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

[2023] SGHC 151

Originating Application No 844 of 2022
Summons No 4486 of 2022
Registrar's Appeal No 25 of 2023
Summons No 57 of 2023

Between

Gulf International Holding Pte Ltd

… *Claimant*

And

Delta Offshore Energy Pte Ltd

… *Defendant*

GROUNDS OF DECISION

[Companies — Receiver and manager — Judicial management order]
[Credit And Security — Remedies — Judicial management]
[Arbitration — Stay of court proceedings]

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Gulf International Holding Pte Ltd
v
Delta Offshore Energy Pte Ltd

[2023] SGHC 151

General Division of the High Court — Originating Application No 844 of 2022, Summons No 4486 of 2022, Registrar's Appeal No 25 of 2023 and Summons No 57 of 2023
Hri Kumar Nair J
23 February, 16 March 2023

24 May 2023

Hri Kumar Nair J:

1 This dispute arises from the financing and development of a large power plant project in Vietnam. A number of related applications were put before me: (a) Gulf International Holding Pte Ltd's ("**Gulf International**") application to place Delta Offshore Energy Pte Ltd ("**Delta**") under judicial management;[1] (b) Delta's appeal against the learned assistant registrar's (the "**AR**") dismissal of its application for a stay of the judicial management application pursuant to the section 6 of the International Arbitration Act 1994 (the "**IAA**"); and (c) Delta's application for a dismissal or stay of the judicial management

[1] Gulf International's application for an interim judicial management order was fixed for hearing at the same time as its application for a judicial management order and was therefore academic.

application pursuant to section 91(7) of the Insolvency, Restructuring and Dissolution Act 2018 (the "**IRDA**").

2 On 16 March 2023, I allowed the judicial management application and dismissed Delta's appeal and application for a stay or dismissal, giving brief reasons. These are my grounds in full.

Facts

The parties

3 Gulf International is incorporated in Singapore and is a wholly owned indirect subsidiary of Gulf Energy Development Public Company Limited ("**Gulf Development**"), a company incorporated in Thailand. Gulf International and Gulf Development are collectively the largest power producer in Thailand. Delta is an investment holding company incorporated in Singapore.

Background to the dispute

4 In 2020, Gulf International entered talks with Mr Nguyen Ian Duc Thang and Mr Quintos Roberto Mayo (the "**Sponsors**") to develop a gas-to-power facility (the "**Power Plant**") in Bac Lieu Province, Vietnam (the "**Project**"). The Sponsors were shareholder-directors of Delta (they collectively held 75% of the paid-up share capital of Delta at the time). The Project falls under a new governmental program for major infrastructure developments and was (and still is) regarded as a high-profile, nationally important project to Vietnam; it is furthermore part of a pilot for a new model of financing for power projects and being used by the Vietnamese government to develop a policy on project financing in the future. It is said to be critical to Vietnam's energy

security and socio-economic development. The culmination of these discussions were the following agreements:

(a) a Joint Development Agreement between (i) Gulf Development; (ii) Delta; (iii) the Sponsors; and (iv) Unicorn Enterprise Pte Ltd, dated 17 June 2020, and amended on 23 June 2020 and 28 November 2020 (the "**JDA**");

(b) a Convertible Loan Agreement between (i) Gulf International; (ii) Delta; and (iii) the Sponsors, dated 28 November 2020 (the "**CLA**"); and

(c) a Deed of Security over Shares between (i) Gulf International; and (ii) the Sponsors dated 28 November 2020 (the "**Deed**").

5 Under the JDA, Gulf Development, Delta and the Sponsors agreed that Delta would incorporate a company in Vietnam which would be responsible for developing and implementing the Project. Delta accordingly incorporated Bac Lieu LNG Power Company Limited ("**BLLP**") in Vietnam on 11 June 2021.

6 Under the CLA, Gulf International agreed to disburse loans to Delta in four tranches upon the achievement of certain milestones of the Project (the "**Loans**"). These were to be applied towards the financing, development, construction, operation and maintenance of the Project. Gulf International disbursed loans in three tranches totalling US$10m – comprising Tranches A, B and C – to Delta (the "**Disbursed Loans**").

7 The Loans were secured by a share charge provided for in the Deed (the "**Share Charge**"). Under clause 2.2 of the Deed, the Loans were secured over,

inter alia, 75% of the shares in Delta (the "**Charged Shares**"), *ie*, the three out of the four issued shares in Delta which were held by the Sponsors.

8 Under clause 4.1 of the CLA, each tranche of the Disbursed Loans was due for repayment 12 months after it was disbursed:

> **4.1 Repayment**
>
> Subject to Clause 4.4 (Set-off against Subscription Price), the Borrower shall repay the Outstanding Amount in full within the earlier of:
>
> (a) five (5) Business Days after the Completion Date; and
>
> (b) the date falling twelve (12) months after the Utilisation Date of the relevant Loan(s) under this Agreement.

On Delta's request, Gulf International extended the repayment dates for two of the three tranches of the Disbursed Loans (a) on 17 November 2021 in respect of Tranche A; and (b) on 3 February 2022 in respect of Tranches A and B (Gulf International denied Delta's request on 5 April 2022 for a further extension on all three tranches of the Disbursed Loans). Accordingly, the repayment date for the Disbursed Loans was 7 April 2022. However, Delta did not repay any part of the Disbursed Loans by 7 April 2022 or thereafter.

9 On 8 April 2022, Gulf International declared an event of default under clause 5.1(b)(i) of the CLA.

Procedural history

10 On 13 December 2022, Gulf International filed an application asking that (a) Delta be placed under judicial management; and (b) Mr Patrick Bance ("**Mr Bance**") and Mr Jason Aleksander Kardachi ("**Mr Kardachi**") of Kroll

Pte Ltd be appointed as judicial managers of Delta (case no.: HC/OA 844/2022) (the "**JM Application**").

11 Three days later, Gulf International filed a summons asking that (a) Delta be placed under interim judicial management; and (b) Mr Bance and Mr Kardachi be appointed as interim judicial managers of Delta (case no.: HC/SUM 4486/2022) (the "**IJM Application**").

12 On 4 January 2023, Delta applied for all proceedings in relation to the JM Application, including the IJM Application, to be dismissed or stayed pursuant to s 91(7) IRDA, or, alternatively, pursuant to s 6 IAA.

13 On 6 January 2023, Delta amended its application and asked for all proceedings in relation to the JM Application, including the IJM Application, to be stayed only pursuant to s 6 IAA (case no.: HC/SUM 24/2023) (the "**IAA Stay Summons**").

14 Delta then filed a fresh summons for all proceedings in relation to the JM Application, including the IJM Application, to be dismissed or stayed pursuant to s 91(7) IRDA (case no.: HC/SUM 57/2023) (the "**IRDA Summons**"). The IAA Stay Summons and the IRDA Summons were made on a common basis, namely, that the debt allegedly owed by Delta to Gulf International was disputed and subject to an arbitration agreement under the CLA, and the court should therefore stay or dismiss the JM Application.

15 On 30 January 2023, the AR dismissed the IAA Stay Summons on the basis that there had been a clear and unequivocal admission of the debt by Delta through its multiple requests for extensions of time for the repayment of the Disbursed Loans, and there was therefore no dispute to be submitted to

arbitration; accordingly, there was no reason for a stay of proceedings to be granted.[2] Delta filed a notice of appeal against the decision (case no.: HC/RA 25/2023) (the "**RA**").

16 On 8 February 2023, Delta commenced arbitration proceedings against Gulf International and Gulf Development.[3] It sought, *inter alia*, the following reliefs:

(a) a declaration that Gulf Development had breached the JDA;

(b) a declaration that Gulf International was not allowed to declare a default under the CLA or claim that the Disbursed Loans are due and owing; and

(c) damages for breach of the JDA in an amount to be assessed.

17 The parties each filed several sets of written submissions: (a) the first set in respect of the JM Application and the IJM Application ("**Written Submissions on the JM and IJM Applications**"); and (b) the second set in respect of the RA ("**Written Submissions for the RA**"). After the hearing on 23 February 2023, the parties filed (c) further written submissions on:

(i) whether the principle set out in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] Ch 589 ("***Salford***") (the "***Salford* principle**"), which was adopted and endorsed in *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)*

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2 Certified Transcript (30 January 2023) in respect of HC/SUM 24/2023.

3 Unsworn affidavit of Edward John McCartin III filed on 8 February 2023 ("**EJM's 2nd Affidavit**") at para 42 and Tab EJM-17 (notice of arbitration).

[2020] 1 SLR 1158 ("***AnAn***"), should be applied in the context of a judicial management application; and

(ii) the contents of a further unsworn affidavit of Mr Ian Duc Thang Nguyen, filed on 2 March 2023 ("**IDTN's Affidavit**") pursuant to my direction at the hearing on 23 February 2023, setting out Delta's updated financial position and its plans for completing the Project ("**Further Written Submissions**").

The RA and the IRDA Summons

Issues to be determined

18 The main dispute between the parties concerned whether Delta should be placed in judicial management. Delta disputed that it owed a debt to Gulf International, and on that basis sought a stay or dismissal of proceedings for that issue to first be arbitrated. Delta also argued that the JM Application should be dismissed because there was no debt due and owing to Gulf International and insufficient evidence had been adduced by Gulf International to prove that Delta was either unable or likely to become unable to pay its debts.

19 Whether the JM and IJM Applications should be stayed turns on whether (a) there was a genuine dispute between the parties referable to arbitration; and (b) the IAA Stay Summons amounted to an abuse of process. This is the subject matter of both the RA and the IRDA Summons. The main areas of contention between the parties were:

(a) whether Delta had admitted its debt to Gulf International;

(b) whether the Disbursed Loans were not repayable because the repayment deadlines were flexible;

(c) whether the Disbursed Loans were not repayable because the Loans would be converted into equity and the amount repayable would be set-off against the share premium to be paid by Gulf Development under the JDA on a future date;

(d) whether Gulf International and Gulf Development's (alleged) breaches of the JDA disentitled Gulf International from declaring a default under the CLA or claim the Disbursed Loans were due;

(e) whether Delta's obligations under the CLA were independent of the JDA and unaffected by breaches thereof; and

(f) whether Delta was in breach of its obligations in the Deed and the CLA.

The parties' cases

Delta's case

20 Delta argued that (a) there was a valid arbitration agreement between the parties; and (b) there was a dispute referable to arbitration.

21 The arbitration clauses Delta relied on are reproduced below. Delta argued that the express wording of these clauses reflects that Gulf International and Delta had intended for arbitration to be the mechanism for disputes arising out of or in connection with the CLA.[4] Furthermore, Gulf International did not

[4] Delta's Written Submissions for the RA at para 29.

challenge the validity of the CLA or the validity or scope of the arbitration agreement in the CLA.[5]

> **14.2 Management Discussions**
>
> Parties shall first attempt to resolve any dispute, controversy or claim arising in any way out of or in connection with this Agreement including:
>
> (a) any contractual, pre-contractual or non-contractual rights, obligations or liabilities; and
>
> (b) any issue as to the existence, validity or termination of this Agreement,
>
> (a "**Dispute**") by discussions amongst representatives from both the Lender [*ie*, Gulf International] and the Borrower [*ie*, Delta].
>
> **14.3 Arbitration**
>
> (a) Any Dispute not resolved in accordance with Clause 14.2 (*Management Discussions*) within fifteen (15) days after the commencement of discussions shall be referred to and finally resolved by arbitration in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (the "**Rules**") for the time being in force, which Rules are deemed to be incorporated by reference in this Clause 14.3 (*Arbitration*).[6]

22 Delta argued that whether the Disbursed Loans were due and payable, and whether Delta was in breach of the Deed and the CLA, were disputes that fall within the ambit of clause 14 of the CLA.[7] Delta highlighted the following:[8]

(a) Gulf International and Gulf Development's refusal to contribute their technical expertise prohibited milestones in the Project from being

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5 Delta's Written Submissions for the RA at para 29.

6 Affidavit of Boonchai Thirati dated 9 December 2022 ("**BT's 1st Affidavit**") at Tab BT-4 (the CLA).

7 Delta's Written Submissions for the RA at para 33.

8 Delta's Written Submissions on the JM and IJM Applications at para 24.

achieved, which in turn meant that the Loans were not fully disbursed and the Project could not succeed on account of the lack of funding.[9] Their refusal to contribute technical expertise also amounted to a breach of the JDA, which disentitled them from declaring a default under the CLA or claiming that the Disbursed Loans were due and owing.[10]

(b) There was no debt due and payable to Gulf International because the agreement between the parties envisaged that the Loans would be converted into equity such that "Gulf Development/Gulf [International]" would be a 50% shareholder in the Project.[11] This is because the CLA must be read together with the JDA, which provided that Gulf Development would purchase shares in Delta through the conversion of the Loans into equity.[12]

(c) The extensions of time sought for the repayment of the Disbursed Loans were made with a view to continue the development of the Projects and eventual conversion of the Loans into equity.[13] Delta had therefore not made clear and unequivocal admissions to both its liability for and quantum of debt, comprising the Disbursed Loans and interest thereon.[14] Delta also argued that its multiple requests for extensions of time were not clear and unequivocal admissions of debt since they were subject to caveats, including (i) that they were made on

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9 Delta's Written Submissions on the JM and IJM Applications at para 18.

10 Delta's Written Submissions on the JM and IJM Applications at paras 19(a) and (b).

11 Delta's Written Submissions on the JM and IJM Applications at para 19(c); Delta's Written Submissions for the RA at paras 51 and 52.

12 Delta's Written Submissions for the RA at para 44, 48–50.

13 Delta's Written Submissions on the JM and IJM Applications at para 20, third row.

14 Delta's Written Submissions on the JM and IJM Applications at para 22(a).

the basis that the parties would continue the development of the Project and work towards and investment by Gulf International in Delta;[15] and (ii) "Conversion and any other termination provisions provided for under the CLA".[16]

(d) Delta raised numerous other factual disputes concerning the Disbursed Loans, including the fungibility of repayment dates, whether they fell due or would be converted into equity and who would bear responsibility for Delta's inability to repay the Disbursed Loans, and argued that these should be dealt with via arbitration.[17]

23 Delta also argued that there were other disputes underpinning the JM Application which were referable to arbitration.[18] These concerned Delta's purported breaches of the Deed and the CLA by:

(a) diluting Gulf International's security over the Charged Shares by increasing Delta's share capital from four shares to 5,396,169 shares (the "**Share Issuance**");[19]

(b) failing to inform Gulf International and Gulf Development of the Share Issuance;[20]

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15 Delta's Written Submissions for the RA at paras 38 and 39.

16 Delta's Written Submissions for the RA at paras 40 and 41.

17 Delta's Written Submissions for the RA at paras 51 and 52.

18 Delta's Written Submissions for the RA at paras 55 and 56.

19 Delta's Written Submissions for the RA at para 53.

20 Delta's Written Submissions for the RA at para 54(a).

(c) procuring the Share Issuance without satisfying the necessary preconditions;[21] and

(d) failing to ensure that Newco (which, according to clause 1.1 of the CLA, is defined as a company to be incorporated in Singapore and to be the sole shareholder of Holdco, which is another company to be incorporated in Singapore as the sole shareholder of Delta) acceded to the CLA within three business days after its incorporation.[22]

24 In the circumstances, Delta argued that, applying the *Salford* principle, the disputes should first be arbitrated, and the court ought to stay or dismiss the JM Application and the IJM Application.[23]

Gulf International's case

25 Gulf International argued that (a) there was no dispute referable to arbitration; (b) Delta's application amounted to an abuse of process; and (c) in any event, as Gulf International was a contingent creditor of Delta and Delta did not dispute that the Disbursed Loans ultimately should be repaid to Gulf International, Gulf International was thereby entitled to make the JM Application.[24]

26 Gulf International argued that there was no dispute referable to arbitration for the following reasons:

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21 Delta's Written Submissions for the RA at para 54(b).

22 Delta's Written Submissions for the RA at para 54(c).

23 Delta's Written Submissions for the JM and IJM Applications at para 16.

24 Gulf International's Written Submissions for the RA at paras 69–74.

(a) The Disbursed Loans were indisputably due from Delta to Gulf International, and Delta had unequivocally admitted its liability to repay the same.

(b) The arbitration clause in the JDA was not relevant to the IAA Stay Summons and the RA since Gulf International was not a party to the JDA – only Gulf Development was. The only applicable arbitration agreement between Gulf International and Delta pertaining to the Disbursed Loans was clause 14.3 of the CLA. The CLA deals with a specific aspect of the JDA, namely the provision of the Loans.[25] However, substantially all of the arguments relied on by Delta to dispute its obligation to repay the Disbursed Loans relate to issues governed by the JDA,[26] and Delta cannot rely on a cross-claim under a different contract to restrict Gulf International's exercise of its rights under the CLA.[27]

(c) There was no dispute between the parties on account of the fact that the parties' objective intention ascertained from the CLA was for the Disbursed Loans to be repaid by Delta, the only exception being, under clause 4.4 of the CLA, if Gulf International elects at its sole discretion to exercise its right to set-off the outstanding amount of the Disbursed Loans against the sums payable for the subscription of shares (which would follow from a share subscription agreement entered into between Gulf International and Holdco after the CLA),[28] which was not

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25 Gulf International's Written Submissions for the RA at paras 15 and 16.

26 Gulf International's Written Submissions for the RA at para 45.

27 Gulf International's Written Submissions for the RA at paras 48–51.

28 BT's 1st Affidavit at Tab BT-4 (the CLA) / p 121.

the case here.[29] Gulf International was also not under an obligation to convert the Loans to equity in Delta.[30]

27 Gulf International submitted that Delta's applications for a stay (or dismissal) amounted to an abuse of process for the following reasons:

(a) Delta had been aware of, and admitted, its obligation to repay the Disbursed Loans but suddenly changed its position and claimed that there was no debt due and owing to Gulf International.[31]

(b) Gulf International's alleged breaches of the JDA occurred even before Delta's first request for an extension of time.[32]

(c) Delta sought, by the Share Issuance and since then, to deprive Gulf International of its security, delay repayment of the Disbursed Loans and extract more capital from Gulf International.[33]

(d) Delta attempted to rewrite the parties' bargain by demanding that any exercise of remedies under the Share Charge be subject to arbitration when the Deed provides for disputes to be submitted to the exclusive jurisdiction of the Singapore courts.[34]

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29 Gulf International's Written Submissions for the RA at paras 20–23.

30 Gulf International's Written Submissions for the RA at paras 27–29.

31 Gulf International's Written Submissions for the RA at paras 53 and 58.

32 Gulf International's Written Submissions for the RA at para 59.

33 Gulf International's Written Submissions for the RA at paras 60, 61 and 63.

34 Gulf International's Written Submissions for the RA at para 62.

(e) Delta sought a stay for the ulterior motive of frustrating Gulf International's exercise of its legitimate rights as Delta's creditors to recover sums due to it.[35]

28 The arguments raised by Delta engage the principles laid down in *Salford* and *Anan*. These cases establish that where a creditor brings a winding up application premised on a disputed debt, which dispute is governed by an arbitration agreement, the court should, save in wholly exceptional circumstances, stay or dismiss the winding up application (*Salford* at [39] and [40]; *Anan* at [30]). An exception to this is where the said dispute is raised by the debtor in abuse of the court's process (*Salford* at [33]; *Anan* at [56] and [91]), for example, where the debt was previously admitted (*Anan* at [99(a)]).

29 Accordingly, I consider below (a) whether Delta admitted the debt owed to Gulf International; and (b) whether Delta's IAA Stay Summons and IRDA Summons amount to an abuse of process. There is a precedent question of the applicability of the *Salford* principle to the facts, given that both *Salford* and *Anan* dealt with winding up and not judicial management applications (the "**Applicability Question**"). I shall nonetheless deal with this later, given my findings below that there was no disputed debt and that Delta acted in abuse of process.

Whether Delta admitted the debt

30 I find that by seeking, and obtaining, the various extensions of time to repay the Disbursed Loans, Delta unequivocally acknowledged and admitted that it owed Gulf International the principal sum of US$10m and interest

[35] Gulf International's Written Submissions for the RA at para 68.

accrued thereon under the terms of the CLA. Its arguments denying its indebtedness to Gulf International constituted a change in position that amounted to an abuse of process.

31 I set out relevant sections of Delta's requests for extensions of time below:

(a) First request for extension of time to repay the Tranche A loan:

> The Parties are continuing the development of the Project under the Agreements and working toward an investment by [Gulf International] in [Delta], as contemplated by the Agreements. [Delta] desires to extend the time for repayment of the Tranche A Loan due on 28 November 2021 for one (1) year until 28 November 2022 (subject to Conversion and any other termination provisions provided for under the CLA) and to set forth their agreement as to same herein.[36]

(b) Second request for extension of time to repay the Tranche A and Tranche B loans:

> The Parties are continuing the development of the Project under the Agreements and working toward an investment by the Lender in the Borrower, as contemplated by the Agreements. The Borrower desires to:
>
> > (1) Extend the time for repayment of the Tranche A Loan under the CLA with the principal amount of USD 2,500,000 due until 07 April 2022 and;
> >
> > (2) Extend the time for repayment of the Tranche B Loan under the CLA with the principal amount of USD 2,500,000 due until 07 April 2022[.][37]

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36 BT's 1st Affidavit at Tab BT-10 (letters requesting and granting extensions) / pp 220 and 221.

37 BT's 1st Affidavit at Tab BT-11 (letters requesting and granting extensions) / p 227.

(c) Third request for extension of time to repay the Disbursed Loans (comprising of Tranches A, B and C):

> The Parties are continuing the development of the Project under the Agreements and working toward an investment by the Lender in the Borrower, as contemplated by the Agreements. The Borrower desires to:
>
> 1. Extend the time for repayment of the Tranche A Loan under the CLA with the principal amount of USD 2,500,000 by 31 May 2022;
>
> 2. Extend the time for repayment of the Tranche B Loan under the CLA with the principal amount of USD 2,500,000 by 31 May 2022; and
>
> 3. Extend the time for repayment of the Tranche C Loan under the CLA with the principal amount of USD 5,000,000 due by 31 May 2022.[38]

32 In other words, in each of the requests, Delta clearly and unequivocally acknowledged that the various tranches were due to be repaid by a specified date and was asking for more time to repay the same.

33 Delta argued that its statement that the parties were continuing the development of the Project and working towards an investment by Gulf International in Delta (which had been repeated in all three letters of request for extension of time) amounted to a qualification to its liability to repay the Disbursed Loans.[39] I disagree. That was not a qualification of its liability to repay, but instead the *rationale* for asking for extensions of time to repay.

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38 BT's 1st Affidavit at Tab BT-12 (letters requesting and granting extensions) / pp 236 and 237.

39 Delta's Written Submissions on the JM and IJM Applications at paras 20 (third row) and 22(a); Delta's Written Submissions for the RA at paras 13, 14 and 38.

34 Furthermore, in seeking the extensions, Delta had not in any way reserved its rights. In contrast, the parties had expressly agreed that Gulf International had reserved its rights under the CLA, and that the extensions had not constituted a waiver of its rights and remedies thereunder. I highlight the following:

(a) Delta, when it requested the first extension, sought to "extend the time for repayment of the Tranche A Loan… for one (1) year… (*subject to Conversion and any other termination provisions provided for under the CLA*)…" [emphasis added].[40]

(b) Gulf International's response to Delta's first request stated that it agreed to the extension "***on the conditions*** that: … all the terms and conditions set out in the CLA, including clause 2.3 (*Interest*), ***shall continue to apply*** to the interest accrued on the Tranche A Loan in all respects…" [emphasis added in bold italics]. It also "reserve[d] any right or remedy it may have [had] now or subsequently [and its] letter [had] not constitute[d] a waiver of any right or remedy".[41]

(c) Gulf International also, in its response to Delta's first request, asked Delta to "confirm [Delta's] understanding and acceptance of [Gulf International's] terms and conditions" by signing an "execution page" to its response thereafter, which Delta did.[42]

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40 BT's 1st Affidavit at Tab BT-10 (letters requesting and granting extensions) / p 221.

41 BT's 1st Affidavit at Tab BT-10 (letters requesting and granting extensions) / pp 223 and 224.

42 BT's 1st Affidavit at Tab BT-10 (letters requesting and granting extensions) / pp 224 and 225.

(d) In respect of the second extension, Gulf International's response stated that:

> 5. Except as expressly consented to, waived or amended in this letter, the CLA and the Tranche A Loan Repayment Extension Letter shall remain in full force and effect.
>
> 6. … [Gulf International] … reserves any right or remedy it may have now or subsequently. This letter does not constitute a waiver of any right or remedy.[43]

35 I find therefore that there was an admission by Delta of the debt it owed to Gulf International in respect of the Disbursed Loans and the interest accrued thereon and thus, no disputed debt in this case.

Whether Delta's conduct amounts to an abuse of the court's process

Whether Delta's change in position constituted an abuse of process

36 The Court of Appeal in *AnAn* recognized that a debtor may genuinely dispute a debt which it had expressly and repeatedly admitted on previous occasions and, notwithstanding that the debtor may appear *bona fide* in raising the alleged dispute, the court ought, in the absence of a clear and convincing reason for the change of position, to refuse a stay as it would amount to an abuse of process – see *AnAn* at [94]. I therefore examine the reasons advanced by Delta in support of its claim that it was not indebted to Gulf International.

37 I find that Delta's change in position in subsequently denying the debt was an abuse of process.

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[43] BT's 1st Affidavit at Tab BT-11 (letters requesting and granting extensions) / p 231.

38 In my judgment, Delta failed to show clear and convincing reasons for its change of position. On the contrary, its arguments and conduct only underscored its abuse of the court process.

39 First, while I accept that the CLA must be read and understood together with the JDA, the interpretation Delta advanced with respect to its payment obligations under the CLA – that repayment deadlines were flexible or fungible – are plainly misconceived. Clause 2.7 (titled "Clause 8") of the JDA (as amended) states that Gulf Development was to provide Delta with funding of US$15m in four separate tranches, on the fulfilment of various milestones of the Project. More importantly, the JDA specifically provides as follows:

> the additional terms on which the loans are advanced shall be further agreed between Gulf [Development] and [Delta] and set out in the terms of the loan agreement, including but not limited to: … *the loan repayment shall be made after twelve (12) months from the utilization date of each tranche…*[44]
>
> [emphasis added]

40 It was Gulf International which furnished the Disbursed Loans by way of the CLA, which was the operative document governing the terms of the Disbursed Loans. The CLA provides specific repayment dates for each tranche, consistent with the terms of the JDA (see [8] above). Clause 13.6 of the CLA states that it may only be amended in writing by another document executed by the parties.[45] It was not in dispute that no such amending document exists. There was therefore no issue of the repayment being "flexible" or "fungible", as Delta contended.

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44 BT's 1st Affidavit at Tab BT-3 (the JDA) / p 104.

45 BT's 1st Affidavit at Tab BT-4 (the CLA) / p 137.

41 Second, Delta argued that there was no obligation to repay the Disbursed Loans as it would be set-off against the share premium to be paid by Gulf Development for the acquisition of shares in Delta. This is also misconceived. Clause 4.4 of the CLA provides that Gulf International "may elect to set-off" the outstanding amount of the Disbursed Loans against the sums payable for the subscription of shares in Delta.[46] The relevant sections of the CLA are reproduced below:

> **1.1 Definitions**
>
> …
>
> "Shares" means any ordinary shares of [Delta] as at the date of this Agreement and including any shares to be allotted, issued, transferred, redeemed or repaid to any person who has an option or right of pre-emptive or conversion or any rights to convert any loan into share of the [Delta] or to convert the share into share capital of a different description (if any).
>
> …
>
> **4.4 Set off against Subscription Price**
>
> The Lender *may elect to set-off* the Outstanding Amount against the sums payable to the [Delta] for the subscription of Shares in accordance with the Share Subscription Agreement.
>
> [emphasis added in italics]

42 This is consistent with the JDA, which provides that:

> If Closing [defined at clause 2.5 (titled "Clause 6") of the JDA] occurs after the advance of loan(s), Gulf [Development] *shall have the right* to offset the total amount of the loan advanced together with interest… against the 2nd Payment of Share Subscription Fee …"[47]
>
> [emphasis added]

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46 BT's 1st Affidavit at Tab BT-4 (the CLA) / pp 122 and 127.

47 BT's 1st Affidavit at Tab BT-3 (the JDA) / p 104.

43 There was therefore no *obligation* for Gulf International to set-off the Disbursed Loans against the subscription price. Further, it was undisputed that Closing had not even occurred at the time the demand for payment was made. In the event, Gulf International exercised its right to demand repayment of the Disbursed Loans when they were due (after the extensions had expired), and the Disbursed Loans were therefore repayable.

44 Third, Delta's claim that Gulf Development was in breach of the JDA was irrelevant. Delta may be entitled to pursue its claims in damages against Gulf Development in arbitration, but that did not relieve Delta of its liability to repay the Disbursed Loans to Gulf International under the CLA. I note that Delta did not specifically ask for damages against Gulf International in the arbitration, but only a declaration that Gulf International was not allowed to declare default under the CLA or claim that the Disbursed Loans were due and owing.[48] I further note that Delta's claim for damages against Gulf Development was unquantified.[49] Significantly, Delta only commenced arbitration proceedings on 8 February 2023,[50] after the JM Application had been filed, although Gulf International had demanded the repayment of the Disbursed Loans as long ago as 8 April 2022.[51] I stress that I am not adjudicating or otherwise commenting on the claims that are now the subject of arbitration, but am of the view that those claims did not entitle Delta to deny its liability to immediately repay the Disbursed Loans with interest.

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48 EJM's 2nd Affidavit at para 42(b).

49 EJM's 2nd Affidavit at para 42(c).

50 EJM's 2nd Affidavit at Tab EJM-17 (notice of arbitration).

51 BT's 1st Affidavit at para 22.

45 The above is sufficient to decide the issue of abuse. However, as the Court of Appeal highlighted at [99] of *AnAn*, abuse of the court's process can manifest itself in a multitude of scenarios. In this regard, Delta's conduct following Gulf International's demand for immediate payment of the Disbursed Loans on 8 April 2022 – in particular, the Share Issuance – was relevant to, and aggravated, its abuse of process.

Whether the Share Issuance was an abuse of process

46 The Loans were secured by the Share Charge pursuant to clause 2.2 of the Deed. The relevant definitions and clause 2.2 are reproduced below:

> **1.1 Definitions**
>
> …
>
> "**Charged Assets**" means the Shares and the Related Assets;
>
> …
>
> "**Related Assets**" means:
>
> > (a) dividends, distributions, interest and other income payable in respect of the Shares;
> >
> > (b) allotments, rights, money or property of any kind whatsoever at any time arising from the Shares by way of conversion, exchange, redemption, bonus, preference, option, substitution or otherwise;
> >
> > (c) stocks, shares and securities offered in addition to or substitution for the Shares or otherwise; and
> >
> > (d) all other rights, benefits and proceeds of any kind whatsoever at any time in respect of or derived from the Shares;
>
> "**Secured Obligations**" means all obligations owing to the Chargee (whether for its own account or as trustee) by any Obligor under or pursuant to the Transaction Documents, whether present or future, actual and contingent, including in respect of any further advances made after the date of this Agreement; and

> "**Shares**" means seventy-five percent (75%) of the shares in the share capital of the Company held by, to the order of or on behalf of a Chargor at any time as such Shares are identified in Schedule 1 (Charged Assets (Shares)) hereto and any Additional Shares; and
>
> …
>
> **2.2 Charge**
>
> Each Chargor [*ie*, the Sponsors] charges its Charged Assets to the Chargee [*ie*, Gulf International] with full title guarantee by way of first fixed charge as continuing security for the payment and discharge by the Company [*ie*, Delta] of all the Secured Obligations.[52]

47 The Share Charge is governed, not by an arbitration agreement, but an irrevocable submission to the exclusive jurisdiction to the Singapore courts – clause 25.2 of the Deed.[53] Clause 4.2 of the Deed provides that at any time on or after the occurrence of an "Enforcement Event", Gulf International shall, *inter alia*, be entitled to exercise any voting rights in respect of the Charged Shares, transfer all or part of the Charged Shares into its own name and exercise all other powers and rights conferred on or exercisable by the legal and beneficial owners of the Charged Shares.[54] *Per* clause 1.1 of the Deed, an "Enforcement Event" includes an Event of Default under the CLA, specifically, where "the Borrower does not pay on the due date any due and payable Outstanding Amount in accordance with this Agreement" (clause 5.1(b)(i) of the CLA).[55] In short, Delta's failure to pay on Gulf International's demand on 8 April 2022 would have entitled Gulf International to assume control of Delta.

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52 BT's 1st Affidavit at Tab BT-6 (the Deed) / pp 164–166.

53 BT's 1st Affidavit at Tab BT-6 (the Deed) / p 184.

54 BT's 1st Affidavit at Tab BT-6 (the Deed) / pp 167 and 168.

55 BT's 1st Affidavit at Tab BT-6 (the Deed) / pp 164 and 165 and Tab BT-4 (the CLA) / pp 127 and 128.

48 Obviously aware of this possibility, Delta surreptitiously took steps to deny Gulf International its rights under the Share Charge. On or around 15 July 2022, by way of a shareholders' ordinary resolution passed at an extraordinary general meeting, Delta increased its share capital from four shares to 5,396,169 shares.[56] The resolution was passed by the Sponsors holding 75% of Delta's shares.[57] The new shares were issued to one Sisyphus Clean Energy Pte Ltd ("**Sisyphus**")[58] apparently as consideration for the settlement of a purported debt of US$5,396,165 owed by Delta to the Sponsors,[59] which Delta claimed had been ultimately assigned to Sisyphus.[60] In short, Sisyphus did not inject fresh capital into Delta. Sisyphus appears to be related to Delta – it has the same registered address as Delta, one of the Sponsors is one of its two directors, Delta and Sisyphus have in common two directors and a secretary,[61] and the Sponsors appear to have formed Sisyphus.[62] In IDTN's Affidavit, Delta belatedly claimed that the issuance of the new shares was to

> improve [Delta's] balance sheet for future investments", and that the conversion of the loan into equity "was necessitated but [*sic*] the Sponsor's desire not to increase the burden on [Delta]

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56 BT's 1st Affidavit at paras 29 and 30, Tab BT-16 (notice of resolution and minutes of extraordinary general meeting).

57 BT's 1st Affidavit at Tab BT-16 (notice of resolution and minutes of extraordinary general meeting).

58 See also IDTN's Affidavit at Tab IDTN-1 (director's statement and unaudited consolidated financial statements) / p 53.

59 BT's 1st Affidavit at para 30, Tab BT-16 (notice of resolution and minutes of extraordinary general meeting) and Tab BT-17 (statement containing particulars of shares allotted otherwise than for cash).

60 BT's 1st Affidavit at Tab BT-16 (notice of resolution and minutes of extraordinary general meeting).

61 BT's 1st Affidavit at Tab BT-1 (Accounting and Corporate Regulatory Authority ("**ACRA**") business profile of Delta), Tab BT-17 (ACRA business profile of Sisyphus).

62 IDTN's Affidavit at para 59(a).

> for cash repayment of [the] loan with a view towards reducing the overall debt burden on the Project so as to secure new funding from other investors.[63]

49 I do not accept this explanation. First, no evidence was adduced to explain how the said debt arose.

50 Second, the timing and effect of the move was to fundamentally impact Gulf International's security under the Share Charge – while it had previously held security in 75% of the shares in Delta, after the Share Issuance it held security in less than 0.0015% – and thereby prevent it from exercising its rights to take control of Delta. Significantly, Gulf International was not given notice of the Share Issuance at the time and only learned of it several months later.[64]

51 Third, and significantly, when Gulf International sought to restore its security by asking the relevant parties to execute a new share charge,[65] the Sponsors responded by requiring "a full waiver of defaults under the JDA" and stating that "[a]ny exercise of remedies under the [Share Charge] should be subject to [the] satisfaction of the dispute resolution provision [*sic*] of the JDA and the CLA".[66]

52 The clear inference is that the Share Issuance was deliberately done to frustrate Gulf International's rights under the Charge. The Sponsors' insistence on a full waiver of any default and for the exercise of remedies under the Share Charge to be subject to arbitration before they would remedy the situation made

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63 IDTN's Affidavit at para 59(a).

64 BT's 1st Affidavit at para 26.

65 BT's 1st Affidavit at para 37.

66 BT's 1st Affidavit at para 40 and Tab BT-23 / p 330.

clear their agenda. Delta argued that any dispute relating to this incident is a matter for arbitration. However, the Share Charge is not governed by an arbitration clause (at [47] above).

53 Fourth, the issuance of the new shares was contrary to Delta's Amended Constitution,[67] which states (amongst other things) the following:

> the rights for the time being attached to any class of shares for the time being forming part of the share capital of the Company which have been charged or mortgaged by way of security, from time to time, to any… company…, shall not be modified, affected, varied, extended or surrendered in any way or manner without the prior written consent of such… company.[68]

54 Delta did not deny this or offer any argument or explanation as to how the Share Issuance was consistent with its own constitution. This further suggests that the primary purpose of the Share Issuance was to prejudice Gulf International's security over the Disbursed Loans.

55 Importantly, but for the issuance of the new shares to Sisyphus, Gulf International could have exercised its rights under the Share Charge and taken control of Delta. In that event, the JM Application would not have been necessary. I therefore find Delta's conduct relevant to these proceedings and that it acted in abuse of process.

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67 BT's 1st Affidavit at para 28.

68 BT's 1st Affidavit at Tab BT-2 / p 54.

The Applicability Question

56 For completeness, and while not necessary for my decision, I observe that the *Salford* principle and its underlying rationale may not apply as strictly in respect of a judicial management application.

The Salford principle

57 The *Salford* principle prescribes that where an applicant brings a winding up application premised on a disputed debt which is subject to an arbitration agreement, the court should, save in wholly exceptional circumstances, stay or dismiss the winding up application (*Salford* at [39] and [40]; *Anan* at [30]); to show that the debt is "disputed", it is sufficient to show that the debt is not admitted (*Salford* at [40]; *Anan* at [31]). The rationale is to prevent an applicant from using liquidation proceedings to bypass the arbitration agreement, which would happen if the court conducted a summary judgment-type analysis on the disputed debt (*Salford* at [40]; *Anan* at [30]). Parties should be held to the bargain they entered to have such disputes adjudicated in arbitration.

58 The Court of Appeal approved of the *Salford* principle in *Anan* (at [57]) because it promotes coherence in the law, including by preventing abuse of winding-up proceedings (*Anan* at [57], [61]–[65]), gives effect to the principle of party autonomy (*Anan* at [75]–[82]) and helps to achieve cost savings (*Anan* at [85]) and certainty (*Anan* at [84]) in the law. *Anan* highlighted an exception to the *Salford* principle: where the debtor asks for a dismissal or stay in abuse of the court's process *eg*, by disputing a debt which had previously admitted (*Anan* at [56] and [91]).

Relevance of the Salford principle to judicial management applications

59 The above arguments are, as a matter of principle and logic, relevant to judicial management applications as well. Under s 90(a) IRDA, the court may only make a judicial management order where the company is, or is likely to become, unable to pay its debts. In cases where that issue turns on a disputed debt, the court would ordinarily, in the exercise of its discretion, require that the debt first be adjudicated – see *Hammonds (a firm) v Pro-fit USA Ltd* [2007] EWHC 1998 (Ch) at [54] and [55]. Where parties have agreed that arbitration is the mechanism to adjudicate that dispute, they should, in ordinary cases, be held to that bargain.

60 The *Salford* principle is not engaged where there is no disputed debt or where the debt is admitted (as in this case – see [35] above). The abuse of process exception recognised in *AnAn* should apply in judicial management applications. Indeed, where it can be established, independent of the subject debt, that a company is or is likely to become unable to pay its debts, the case for a judicial management application may be more compelling. As will be explained below, that was the situation in this case, where Delta's own evidence showed that it was insolvent without considering its liability to Gulf International (at [79] and [81]).

61 Nonetheless, a decision on whether to stay proceedings is ultimately an exercise of the court's discretion, and there are appreciable differences between winding up and judicial management applications which attenuate the application of the *Salford* principle in the latter.

The application of the Salford principle to judicial management applications

62 The Court of Appeal in *AnAn* was concerned with the potential for abuse where a creditor could make an "arbitrary or tactical choice" to make a winding up application instead of pursuing an ordinary claim for debt and thereby invite the court to adjudicate a disputed debt notwithstanding that it was subject to arbitration (*Anan* at [63]). This also applies to judicial management applications. However, with respect to judicial management applications, the *potential* of abuse is reduced, and the *consequences* of abuse are markedly different, making this concern less relevant. Significantly, judicial management applications engage concerns of public interest which, in some instances, may justify giving precedence to the insolvency regime over arbitration. I elaborate below.

63 First, the judicial management regime engages a broader public interest than the liquidation regime as the former is designed, as one of its objectives, for the rescue and rehabilitation of an ailing business. As stated by the then Minister for Finance in Parliament during the Second Reading of the Companies (Amendment) Bill and introducing the scheme of judicial management, "the benefits of a successful company rescue accrue not only to its shareholders but to employees, the business community and the general public" (*Singapore Parliamentary Debates, Official Report* (5 May 1986) vol 48 at col 40 (Hu Tsu Tau, Minister for Finance).[69] The same considerations do not apply to the same degree in liquidations, which engage the more limited concerns of "economic efficiency and optimal returns for creditors" (*Anan* at [68]). The broader public interest engaged by the judicial management regime arguably should, in

[69] See also Gulf International's Further Written Submissions at paras 9 and 12.

appropriate cases, be given greater weight than the principle of party autonomy in the context of enforcing arbitration agreements. The need for swift intervention to rescue and rehabilitate a viable company should be given proper consideration. That factor arises in this very case, given the looming deadline to build the Power Plant and the lack of a coherent or concrete plan from Delta to meet that obligation (see below at [88]). It may be unfair to compel a creditor, which can demonstrate that there are no triable issues with respect to the debt, to go through arbitration to establish that debt only for the debtor company to deteriorate in the meantime to render the same unrecoverable. The case for a stay may be even less compelling where a judicial management order will also benefit other stakeholders, including other creditors, minority shareholders and employees, who may be unable to make or affect decisions to protect or maintain the viability of the business.

64 The Court of Appeal appears to recognize this at [69] in *Anan* (and [45] and [56] in *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 SLR 414), where it reasoned that a matter "in the wider public interest… [t]herefore… ought to [be] treat[ed]… as non-arbitrable even if the parties expressly included them within the scope of their arbitration agreement". The Court of Appeal also adopted the same reasoning at [111] and [112] of *AnAn,* where it highlighted that the court may grant a stay (instead of dismissing a winding up application) and allow a creditor to restore the application *before* the debt is established via arbitration, in cases where no triable issues are raised by the debtor company and there are *legitimate concerns* about the solvency of the debtor company as a going concern. The Court of Appeal gave examples of where the debtor company (a) has no genuine desire to arbitrate the dispute and is simply relying to the arbitration agreement to delay payment of legitimate

debts; or (b) is paying off other creditors to stave off other winding up proceedings, to the detriment of the applicant creditor, and there is no legitimate explanation for the different treatment of the creditors. This underscores the point that the court should, in exercising its discretion whether to grant a stay of a judicial management application in favour of arbitration, conduct a holistic examination of the circumstances, beyond potential instances of abuse of process by the debtor company. Those circumstances, in my view, should include a broader consideration of the need to intervene in the interests of the debtor company as well as other stakeholders.

65 Second, a judicial management order will only be made where the court is satisfied that one or more of the purposes set out in s 89(1) IRDA would likely be achieved (in addition to a requirement that a debtor company be unable or likely to become unable to pay its debts). This is different from a winding up application, which could turn entirely on whether a company was unable to pay its debt (s 125(1)(*e*) IRDA), which may be largely or entirely constituted by the disputed debt. This distinction is significant because it reflects the reduced potential for abuse by way of an applicant's "arbitrary or tactical choice" to make a judicial management application to circumvent the arbitration agreement, since the applicant must additionally show that one of the statutory purposes of judicial management would be achieved to successfully obtain a judicial management order. This is closely related to the point made in the preceding paragraph: the statutory purposes of judicial management reflect the engagement of a broader public interest. It is generally in the public interest to save, not destroy, a company.

66 Third, the *consequence* of any instance of abuse as contemplated in *Salford* and *Anan* is less weighty in judicial management applications as

compared to winding up applications. In winding up applications, where the disputed debt is not ultimately established, the court can only order a permanent stay of the winding up order. As noted at [80] of *AnAn*, a winding up order is draconian and irreversible and, if the *Salford* principle did not apply, there could be "irreparable harm to the debtor-company's stakeholders, including shareholders and other creditors".

67 In contrast, judicial management includes as one of its purposes the survival of the company as a going concern (s 89(1)(*a*) IRDA), and the court has the power to discharge the company from judicial management when such purpose has been achieved – s 112 IRDA. Further, a judicial management order is effective for only 180 days, unless the court otherwise specifies (s 111(1) IRDA). These mitigate the consequences of abuse. The court should therefore be more ready and willing to invoke the judicial management regime where the purpose is to preserve and protect the interests of its stakeholders.

68 Both parties referred me to *Fieldfisher LLP v Pennyfeathers Ltd* [2016] EWHC 566 (Ch) ("***Fieldfisher***"), where Nugee J dismissed an administration application, which is similar to a judicial management application, applying the *Salford* principle. Delta pointed out, relying on *Fieldfisher*, that a court cannot be satisfied if debts are due for the purposes of a judicial management application unless it embarks on an enquiry as to those debts but, where there is an arbitration agreement, this enquiry should not be addressed by the court.[70] Delta also argued that the "differences between the policy [*sic*] behind [judicial management] and winding up [regimes]" should not stop *Salford* from applying here, since "the policy considerations

[70] Delta's Further Written Submissions at paras 6 and 9.

underpinning the *Salford* principle relates [*sic*] to the arbitration regime".[71] Gulf International argued that *Fieldfisher* can be distinguished because the court there received limited assistance on the Applicability Question and had "considered itself bound by the *Salford* principle to dismiss the [judicial management] application… noting that it reached this conclusion 'without much enthusiasm'". Furthermore, the court did not provide comprehensive reasons for why it "considered itself bound by the *Salford* principle".[72] I agree with the concerns raised by Gulf International. Further, while I accept the policies underpinning the *Salford* principle, they are, in my view, attenuated in the context of judicial management applications for the reasons set out above. I also note in passing that Nugee J had, ten days after that decision, rescinded his earlier order dismissing the administration application and instead made an administration order, having accepted that the company owed some £270,000 (*LF2 Ltd v Supperstone* [2019] 1 BCLC 38 at [10]). I therefore do not find *Fieldfisher* instructive.

69 For the foregoing reasons, I find that the *Salford* principle should not apply as strictly in judicial management applications. Where an applicant brings a judicial management application based on a disputed debt which is subject to an arbitration agreement, the court should not limit its discretion to stay or dismiss the application only where the alleged debtor is acting in *abuse of the court's process*. Instead, the court should make a *more holistic assessment* of the facts and consider, *inter alia*, the interests of the other stakeholders of the debtor company and the wider public interest.

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71 Delta's Further Written Submissions at para 7.

72 Gulf International's Further Written Submissions at paras 13–16.

70 Even if Delta's conduct did not amount to an admission of its liability to repay the Disbursed Loans, I would have dismissed its applications to stay or dismiss the JM Application. This is because (a) there are no triable issues with respect to Delta's liability to repay the Disbursed Loans; (b) the evidence is clear that Delta is insolvent without considering its liability to Gulf International; (c) Delta is unable to advance the Project; (d) Delta has not acted in good faith in its dealings with Gulf International and in these proceedings; and (e) Delta's creditors, including Gulf International, and the Project (and its stakeholders) will likely suffer substantial prejudice if there is no timely intervention. I elaborate on these matters below (save for (a), which has been dealt with above).

Conclusion on the RA and the IRDA Summons

71 I thus find that Delta had made clear and unequivocal admissions of the Disbursed Loans owed to Gulf International and that there was therefore no dispute referable to arbitration. I further find that Delta abused the court process. Accordingly, I dismiss the RA and the IRDA Summons.

The JM Application

Issues to be determined

72 The main issues in the JM Application were:

(a) whether Delta was or was likely to be unable to pay its debts;

(b) whether there was a real prospect that one or more of the purposes of judicial management would be achieved; and

(c) whether the proposed judicial managers were qualified.

The parties' cases

Gulf International's case

73 Gulf International argued that Delta was or was likely to be unable to pay its debts, and that there was a reasonable probability of rehabilitating Delta or of preserving all or part of its business as a going concern or that otherwise the interest of creditors would be better served than by resorting to a winding up.[73]

74 Gulf International averred that Delta owed substantial debts of about US$27,301,096 to 63 other creditors, of which US$18,886,542 had been or was likely to be demanded by Delta's creditors,[74] and Delta was further obliged to return a deposit of US$3m under the JDA to Gulf Development.[75] Delta had limited realisable assets from which proceeds could be used to satisfy its debts and it did not expect any income in the near future.[76] Delta was therefore unable or likely to be unable to pay its debts based on the cash flow test.[77]

75 Gulf International argued that placing Delta under judicial management would give it the best chance of ensuring its survival and ensure a more advantageous realisation of its assets than its liquidation; consequently, there

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73 Gulf International's Written Submissions on the JM and IJM Applications at para 2.

74 Gulf International's Written Submissions on the JM and IJM Applications at paras 32, 33(a) and 33(b).

75 Gulf International's Written Submissions on the JM and IJM Applications at para 32.

76 Gulf International's Written Submissions on the JM and IJM Applications at paras 33(c), 33(d) and 33(e).

77 Gulf International's Written Submissions on the JM and IJM Applications at para 34.

was a real prospect of one or more of the purposes of judicial management being achieved.[78] This was for the following reasons:

(a) Gulf International was the single largest creditor of Delta and its support was likely required for any proposed scheme of arrangement to succeed.[79]

(b) Delta's management had demonstrated a propensity to act with little regard for the interest of Delta's creditors, which led to a breakdown in trust and confidence in them; judicial managers, as independent third parties, would renew creditors' confidence in Delta.[80]

(c) The appointment of judicial managers would also address the general ineptitude of Delta and/or the Sponsors in advancing the Project.[81]

Delta's case

76 In addition to disputing its debt to Gulf International, Delta resisted the JM Application on the basis that Gulf International had not provided sufficient evidence to show that Delta was unable to pay its debts or was cash flow insolvent.[82] Delta argued that Gulf International had not adduced any evidence

78 Gulf International's Written Submissions on the JM and IJM Applications at para 43.

79 Gulf International's Written Submissions on the JM and IJM Applications at para 44.

80 Gulf International's Written Submissions on the JM and IJM Applications at paras 45 and 46.

81 Gulf International's Written Submissions on the JM and IJM Applications at paras 47 and 48.

82 Delta's Written Submissions on the JM and IJM Applications at para 3.

of Delta's current assets and liabilities,[83] notwithstanding that as a partner in the joint venture, it should have had more than a limited knowledge of Delta's affairs and should also have taken reasonable steps to obtain publicly available information when preparing its case.[84] Delta also argued that the JM and IJM Applications were filed for the collateral purpose of allowing Gulf International to take control of Delta.[85]

77 Delta further argued that statutory purposes of judicial management would not be met, because (a) it was critical that Delta's management remained in control of the Project, given that they had developed goodwill and rapport with various Vietnamese governmental stakeholders who were critical to the success of the Project;[86] (b) the proposed judicial managers did not have the relevant expertise to manage the Project,[87] which was especially concerning given the short runway before the Power Plant had to start operating;[88] (c) the proposed judicial managers did not have a clear plan of action;[89] and (d) the proposed judicial managers have not demonstrated an ability to secure funding from other investors for the Project and are unlikely to be able to do so.[90]

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83 Delta's Written Submissions on the JM and IJM Applications at paras 38–41.

84 Delta's Written Submissions on the JM and IJM Applications at para 42.

85 Delta's Written Submissions on the JM and IJM Applications at para 31.

86 Delta's Written Submissions on the JM and IJM Applications at paras 43–46.

87 Delta's Written Submissions on the JM and IJM Applications at paras 51–54.

88 Delta's Written Submissions on the JM and IJM Applications at para 53.

89 Delta's Written Submissions on the JM and IJM Applications at paras 55–59.

90 Delta's Written Submissions on the JM and IJM Applications at paras 60 and 61.

Whether Delta was or was likely to be unable to pay its debts

78 With respect to Delta's ability to pay its debts, the applicable test is the cash flow test – see *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd (formerly known as Tong Teik Pte Ltd)* [2021] 2 SLR 478.

79 Delta was unable to pay its debts. At my direction made on 23 February 2023, Delta filed IDTN's Affidavit on 2 March 2023 to disclose its current financial position. In summary:

(a) Based on its financial statement for financial year ("**FY**") 2021, Delta's current liabilities exceeded its current assets by US$13,034,035.[91]

(b) Delta anticipated that its liabilities would increase in FY 2022 as more services would have to be performed to progress the Project.[92] Based on its balance sheet for FY 2022, its current liabilities exceeded its current assets by US$17,841,485.37 as at 28 February 2023.[93]

(c) The amount outstanding and due to the Project's contractors as at 1 March 2023 was US$19,868,190.80.[94]

(d) As the Project is in its development phase, no revenue is currently being generated, and none is expected for some time.[95]

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91 IDTN's Affidavit at para 6.

92 IDTN's Affidavit at para 7.

93 IDTN's Affidavit at Tab IDTN-2 (Delta's balance sheets) / p 64.

94 IDTN's Affidavit at para 9 and Tab IDTN-4 (outstanding amounts owed by Delta to the Project's contractors) / p 69.

95 IDTN's Affidavit at para 8.

80 The liabilities set out above stand in stark contrast to the position taken by Delta in EJM's 2nd Affidavit, where it effectively denied Gulf International's assertion that it was unable to pay its debts. It even described Gulf International's allegation that the shares in BLLP were Delta's only substantial asset as a bare assertion,[96] when that was clearly the case. Delta's lack of candour was troubling, particularly when it was at the same time urging the court not to appoint judicial managers on the basis that it intended to take diligent steps to complete the Project.[97]

81 For completeness, the above liabilities do not include the admitted debt to Gulf International under the CLA. The outstanding amount, including interest, under the CLA stood at US$11,258,542 as at 16 December 2022.[98] I was also informed by Delta's counsel at the hearing on 23 February 2023 that Gulf Development had on 18 January 2023 issued a demand for the refund of the Exclusivity Deposit of US$3m following the expiry of the Exclusivity Period under the JDA.[99]

82 Delta described funding as being critical to the continuity of the Project.[100] That must plainly be the case. Delta argued that it was in the process of seeking the necessary funding – it referred to a term sheet dated 23 September

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96 EJM's 2nd Affidavit at para 46. See also Delta's Written Submissions on the JM and IJM Applications at paras 38–42.

97 *Eg*, Delta's Written Submissions on the JM and IJM Applications at paras 38–41.

98 BT's 1st Affidavit at para 24.

99 See also Affidavit of Boonchai Thirati dated 16 February 2023 at paras 34–36.

100 EJM's 2nd Affidavit at para 63.

2022 with a potential investor, B. Grimm Power Public Company Limited ("**B Grimm**"), which was said to be in the process of conducting its due diligence.[101]

83 Delta estimated that it would require a further US$4.9 million to complete the execution of the Power Purchase Agreement with the Vietnamese Government (the "**PPA**")[102] and meeting this milestone would enable Delta to raise more funding.[103] As at the time of the filing of IDTN's Affidavit, B Grimm was apparently in talks with a "Middle Eastern investor" as a "co-investment partner", and Delta and B Grimm were working together to finalise a loan agreement.[104] As a back-up plan, Delta said that it would embark on "a capital raising roadshow" and was in discussions with entities such as "McDermott, Bechtel Infrastructure and power Corporation" to do so.[105]

84 The lack of detail in these funding proposals is telling. The fact of the matter is that funding has not been secured and there was no assurance that it will be. Further, it is insufficient merely to secure enough funds to see the Project to the execution of the PPA. Delta already owed significantly higher liabilities, and it clearly did not have the funds to meet those liabilities. Delta's assertion that the appointment of judicial managers would prejudice its funding efforts is speculative and self-serving. There is also no evidence that any of these prospective funders would not be willing to work with judicial managers to invest in and complete the Project.

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101 EJM's 2nd Affidavit at para 66 and Tab EJM-24 / p 327.

102 IDTN's Affidavit at para 50; Delta's Further Written Submissions at para 16.

103 IDTN's Affidavit at para 12.

104 IDTN's Affidavit at para 55.

105 IDTN's Affidavit at paras 7 and 57; Delta's Further Written Submissions at para 18.

Whether there was a real prospect that the purpose(s) of judicial management will be achieved

85 Gulf International needs to show a "real prospect" that one or more of the purposes of judicial management could be achieved. I am satisfied that it has done so.

86 Delta's only significant asset is (ultimately) the Power Plant, and its value was thus entirely dependent on the progress and success of the Project. In IDTN's Affidavit, it was stated that the Project, if developed to fruition, was viable.[106] It is therefore in all the parties' interests that the Project is well-executed and completed in good time. In this regard, the Power Plant must commence the first phase of its operations by January 2024 or risk losing its licence, unless an extension was granted by the Vietnamese Government.[107] Delta asserted that an extension would likely be granted as the delays to the Project were caused by the Vietnamese Government.[108] But no evidence was produced that the Vietnamese Government had acknowledged responsibility for any delay or was committed to granting an extension.

87 Gulf International is a significant creditor and would be prejudiced if the Project is not completed or the licence terminated. It correctly pointed out that Delta has not been able to get the Project going for some years and there is no reason to believe that its current management would be able to do so on a timely basis or at all.

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106 IDTN's Affidavit at para 61.

107 BT's 1st Affidavit at paras 46 and 47.

108 IDTN's Affidavit at paras 20–23.

88 While Delta claimed in IDTN's Affidavit that "the Project is nearing the execution of the PPA",[109] it was clear from the same affidavit that much remained to be done. Whether the PPA would be achieved would depend on, *inter alia*, Delta (a) receiving funding, which, as explained above, was uncertain; and (b) completing the steps set out in Annex B to IDTN's Affidavit, which were heavily qualified as being reliant on negotiations and co-operation with various third parties. Annex B also comprised bare statements of what Delta intended or would need to do; given its failure to reasonably progress the Project to date, they were not convincing. The fact of the matter was that, of the Project milestones, only those in the pre-development stage had been completed, and that was in the first quarter of 2020.[110] Before Delta could agree and execute the PPA, which Delta agreed was a critical milestone, it must first have in place a feasibility study and a Grid Interconnection Plan ("**GIP**") approved by the Prime Minister of Vietnam.[111] It was also necessary to obtain approval for the feasibility study, but that had missed its deadline by more than two years – it has still not been done[112] and its current status is unknown. Given the extensive delays that have already occurred and the lack of detail and the qualifications in Delta's proposed plan of action, I agree with Gulf International that Delta's assertions that the GIP could be finalised by the second quarter of 2023,[113] and negotiations on the PPA completed by the third quarter of 2023,[114] were not realistic.

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109 IDTN's Affidavit at para 20.

110 IDTN's Affidavit at para 15(a) and Annex B / p 39.

111 IDTN's Affidavit at para 15(b).

112 IDTN's Affidavit at Annex B / p 32.

113 IDTN's Affidavit at para 29(a).

114 IDTN's Affidavit at paras 28 and 29(b).

89 I note that Delta in fact blamed Gulf Development for the Project's current predicament – specifically, for Gulf Development's failure to (a) offer its expertise in relation to the preparation of the PPA; (b) give its inputs for the tender of LNG (presumably liquified natural gas)[115] supply and the feasibility study to be appraised by the Ministry of Industry and Trade of Vietnam; and (c) provide developmental assistance which impacted the achievement of the condition precedents under the CLA.[116] These complaints are the subject matter of the arbitration, and I therefore make no comment. However, this argument undermines Delta's position, as it suggests that Delta cannot continue with the Project without the technical and financial assistance of Gulf Development or another party. In any event, and on any view, there has been a breakdown of trust between Gulf International, Gulf Development, Delta and the Sponsors. In so far as Gulf Development's expertise would be useful for the completion of the Project, a judicial management order would enable Gulf Development to work with managers it can trust. I note that Gulf Development has committed to working with the judicial managers to advance the Project.

90 Delta claimed that the Project's contractors would not demand or sue for payments currently due on the understanding that the current management continues to manage the Project.[117] This is just a bare assertion. Further, it is unclear why that would be the case – it would be in the contractors' interests for funding to be secured and the Project completed so that they can be paid. There is no reason why they would not want to work with judicial managers to make that happen.

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115 IDTN's Affidavit at para 17(c).

116 EJM's Affidavit at paras 24(b) and 24(c); Delta's Written Submissions on the JM and IJM Applications at paras 11 and 12.

117 IDTN's Affidavit at paras 10 and 13.

91 In short, the current arrangement was not working, and a new approach is required. While there is no guarantee that appointing judicial managers will result in the successful completion of the Project, it presented the most viable solution.

92 While the above is sufficient to justify appointing judicial managers, Delta's conduct with respect to the Share Issuance (see [46]–[55] above) also casts serious doubts on its conduct and *bona fides*. I note that in the context of that incident, the Sponsors declined to provide an undertaking to Gulf International that "there will not be any dealing, disposal or dissipation of shares in [Delta] (both direct and indirect holding), [Delta's] assets and interests pending the hearing of [the JM Application]".[118] Gulf International's request for such an undertaking was understandable given what happened. However, no reason was offered by Delta as to why even that undertaking was not, or could not be, furnished.

93 I also note Delta's position that, should the proposed judicial managers be appointed, the Sponsors would step away from the Project.[119] That is their prerogative, but their rationale that they would not be able to work with the proposed judicial managers, without even speaking with them, spoke volumes of their attitude and desire to make the Project work.

94 Delta's final argument was that the judicial managers may withdraw the arbitration proceedings and therefore prejudice its rights. The judicial managers

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118 Gulf International's Written Submissions for the RA at para 60(d); Affidavit of Boonchai Thirati dated 16 December 2022 ("**BT's 2nd Affidavit**") at paras 6–8, Tab BT-28 (letters concerning the undertaking).

119 IDTN's Affidavit at para 64.

are officers of the court and bound to act properly. That includes properly assessing, and, if necessary, pursuing the claims in the arbitration. It was therefore entirely speculative to assert that they would improperly withdraw the proceedings.

95 I therefore agree with Gulf International that placing Delta in judicial management would best ensure the survival of Delta as a going concern.

Whether the proposed judicial managers are qualified

96 It was Delta's case that its management had been working on the Project since its inception, and therefore had experience working on the ground as well as navigating the relevant regulatory environment in Vietnam.[120] It claimed that, in contrast, the proposed judicial managers did not have any, or sufficient, experience and will therefore not likely meet the Project deadlines. As noted above, Delta's alleged experience and know-how has thus far not proved adequate to reasonably advance the Project. Its claims therefore ring hollow.

97 According to their respective *curricula vitae*, the proposed judicial managers have experience managing power projects in the region, including Vietnam.[121] More importantly, they are part of one of the leading sets of insolvency practitioners in Asia and will be able to call on its corporate knowledge and resources.[122] The proposed judicial managers have set out a 90-day workplan, which includes meeting with the various national and provincial government bodies to progress the PPA and obtain an extension of the project

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120 Delta's Written Submissions on the JM and IJM Applications at paras 51 and 52.

121 BT's 1st Affidavit at Tab 26 (credentials of proposed judicial managers).

122 Affidavit of Boonchai Thirati dated 9 March 2023 ("**BT's 5th Affidavit**") at para 33.

licence.[123] If the Vietnamese Government is keen to get the Project up and running – and all parties agree that it is – there is no reason to believe that it will refuse to work with the proposed judicial managers and cease engaging with BLLP. Delta's assertions to the contrary were again speculative and self-serving.

98 I also note that the proposed judicial managers will not be without support. Gulf Development, which is one of the largest energy producers in Thailand, has stated that it is committed to supporting the proposed judicial managers. Given its significant investment thus far, there is no reason to doubt this.

Conclusion

99 I find that there was no disputed debt, on account of Delta's admissions of debt to Gulf International. I further decide that Delta's subsequent denial of the said debt and its Share Issuance meant that it acted in abuse of process. Accordingly, Delta is not entitled to a stay or dismissal of the JM Application. I also find that Delta was unable to pay its debts and that there was a real prospect that the making of a judicial management order would be likely to achieve the survival of Delta as a going concern. Given that the success of the Project is important not just to Delta's creditors but also, as a "high profile [*sic*] nationally important power generation project",[124] for Vietnam, there are additional reasons in favour of making a judicial management order.

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123 BT's 5th Affidavit at para 34 and Tab BT-39 (proposed judicial managers' workplan).

124 BT's 2nd Affidavit at Tab BT-30 (letter from Delta and the Sponsors to Gulf International and Gulf Development) / p 34.

100 In the circumstances, I allow the JM Application.

101 I make no order on the Interim JM Application as that is moot.

102 I also dismiss the RA and the IRDA Summons with costs to be taxed, if not agreed, and paid by Delta to Gulf International.

Hri Kumar Nair
Judge of the High Court

Emmanuel Duncan Chua, Yiu Kai Tai, Lim Jia Ren and Irvin Ho Jia Xian (Wong & Leow LLC) for the claimant;
Lim Hui Li Debby and Toh Wei Qing, Geraldine (Dentons Rodyk & Davidson LLP) for the defendant.