion

85 For the reasons set out above, we allowed the appeal and ordered that JHC be wound up. We further order that FGHK is to be paid costs in the following sums: (a) S$25,000 for the costs of the proceedings below; (b) S$50,000 for costs of the appeal; and (c) S$11,999.05 for disbursements incurred in the appeal. These costs are to be borne jointly and severally by JHC and its directors.

Sundaresh Menon
Chief Justice

Steven Chong
Justice of the Court of Appeal

Kannan Ramesh
Judge of the Appellate Division

Sarjit Singh Gill SC, Daniel Tan Shi Min, Hoang Linh Trang, Chu Shao Wei Jeremy and Edwin Yang Yingrong (Shook Lin & Bok LLP) for the appellant;
Tan Chuan Thye SC, Cheng Wai Yuen Mark, Tan Tian Hui and Timothy Ang Wei Kiat (Rajah & Tann Singapore LLP) for the respondent.
