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

**[2024] SGHC 116**

Companies' Winding Up No 226 of 2023

Between

Jason Chia Vui Khen

… *Claimant*

And

HR Easily Pte Ltd

… *Defendant*

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# JUDGMENT

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[Insolvency Law — Winding up — Winding-up order]
[Insolvency Law — Winding up — Inability to pay debts]

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# Chia Vui Khen Jason
# v
# HR Easily Pte Ltd

**[2024] SGHC 116**

General Division of the High Court — Companies' Winding Up No 226 of 2023
Christopher Tan JC
26 March 2024

3 May 2024 Judgment reserved.

**Christopher Tan JC:**

1 The defendant is a firm offering human resource software and information technology solutions ("Defendant").[1] The claimant was employed as the Defendant's Head of Corporate Development ("Claimant"),[2] until his employment was terminated by the Defendant. He claims that at the point of termination, the Defendant owed him unpaid salary totalling $145,161.30.[3] The Claimant served a statutory demand ("the SD") on the Defendant for this sum, pursuant to s 125(2)(*a*) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA"). Upon the Defendant's failure to satisfy the SD in full, the Claimant filed this application to wind up the Defendant.

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1 Rajesh Nair's 1st affidavit at para 9.

2 Defendant's submissions at para 3.

3 Claimant's submissions at para 2.

2 I dismiss the winding-up application and provide my reasons below.

## Background

3 The Claimant commenced working for the Defendant in January 2020, at a monthly salary of $12,000.[4] He alleges that that slightly after a year of being in the Defendant's employment, he stopped receiving his salary. Specifically, he claims that his salary for February 2021 and the months which followed were not paid.[5] At the time, the Defendant was facing financial difficulties.[6] The Claimant alleges that notwithstanding this, he continued working for the Defendant, in the hope that it would get back on its feet and come into sufficient funds to pay his remuneration.[7] However, on 3 January 2022, the Defendant terminated his employment without even giving him the contractually specified four weeks' notice of termination.[8] The Claimant alleges that at the point of termination, the Defendant owed him unpaid salary amounting to $145,161.30 (including salary in lieu of notice of termination).

4 Following the Claimant's termination and throughout the calendar year 2022, the Defendant's financial woes did not appear to abate. In early 2023, relief eventually arrived when the Defendant was acquired by a new owner, HRIG Pte Ltd ("HRIG").[9] According to the Defendant, HRIG provided an injection of $150,000 to help the Defendant clear its debts.[10] Notwithstanding

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4 Claimant's submissions at paras 7–8.

5 Claimant's 1st affidavit at para 12.

6 Claimant's submissions at para 15; Defendant's submissions at para 7.

7 Claimant's 2nd affidavit at para 16.

8 Claimant's 1st affidavit at para 9.

9 Rajesh Nair's 1st affidavit at para 7(i); Claimant's 2nd affidavit at para 4.

10 Rajesh Nair's 2nd affidavit at para 18.

the infusion of funds, the Claimant was still not paid the salary which he claimed was owing to him.

5 On 7 August 2023, the Claimant served the SD on the Defendant, demanding payment of $145,161.30,[11] comprising:

(a) $132,000, being his monthly salary for 11 months in 2021, from February to December 2021 (both months inclusive);[12]

(b) $1,161.30, being his pro-rated salary for the first three days of January 2022;[13] and

(c) $12,000, being one month's salary in lieu of notice of termination, following his termination on 3 January 2022.[14]

The Defendant failed to satisfy the SD within the statutory three-week deadline. When ensuing negotiations between the parties fell through, the Claimant filed the present application, on 3 November 2023, to wind up the Defendant.

6 The Defendant agrees that the Claimant's employment *was* terminated. However, it disagrees that the termination took place on 3 January 2022. Rather, the Defendant contends that the Claimant was terminated some months *earlier*, on 2 September 2021.[15] The Defendant also agrees with the Claimant that salary in lieu of notice was payable upon termination. However, given that the Claimant's employment was terminated on 2 September 2021, the salary for the entire month of September 2021 would count towards salary in lieu of notice.

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11 Claimant's 1st affidavit at para 20.

12 Claimant's 1st affidavit at para 13(a).

13 Claimant's 1st affidavit at para 13(b).

14 Claimant's 1st affidavit at paras 14–15.

15 Defendant's submissions at para 14.

Hence, the Defendant's position as regards the Claimant's breakdown of the SD amount is as follows:

(a) As regards the $132,000 in para 5(a) above, being salary claimed for February to December 2021:

(i) Salary for the eight-months spanning February to September 2021 (amounting to $96,000) had fallen due. Of this, salary for the month of September 2021 served as salary in lieu of notice of termination.

(ii) Salary for the three-month period of October to December 2021 (amounting to $36,000) was never due as the Claimant ceased being an employee after September 2021.

(b) As for the $1,161.30 in para 5(b) above, being salary for the first three days of January 2022, the Claimant was not entitled to this as he ceased being an employee after September 2021.

(c) As regards the $12,000 in para 5(c) above, the Claimant was not entitled to this because his salary for September 2021 already served as salary in lieu of notice (see (a)(i) above).

7 Of the $96,000 referred to in para 6(a)(i) above, comprising salary for the eight months spanning February to September 2021, the Defendant's case is as follows:

(a) The March 2024 Payments – $48,000:

The Defendant admitted (albeit *very* belatedly) that it failed to pay the Claimant's salary for the following months in 2021:

(i) April;

(ii) *half* of June;

(iii) July;

(iv) *half* of August, and

(v) September.

These collectively added up to four months of salary (three full months plus two half months), *ie*, $48,000. It was only in *March 2024* that the Defendant made payments totalling $48,000 to the Claimant ("the March 2024 Payments") to discharge its liability for the Claimant's salary relating to these months.[16]

(b) Withholding tax – $12,000:

As for the salary for the month of May 2021, the Defendant admitted that this was not paid. However, it contends that one month's salary had to be withheld for withholding tax, to be paid to the Inland Revenue Authority of Singapore ("IRAS").

(c) The Disputed Months – $36,000:

As regards the salary for the remaining months (collectively referred to as "the Disputed Months"), *ie*,

(i) February;

(ii) March;

(iii) *half* of June; and

(iv) *half* of August,

these collectively added up to three months' worth of salary (two full months plus two half months), *ie*, $36,000. The Defendant contends that the salary for the Disputed Months *were* paid to the Claimant. The Defendant alleges that its Chief Executive Officer ("CEO") at the relevant time, Pascal Henry, had used his credit

16 Defendant's submissions at para 18; Claimant's submissions at para 31; Letter from the Claimant's solicitors to court dated 18 April 2024.

card to make payments to the Claimant totalling $36,000, on account of the salary for the Disputed Months.

8 Notwithstanding the position taken by the Defendant in sub-para (c), *ie*, that the Claimant's salary for the Disputed Months has already been paid, the Defendant has deposited cash of $36,000 in Defence Counsel's client account, by way of escrow. The Defendant intends for this to serve as security, should the Claimant succeed in proving (by way of a civil action) that his salary for the Disputed Months was never paid.

**Overview of the issues**

9 In seeking to wind up the Defendant, the Claimant relies on s 125(1)(*e*) IRDA, which allows the court to wind up a company that is "unable to pay its debts". Pursuant to this, the Claimant raises two submissions:

(a) The Defendant's failure to satisfy the SD triggered the presumption that the Defendant is unable to pay its debts, under limb (*a*) of s 125(2) IRDA.

(b) The Defendant is also unable to pay its debts under the cash flow test in limb (*c*) of s 125(2) IRDA.

The relevant limbs of s 125(2) IRDA are set out below:

> (2) A company is deemed to be unable to pay its debts if —
> …
>
> (*a*) a creditor (by assignment or otherwise) to whom the company is indebted in a sum exceeding $15,000 then due has served on the company, by leaving at the registered office of the company, a written demand by the creditor or the creditor's lawfully authorised agent requiring the company to pay the sum so due, and the company has for 3 weeks after the service of the demand

> neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor;
>
> …
>
> (*c*) it is proved to the satisfaction of the Court that the company is unable pay its debts; and in determining whether a company is unable to pay its debts the Court must take into account the contingent and prospective liabilities of the company.

10 It is well established that winding-up applications should not be used as a means of enforcing payment of a debt which is *bona fide* disputed on substantial grounds: *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] 2 SLR 510 ("*Diamond Glass*") at [38]. Given that the very step of filing a winding-up application can itself damage a company's business and customer goodwill, winding-up proceedings should not be used to put pressure on a company into paying a debt, or settling on terms, when it might not otherwise have to: see *BNP Paribas v Jurong Shipyard Pte Ltd* [2009] 2 SLR(R) 949 ("*BNP Paribas*") at [8], citing *Re Yet Kai Construction Co Ltd* [2000] HKEC 186.

11 However, a company cannot stave off winding up merely by alleging that there is a substantial and *bona fide* dispute over the debt. It is "up to the court to evaluate whatever evidence the company has raised and come to a conclusion on whether the alleged dispute exists": *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") at [17]. In this respect, the standard of proof applied by the courts in determining whether a substantial and *bona fide* dispute exists as regards the debt undergirding the winding-up application is the "triable issue" standard, used in summary judgment proceedings. As held in *Pacific Recreation* at [23]:

> With regard to the applicable standard for determining the existence of a substantial and *bona fide* dispute, it was our view that the applicable standard was no more than that for resisting a summary judgment application, *ie*, the debtor-company need only raise triable issues in order to obtain a stay or dismissal of the winding-up application. …

12 If there is a substantial and *bona fide* dispute regarding the debt, this impacts upon the winding-up applicant's very standing as a creditor to bring the winding-up application. Further, in a case such as the present, where the applicant seeks to wind up a company pursuant to an unsatisfied statutory demand, a substantial and *bona fide* dispute as to the debt that is the subject of the demand concurrently impacts upon the applicant's ability to establish the *substantive requirement* for granting a winding-up order, by impinging on the claim that the company was unable to pay its debts. As held by the Court of Appeal in *Founder Group (Hong Kong) Ltd (in liquidation) v Singapore JHC Co Pte Ltd* [2023] 2 SLR 554 ("*Founder Group*") at [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.
>
> [emphasis added in italics and bold italics]

To reduce verbiage, this judgment will use the term "undisputed" as a loose reference for the portion of any statutory demand amount which is <u>not</u> the

subject of a substantial and *bona fide* dispute.

13 Against the backdrop of these principles, there are two areas of factual dispute in the present case which first need to be addressed, as they have a direct bearing on whether a substantial and *bona fide* dispute has been raised as regards the amount demanded by the SD:

(a) The first is whether the Defendant's employment had indeed ceased after September 2021. If the Defendant can raise a substantial and *bona fide* dispute as to whether this was the case, it would impact upon the Claimant's ability to bring a winding-up application in respect of his salary claim for the months after September 2021.

(b) The second is whether any salary in respect of the eight-month window from February to September 2021 (for which all parties agree that the Claimant *was* still employed by the Defendant) remains outstanding. That in turn hinges on:

(i) whether the Defendant had the right to withhold the May 2021 salary for tax purposes – see para 7(b) above; and

(ii) whether the salary in respect of the Disputed Months in para 7(c) above were (as alleged by the Defendant) paid.

If the Defendant can raise a substantial and *bona fide* dispute on both items (i) and (ii), this will have a bearing on the Claimant's ability to bring a winding-up application in respect of his salary for the months of February to September 2021.

14 Additionally, if the Defendant succeeds in raising a substantial and *bona fide* dispute as regards only part of the Claimant's salary claim, leaving a portion

of the SD amount undisputed, the Claimant still retains his status as a creditor, at least in respect of that portion. So long as that undisputed portion of the SD amount exceeds the statutory threshold of $15,000 in limb (*a*) of s 125(2) IRDA, the deeming provision (which presumes that the Defendant is unable to pay its debts) still comes into operation. In my view, this follows from the position adopted in *Re Inter-Builders Development Pte Ltd* [1991] 1 SLR(R) 126 ("*Inter-Builders Development*"). That case involved a statutory demand under s 254(1)(*e*) read with s 254(2)(*a*) of the Companies Act (Cap 50, 1990 Rev Ed) ("Companies Act (1990)"). Sections 254(1)(*e*) and 254(2)(*a*) of the Companies Act (1990) were respectively the predecessor provisions of ss 125(1)(*e*) and 125(2)(*a*) IRDA, and governed the statutory demand in *Inter-Builders Development*. The statutory threshold for making a statutory demand then was $2,000. Rajendran J held that a statutory demand seeking an amount beyond what was actually due was not necessarily invalid, so long as the amount actually due still exceeded the statutory threshold of $2,000 (at [9]):

> In my view, s 254(2)(a) would operate if the petitioning creditor can establish that a sum exceeding $2,000 is due to him from the company and he has made a demand for a sum in excess of $2,000 in the manner provided in s 254(2)(a) which the debtor has neglected to pay. To hold otherwise would … 'make every winding-up order bad where the creditor had demanded the smallest sum above what was actually due to him'.

15 Having summed up the considerations at play, this judgment will traverse the following issues:

(a) Firstly, whether a substantial and *bona fide* dispute has been raised over any portion of the SD amount, particularly in light of the following two areas of dispute:

(i) when the Claimant's employment ended; and

(ii) whether any salary for February to September 2021 (both

months inclusive) remained outstanding.

Thee portions of the SD amount that are subject to the disputes above will then be deducted, to see if the undisputed portion which remains of the SD amount still crosses the statutory threshold of $15,000. If it does, there would be a sufficient debt to sustain the SD.

(b) Secondly, if the undisputed portion of the SD amount is of a sufficient quantum to sustain the SD, whether the deeming provision in limb (*a*) of s 125(2) IRDA is engaged in this case. In particular, this judgment will examine whether

(i) the March 2024 Payments amounting to $48,000 (see para 7(a) above); and

(ii) the security furnished by way of the $36,000 cash placed in escrow (see para 7(c) above)

collectively sufficed to disengage the deeming provision.

(c) Thirdly, if the deeming provision in limb (*a*) of s 125(2) IRDA is engaged, whether the court's discretion should nonetheless be exercised to dismiss the winding-up application.

16 Finally, this judgment will examine if the Claimant has successfully established his alternative submission, *ie*, that the Defendant is unable to pay its debts under limb (*c*) of s 125(2) IRDA, taking into account the Defendant's contingent and prospective liabilities.

**Two areas of factual dispute**

17 I begin with the two areas of factual dispute.

***When did the Claimant's employment with the Defendant end?***

18 According to the Defendant, its director and (then) CEO, Pascal Henry, was a friend of the Claimant. Upon being hired by the Defendant, the Claimant had then worked directly under Pascal Henry. The Defendant claims that Pascal Henry's employment ended on 2 September 2021 (although he remained as a director thereafter). The Defendant decided that the Claimant's employment should similarly come to an end at the same time, and thus retrenched the Claimant on 2 September 2021.[17] The Defendant further claims that since Pascal Henry was the Claimant's friend, Pascal Henry was asked to inform the Claimant about the latter's retrenchment.[18]

19 The Claimant, on his part, maintains that he did not receive any formal letter of termination in September 2021. He also adduced what he claims was evidence that he was still employed even *after* September 2021:

(a) Firstly, he adduced email exchanges in which his company email address (*ie*, with the Defendant's domain name) was copied in the carbon copy ("cc") list.[19] Specifically, the latest email was from an external party to one of the Defendant's employees, in which the Claimant's company email address was within the cc list. This email was sent on 1 October 2021,[20] *ie*, *a day after* what the Defendant alleges to be the Claimant's last day of work.

(b) Secondly, the Claimant adduced invoices which an external

17 Sharon Lee's affidavit at para 12.

18 Sharon Lee's affidavit at para 15.

19 Exhibited in Claimant's 2nd affidavit at pp 37–53.

20 Exhibited in Claimant's 2nd affidavit at p 38.

party had sent to him, in his capacity as an employee of the Defendant, pertaining to a software tool known as the Calconic App (the "Calconic invoices"). The Claimant contends that he was working with the external party to design and maintain the Calconic App for the Defendant.[21] The Claimant highlights that the latest invoice,[22] dated 10 July 2021, was expressed to be for a billing period stretching to 8 October 2021. The billing period thus extended beyond what the Defendant alleges to be the Claimant's effective last day of work by over a week.

20 The Claimant also procured two affidavits from Pascal Henry, who affirmed that to the best of his recollection, he was not tasked to inform the Claimant of his retrenchment.[23] Pascal Henry also affirmed that *even* if he had been tasked to inform the Claimant but omitted to do so, he did not believe that the relevant department within the Defendant had issued a termination letter, or liaised with the Claimant on the logistics ordinarily attendant upon termination (such as employment pass cancellation and return of company property).[24]

21 The Claimant thus maintains that given these facts, he must have been terminated only on 3 January 2022, when the Defendant disabled access to his work email account. To cast further doubts on the reliability of the Defendant's position as to when he was terminated, the Claimant highlights how the Defendant had, in its very first affidavit filed in these proceedings,[25] initially taken the position that the Claimant stopped working for the Defendant as early

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21 Claimant's 2nd affidavit at para 22.

22 Exhibited in Claimant's 2nd affidavit at p 60.

23 Pascal Henry's 2nd affidavit at paras 6–7.

24 Pascal Henry's 2nd affidavit at para 7.

25 Rajesh Nair's 1s affidavit.

as in February 2021.[26] It was only after conducting some internal inquiries that the Defendant revised its position to the one taken now, *ie*, that the Claimant was retrenched in September 2021.[27]

22 Having examined the evidence, I am of the view that the Defendant has succeeded in raising a substantial and *bona fide* dispute as to whether the Claimant's employment was in fact terminated in September 2021.

23 Firstly, the Claimant's position is at odds with the testimony of the Defendant's Chief Operating Officer, Sharon Lee, who was working as the Defendant's Chief Financial Officer at the material time. The Claimant alleges that he had continued working with Sharon Lee even after the alleged retrenchment in September 2021.[28] However, Sharon Lee affirmed on affidavit that she did not exercise any supervisory function over the Claimant after 2 September 2021.[29] She testified unequivocally that the Claimant was retrenched on 2 September 2021 and, to substantiate this, adduced a printed copy of the Claimant's electronic employee profile, which reflected that his last working day was 30 September 2021 (adding the four-week notice period to the retrenchment date of 2 September 2021 meant that the effective last day was 30 September 2021).[30] This is to be contrasted with Pascal Henry's evidence that, to the best of his recollection, he was not tasked to inform the Claimant of his retrenchment (see para 20 above), I find Pascal Henry's testimony to be somewhat equivocal in tone, as compared to the evidence of Sharon Lee, who

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26 Rajesh Nair's 1st affidavit at para 7(c).

27 Rajesh Nair's 2nd affidavit at para 7.

28 Claimant's 2nd affidavit at para 19.

29 Sharon Lee's affidavit at paras 4 and 11.

30 Exhibited at Sharon Lee's affidavit at pp 9-11.

affirmed in no uncertain terms that the Claimant was terminated on 2 September 2021 and that Pascal Henry was tasked to inform him of this.[31]

24 Secondly, the Claimant's evidence also appears to be at odds with a WhatsApp message sent by him to Sharon Lee. In her affidavit, Sharon Lee adduced a printout of a WhatsApp message from the Claimant dated 2 September 2021, *ie*, the date on which the Defendant says that the Claimant was retrenched. In that message, the Claimant wrote: "[h]i Sharon, the end is here haha" and "[n]eed your help to workout a plan see how best transition Employment Pass [*sic*]".[32] This message was also accompanied by an image of a cartoon face captioned with the words "smile in pain". The Claimant contends that the message was taken out of context, explaining that he had sent it because the Defendant appeared to have run out of investors and the Claimant was thus contemplating whether to leave what appeared to him to be a "sinking ship".[33] He argues that the tenor of the message was far too calm and light-hearted to have emanated from someone who had just been served a notice of retrenchment. In my view, the coincidental timing of the message, as well as its explicit reference to the transitioning of the Claimant's employment pass, lends weight to the Defendant's case that the Claimant was in fact served with notice of his retrenchment on 2 September 2021.

25 As regards the email chains and the Calconic invoices (referred to at para 19 above), I do not find these to be probative of the Claimant being employed by the Defendant after September 2021:

(a) As regards the email chain, the latest email was dated 1 October

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31 Sharon Lee's affidavit at paras 12 and 15.

32 Sharon Lee's affidavit at para 16; Claimant's WhatsApp message exhibited at p 7.

33 Claimant's 3rd affidavit at para 30.

2021, which was just a day after the Claimant's effective last day. More significantly, this email was neither sent by nor addressed to the Claimant, whose company email address merely appeared in the cc list.

(b) As regards the Calconic invoices, the last invoice was dated 10 July 2021, when the Claimant was indisputably still within the Defendant's employment. The fact that the invoice's billing period stretched to 8 October 2021 did not in any way support the Claimant's case that he was still employed by the Defendant as of 8 October 2021. As rightly pointed out by the Defendant, the billing period bears no correlation to the Claimant's term of employment.[34]

26 Accordingly, I find that the Defendant has raised a substantial and *bona fide* dispute in respect of whether the Claimant's employment ceased after September 2021. This in turn raises a substantial and *bona fide* dispute as to whether the salary for the months after September 2021 was ever due .

27 Having arrived at this landing, it is appropriate at this juncture to take stock of the breakdown of the SD amount, set out at para 6 above:

(a) Of the $132,000 referred to in para 6(a) above, a substantial and *bona fide* dispute has been raised in respect of $36,000 (being the salary for the months of October, November and December 2021). This leaves a balance of $96,000, being the salary for the eight months spanning February to September 2021.

(b) A substantial and *bona fide* dispute has also been raised in respect of:

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[34] Rajesh Nair's 2nd affidavit at para 13.

(i) the $1,161.30 referred to in para 6(b) above, *ie*, the claim for pro-rated salary for the first three days of January 2022; and

(ii) the $12,000 referred to in para 6(c), *ie*, the claim for one month's salary in lieu of notice, following the alleged termination on 3 January 2022.

The balance of the SD amount, being the claim of $96,000 for salary for the eight months spanning February to September 2021, will now be assessed.

***Is any salary for February to September 2021 still outstanding?***

28 There is no dispute that the Claimant *was* still in the Defendant's employment during the eight months spanning from February to September 2021, although the Defendant's case is that the month of September served as the notice period post-termination.

29 The Defendant's claim for his salary for these eight months, amounting to $96,000 in total, has been partially paid by the Defendant. Specifically, the Defendant paid the Claimant $48,000 by way of the March 2024 Payments (see para 7(a) above), to discharge the Defendant's liability for the Claimant's salary for the following months in 2021: (a) April; (b) *half* of June; (c) July; (d) *half* of August, and (e) September.

30 As regards the remaining $48,000 (*ie*, $96,000 minus the March 2024 Payments of $48,000), the Defendant's defence is as follows:

(a) Salary for the month of May 2021, amounting to $12,000, was withheld on account of withholding tax, to be paid to IRAS (see para 7(b) above).

(b) Salary for the Disputed Months referred to at para 7(c) above (*ie*, (i) February; (ii) March; (iii) *half* of June; and (iv) *half* of August 2021), totalling $36,000, *was* paid to the Claimant.

31 I begin with the Claimant's salary claim for the month of May 2021 (amounting to $12,000), which the Defendant claims to have withheld for tax purposes. The Claimant argues that the Defendant has failed to adduce evidence of any submissions to the tax authorities. In fact, the Defendant admits that the submission to IRAS has yet to be made, as the Defendant is still sorting out its documents.[35] The Defendant explains the delay by recounting that when it was acquired by HRIG in early 2023, the Defendant's business "was a mess with no clarity on income, client contracts, billings, unpaid bills, compliance issues across multiple countries …".[36] In my view, the claim for the May 2021 salary, constituting the $12,000 purportedly withheld for tax clearance, should be regarded as a sum for which a substantial and *bona fide* dispute has been raised. The Claimant does not dispute that he is a foreigner and was subject to non-resident tax treatment. There is also no indication that the Defendant withheld any more than what was due to IRAS, for the financial year concerned.

32 I now move to the salary claim for the Disputed Months, totalling $36,000. In my view, the Defendant has *failed* to establish a substantial and *bona fide* dispute in respect of these claims. I explain.

33 To show that the Claimant's salary for the Disputed Months was paid, the Defendant adduced evidence of its internal documents, in the form of

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35 Minutes of hearing on 26 March 2024.

36 Rajesh Nair's 1st affidavit at para 7(i); Claimant's 2nd affidavit at para 4.

payslips that purported to record the salary payments to the Claimant.[37] Having looked at these payslips, I do not find them to be even remotely convincing in evidencing the payments which they purported to reflect. For example, several of the payslips contained cryptic entries such as "Salary Hold" and "Salary Deferment", tending to suggest that part or even all of the salary for the month concerned had not been paid.

34 These payslips were emblematic of the broader state of disarray in the Defendant's internal financial records. The Defendant explains that its business was in a mess when it was acquired by HRIG (see para 31 above). Even if I accept that the Defendant was somehow unable to get its internal financial records in order until after the acquisition, the fact remains that the acquisition occurred in early 2023. The SD was served more than *half a year after* that. There was no explanation as to why the Defendant could not get its records in order within that window. In any event, once the SD was served, one would have expected the Defendant to recognise the urgency of getting its records in order. Yet, the Defendant failed to do this, as seen in how it continued to flip-flop on various critical points:

(a) The Defendant took the position in its 2nd affidavit (dated 7 February 2024) that the Claimant had already been paid his salary for, among other months, April and May 2021.[38] This affidavit was filed some *six months after* the SD was served on 7 August 2023, so there would have been ample time for the Defendant to accurately marshal its records and get the facts in the affidavit right. Yet, the affidavit turned out to be inaccurate, and the Defendant subsequently had to concede that

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37 Exhibited in Rajesh Nair's 2nd affidavit at pp 8–13.

38 Rajesh Nair's 2nd affidavit at para 8.

the Claimant's salary for April and May 2021 was *not* paid after all.

(b) Similarly, it took the Defendant more than seven months after service of the SD to recognise that the salary for the months underlying the March 2024 Payments were due and to make payment of the same.

35 Given the dishevelled state of the Defendant's internal documentation, there was clearly a need for extraneous records evidencing payment of the Claimant's salary for the Disputed Months (*eg*, in the form of bank statements). Yet, the Defendant failed to adduce any, and instead asserts that it is *the Claimant* who should adduce evidence of Pascal Henry's credit card statements, to prove that the salary for the Disputed Months was *not* paid.[39] To my mind, this submission misses the point entirely. The Defendant has already conceded that salary for the Disputed Months *were* due to the Claimant. Since the Defendant asserts that it had fully discharged its liability for the salary in respect of the Disputed Months, it bore the evidential burden of showing that payment was made. It is not for the Claimant to prove the converse state of affairs.

36 In any case, even if the Defendant is correct in demanding that the Claimant adduce evidence of Pascal Henry's credit card statements to show that salary for the Disputed Months were *not* paid, the Defendant should at least stipulate *which* credit card was used to pay the Claimant, to avoid any ambiguity as to which statements must be retrieved by Pascal Henry. However, the Defendant has not even cited the credit card account when this would obviously be within the Defendant's knowledge. The Defendant submits that while Pascal Henry had submitted large reimbursement claims to the Defendant, it remains

[39] Minutes of hearing on 26 March 2024.

unclear whether any of these claims related to payments to the Claimant.[40] In my view, if that were indeed the case, the Defendant ought to have adduced these reimbursement claims in evidence to try and shed some light on what transpired during the Disputed Months. In fact, Pascal Henry affirmed that he *did* use his credit card to pay various company overhead costs, including salary payments, for which he then made claims from the Finance Department. The Finance Department would typically reply to him with a breakdown as to who and what was paid. Pascal Henry also affirmed that towards the end of December 2023, his company email account with the Defendant was blocked and his emails deleted, with the result that he was no longer able to retrieve the breakdowns that the Finance Department sent him previously. Nevertheless, Pascal Henry affirmed that he *did not recall* seeing any payments to the Claimant in these breakdowns.[41] In light of this, there was every reason for the Defendant to adduce evidence of Pascal Henry's reimbursement claims for his credit card charges, to show whether they included payments to the Claimant. The Defendant's failure to do so is inexplicable.

37 In contrast, the Claimant adduced statements of his bank account for the months of February to September 2021 – this was the account into which the Defendant had credited his January 2021 salary.[42] Although the descriptions of most of the entries in the statements were redacted by the Claimant, he submits that (despite these redactions) a simple perusal of the statements reveals that his salary for February 2021 and the months following that were never credited. In its written submissions, the Defendant pointed out that these bank statements

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40 Defendant's submissions at para 28.

41 Pascal Henry's 2nd affidavit at para 20.

42 Claimant's 3rd affidavit at para 16; bank statements exhibited at pp 25–72.

"show multiple deposits of between S$2,000–$6,000 each month",[43] thus obliquely implying that these deposits might have been attributable to salary payments from the Defendant. During the hearing, I thus asked Claimant's Counsel to reveal the unredacted version of the bank statements. After this was done, I asked Defence Counsel to highlight those entries which could conceivably be attributed to salary payments for the Disputed Months. She was unable to point to any.

38 The conclusion must be that the Defendant has failed to establish a substantial and *bona fide* defence to the SD, insofar as the salary claim for the Disputed Months is concerned. The Claimant has consequently established his status as a creditor in respect of this portion of his claim. Given that the salary for the Disputed Months add up to $36,000, thereby exceeding the $15,000 threshold in s 125(2)(*a*) IRDA, this means that even after deducting those portions of the SD amount for which there is a substantial and *bona fide* dispute, there still remains a sufficient quantum of undisputed debt which remains unpaid, and on which the SD can be grounded: see *Inter-Builders Development* at [9], cited at para 14 above.

39 I should add that the salary claim for the Disputed Months is not the only claim on which the SD can be sustained. The salary claim for the months underlying the March 2024 Payments, totalling $48,000, also stood in support of the SD. While the salary for these months was ultimately paid in March 2024 (see para 7(a) above), the critical fact remains that *as at the point the SD was served* in August 2023, they were unpaid (and remained unpaid for another seven months thereafter). It is clear that in effecting the March 2024 Payments, the Defendant implicitly conceded that the salary claim for the months

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[43] Defendant's submissions at para 26.

underlying these payments was *undisputed*. This meant that when the SD was served, the total debt which was *not* subject to any substantial and *bona fide* dispute stood at $84,000 – constituted by the claim of $36,000 for the Disputed Months plus the claim of $48,000 for the months underlying the March 2024 Payments – far in excess of the $15,000 statutory threshold.

**Whether the deeming provision in s 125(2)(*a*) IRDA has been engaged**

40 Under limb (*a*) of s 125(2) IRDA, a company is deemed unable to pay its debts if it has "*neglected* to pay the sum [stipulated in the statutory demand], or to secure or compound for it to the reasonable satisfaction of the creditor", within the statutory three-week deadline. Where there is a substantial and *bona fide* dispute over a portion of the debt stipulated in the statutory demand, the Claimant would not qualify as a creditor for that disputed portion (see extract from *Founder Group,* cited at para 12 above). This coheres with the principle that the courts will not allow the winding-up regime to be used to pressure companies into paying genuinely disputed debts (*BNP Paribas* at [8]). Further, as the word "neglect" necessarily implies some element of fault, a company which refuses to satisfy that portion of the statutory demand amount which is subject to a substantial and *bona fide* dispute cannot be said to have *neglected* to pay, secure or compound, under s 125(2)(*a*) IRDA: *Ng Tai Tuan and another v Chng Gim Huat Pte Ltd* [1990] 2 SLR(R) 231 at [13]–[14]. As observed by Megarry J in *In re Lympne Investments Ltd* [1972] 1 WLR 523 at 527:

> Again, the existence of a dispute on substantial grounds as to the existence of any debt defeats the contention that [the company] has, within the meaning of section 223 (*a*) [of the UK Companies Act 1948], "neglected" to pay the sum required by the statutory notice …. In the context of a notice requiring a person to do some act, I do not see how it can be said that the person "neglects" to do that act if the reason for not doing it is a genuine and strenuous contention, based on substantial grounds, that the person is not liable to do the act at all.

Thus, to stave off the deeming provision under limb (*a*) of s 125(2) IRDA from coming into operation, the company needs only to pay, or to secure or compound for, that portion of the statutory demand amount for which there is *no* substantial and *bona fide* dispute.

41 Returning to the present case, the undisputed portion of the SD amount stood at $84,000 – see para 39 above. To recapitulate, the Defendant endeavoured to address this portion of the SD by:

(a) *Paying* the Claimant $48,000, vide the March 2024 Payments (see para 7(a) above); and

(b) *Securing* the salary claim for the Disputed Months, by putting $36,000 into escrow (see para 7(c) above).

Given the views expressed in the preceding paragraph, if the Defendant had made the payment and security in (a) and (b) *within the statutory three-week deadline*, the deeming provision in limb (*a*) of s 125(2) IRDA would not have been engaged, notwithstanding the balance of the SD amount remaining unsatisfied. As that balance is the subject of a substantial and *bona fide* dispute, there was no need for the payment and security to cover it.

42 As an aside, insofar as a debtor company responds to a statutory demand by furnishing security rather than making payment, limb (*a*) of s 125(2) IRDA requires the security to be "to the reasonable satisfaction of the creditor": *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd (formerly known as Tong Teik Pte Ltd)* [2021] 2 SLR 478 ("*Sun Electric Power*") at [93]. If the creditor finds the security to be unsatisfactory, the disagreement can be resolved by the court. Thus, in *BNP Paribas*, the Court of Appeal held (at [5]):

> If the creditor claims that the security is not satisfactory and is determined to issue winding-up proceedings, the debtor may then apply to court for a restraining order so as to enable the court to determine on an objective basis what the reasonable satisfaction of the creditor should be.

In the present case, the $36,000 placed into escrow is, in my view, satisfactory. It fully covers the salary claim for the Disputed Months and (being in the form of cash) can immediately be applied to paying any judgment that is obtained. The security is also adequately safeguarded, in light of the unequivocal undertaking which Defence Counsel gave in open court as to how the escrow monies will be used:[44]

> I give my undertaking to the court now that the $36,000 will be paid out to the Claimant upon judgment by the court that the Claimant is entitled to the said sum. And that we will return the $36,000 to the Defendant should the court decide that the Claimant is not entitled to this sum.

43 The snag in the present case is that both the payment and security were furnished long *after* expiry of the statutory three-week deadline. That being so, were they still effective in preventing the deeming provision in limb (*a*) of s 125(2) IRDA from being engaged? The views expressed by the Court of Appeal in *Sun Electric Power* have a direct bearing on this question. In that case, the Court of Appeal briefly canvassed various Australian authorities in considering what would happen if full payment of the statutory demand amount had been made *after* expiry of the statutory three-week deadline. It is worth setting out the relevant passage from the Court of Appeal's judgment in full (at [105]–[108]):

> 105 There are conflicting case authorities on the issue of the effect of the deeming provision after the prescribed period. The cases fall into three categories. The first category of cases holds that the effect of the deeming provision is only to deem the company to be unable to pay its debts *at the point of the expiry*

[44] Minutes of hearing on 26 March 2024.

> *of the prescribed period, and not at the time of the winding-up hearing*. The court must draw an inference from the fact that the company was unable to pay its debts at the point of the expiry of the prescribed period that the company is also unable to pay its debts at the point of the winding-up hearing. This inference can be rebutted if the company makes full payment between the date of the expiry of the prescribed period and the date of the winding-up hearing. This inference will also be weakened as the period between the date of the expiry of the prescribed period and the date of the winding-up hearing lengthens: see *Deputy Commissioner of Taxation v CYE International Pty Ltd (No 2)* (1985) 10 ACLR 305; and *Re G Stonehenge Constructions Pty Ltd and the Companies Act* (1978) 3 ACLR 941.
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> 106 The second category of cases holds that the effect of the deeming provision is to deem the company to be unable to pay its debts at the point of the expiry of the prescribed period, but this would continue until the winding-up hearing unless payment is made: *Club Marconi of Bossley Park Social Recreation Sporting Centre Ltd v Rennat Constructions Pty Ltd* (1980) 4 ACLR 883.
>
> 107 The third category of cases holds that the effect of the deeming provision is to deem the company to be unable to pay its debts at the time of the winding-up hearing, regardless of whether the debt had been paid off subsequent to the expiry of the prescribed period: *DCT v Guy Holdings Pty Ltd (1994) 14 ACSR 580*.
>
> 108 We note that if the position in the third category is adopted, even full payment would not stave off winding up, much less partial payment. The other two categories give effect to full payment and it would seem therefore that partial payment would be insufficient. …
>
> [emphasis in original]

The Court of Appeal nevertheless reserved its position as to which of the three categories should be accepted (at [108]).

44 Unlike in *Sun Electric Power*, the facts of the present case are such that I am required to land on a view as regards this area, before I can resolve how my discretion should be exercised *vis-à-vis* the winding-up application.

45 I begin by touching on what the Court of Appeal in *Sun Electric Power*

called the first category of cases. The Court of Appeal construed these cases as holding that under the deeming provision, the company's inability to pay its debts is presumed to exist as at the expiry of the statutory three-week deadline *and no later*. However, while the deeming provision does not presume the inability to exist as at the subsequent point when the winding-up application is heard, the presumed inability as at expiry of the statutory three-week deadline serves as a stepping stone allowing the court hearing the winding-up application to *draw the inference* that the inability has *subsisted through to the hearing*. This means that once the statutory three-week deadline expires, satisfying the statutory demand prior to the hearing of the winding-up application can serve to refute or at least weaken that inference.

46 The cases in the first category cited by the Court of Appeal in *Sun Electric Power* are *Re G Stonehenge Constructions Pty Ltd and the Companies Act* (1978) 3 ACLR 941 ("*G Stonehenge*") and *Deputy Commissioner of Taxation v Cye International Pty Ltd (No 2)* (1985) 10 ACLR 305 ("*Cye International*"). In *G Stonehenge*, Needham J (sitting in the New South Wales Supreme Court) made the following comment about the deeming provision in s 222 of the Companies Act 1961 (NSW) (at 943):

> It is my opinion that the company is to be *deemed unable to pay its debts at the date of expiry of the s 222 notice*. … No doubt there would be a presumption that the state of inability to pay its debts deemed to exist by the statute continued unless evidence established that at some other relevant date, for example, the date of the hearing, the company was solvent … *I do not think that the statutory deeming continues forever.*
>
> [emphasis added]

Similarly, in *Cye International*, the defendant company failed to comply with a statutory notice issued under s 364 of the Companies (NSW) Code. In dismissing the application to wind up, Young J (sitting in the New South Wales Supreme Court) remarked (at 306):

> Section 364(2) of the Code provides a method of deeming a company to be insolvent. This deeming occurs if a creditor has served on the company a demand requiring the company to pay the sum so due and the company has for three weeks failed to pay the same.
> …
>
> The company, if the demand had been valid, *would have been deemed to have been insolvent on 5 December 1984* [*ie*, the expiry of the statutory three-week deadline for complying with the statutory demand], but without more material on such a significant matter as this it would be *difficult to draw the inference* ***and I do not draw the inference that the company was also insolvent on 28 June 1985 when the summons was issued or at today's date***. If someone is going to rely on a s 364 notice then it must issue its originating process shortly after the expiry of the demand or provide other material which would give the court a comfortable feeling of satisfaction that the deemed insolvency continues.
>
> [emphasis added in italics and bold italics]

47 With respect, I would not endorse the proposition advanced by the first category of cases. Firstly, in terms of precedent, *G Stonehenge* and *Cye International* have not been followed in subsequent Australian authorities. In *Club Marconi of Bossley Park Social Recreation Sporting Centre Ltd v Rennat Constructions Pty Ltd* (1980) 4 ACLR 883 ("*Club Marconi*"), Needham J expressly disavowed the position which he took in *G Stonehenge*, as reflected in the extract set out in the immediately preceding paragraph above: see *Club Marconi* at 887. Similarly, in *Deputy Commissioner of Taxation v Guy Holdings Pty Ltd* (1994) 14 ACSR 580 ("*Guy Holdings*"), Zeeman J (sitting in the Supreme Court of Tasmania) rejected Young J's approach in *Cye International*, opining (at 583):

> The reasoning adopted by Young J appears to assume that the insolvency was deemed to exist at the moment of non-compliance but not thereafter, so that on an application under s 364(1)(e), which empowered the court to order the winding up of a company if it was unable to pay its debts, proof of a failure to satisfy the requirements of a notice under s 364(2)(a) could not establish that at the time of the hearing the company was unable to pay its debts unless it was possible to infer that fact

> from the fact that on an earlier date it was unable to pay its debts. Naturally, the longer the interval of time between the date upon which the company was deemed to be unable to pay its debts and the date as at which the court was required to find that the company was unable to pay its debts, the less safe it would become to infer the latter from the former. ***That reasoning does not appear to be consistent with other cases in which it was held that the deemed insolvency under s 364(2)(a) continued so long as there was a failure to pay in terms of the notice***: *Club Marconi of Bossley Park Social Recreation Sporting Centre Ltd v Rennat Constructions Pty Ltd* (1980) 4 ACLR 883 *Forsayth NL v Juno Securities Ltd* (1991) 4 WAR 376.
>
> [emphasis added]

48 Secondly, as a matter of principle, it would be problematic to construe the deeming provision as meaning that the company's inability to pay its debts is presumed to exist only as at expiry of the statutory three-week deadline and no later. I would reason as follows:

> (a) When a creditor seeks a winding-up order under subsection 1(*e*) of s 125 IRDA, on account of the company being unable to pay its debts, the court must be satisfied that the inability exists *as at the point of the winding-up hearing*, if the order is to be granted: see *Goode on Principles of Corporate Insolvency Law* (Kristin Van Zwieten gen ed) (Sweet & Maxwell, 5th Ed, 2018) at para 4–13, which cites the decision of the Scottish Court of Session in *Mac Plant Services Ltd v Contract Lifting Services (Scotland) Ltd* [2009] SC 125 ("*Mac Plant Services*"). In *Mac Plant Services*, Lord Hodge opined (at [63]) that the use of the present tense in the phrase "*is* unable to pay its debts" in s 122(1)(f) of the Insolvency Act 1986 (c 45) (UK) indicated that the assessment is to be made as at the date of the hearing of the application. Respectfully, this must be right, as it would otherwise mean that a perfectly healthy company can be wound up because it was unable to pay its debts at some remote point in the past.

(b) Moving then to limb (*a*) of s 125(2) IRDA, this provision endows creditors with a tool to prove that the requisite inability, by way of a statutory demand which (if unsatisfied) gives rise to a presumption that the company is unable to pay its debts. To be meaningful, the time frame to which the presumption relates must map to the same time frame contemplated by s 125(1)(*e*) IRDA. If the company's inability to pay its debts is presumed to exist only as at expiry of the statutory three-week deadline (and no later), this gives rise to an outcome where, notwithstanding the deeming provision having already come into operation, creditors *continue* shouldering the burden of proving the company's inability to pay its debts (which inability must exist as at the date of the hearing). To avoid such a misalignment, the inability contemplated by the deeming provision must be presumed to exist not only as at the expiry of the statutory three-week deadline but *thereafter* as well, up to the point when the winding-up application is heard. That is the construction adopted by the second and third categories of cases alluded to in *Sun Electric Power*, to which I now turn.

49 The difference between the second and third categories of cases (as catalogued by the Court of Appeal in *Sun Electric Power*) is as follows:

(a) Under the second category, the deeming provision is disengaged if full payment of the statutory demand amount is made prior to the hearing of the winding-up application.

(b) Under the third category, the deeming provision remains engaged (and the presumption that the company is unable to pay its debts remains operative) up to the hearing, notwithstanding full payment having been made after expiry of the statutory deadline.

The authority cited by the Court of Appeal in *Sun Electric Power* as supporting the proposition in the second category is *Club Marconi*, where Needham J remarked (at 887):

> The statutory presumption of insolvency must, I think, continue *so long as the company against whom a petition is lodged 'neglects' to pay the sum set out in the notice under s 222*. If there is a dispute on substantial grounds there is no 'neglect'. If there is no such dispute, then the giver of the notice is a creditor and the receiver of the notice is deemed to be unable to pay its debts. Accordingly, there would be no question, on the hearing of the petition, as to whether the company could, in fact, pay its debts.
>
> [emphasis added]

The authority cited by the Court of Appeal in *Sun Electric Power* as supporting the proposition in the third category is *Guy Holdings*. In that case, the applicant served a statutory demand on the respondent company, which the respondent failed to satisfy within the statutory deadline. The applicant filed an application to wind up the respondent company. Prior to the hearing, the respondent company paid the statutory demand amount in full. Notwithstanding the payment, Zeeman J held that the presumption of insolvency remained operative (at 583):

> Notwithstanding the submissions made by counsel for the respondent, I am of the opinion that I am required to presume that the respondent is insolvent. During the period of three months ending on the day when the application was filed the respondent failed to comply with the statutory demand, so that I am required by s 459C(2) to make that presumption. The respondent did not put any material before me in an endeavour to rebut that presumption. It could have endeavoured to do so as authorised by s 459C(3).

50 I am not inclined to adopt the proposition in the second category of cases. In *Club Marconi*, Needham J had remarked rather fleetingly that the presumption continues "so long as the company against whom a petition is lodged 'neglects' to pay the sum set out in the [statutory demand]". However,

he did not appear to explicitly propose, nor did he cite any authorities for the proposition, that the deeming provision should be regarded as disengaged if the debt is paid after expiry of the statutory three-week deadline. Returning to limb (*a*) of s 125(2) IRDA, there is nothing on the face of the provision suggesting that the presumption prematurely expires upon any one event, prior to the matter reaching the court's doorstep. In my view, the interpretation that better coheres with the plain language of the statute would be that the deeming provision remains in operation, up to the hearing of the winding-up application, at which point the company can adduce evidence to show why it should not be wound up. As observed by Goh Yihan JC (as he then was) in *Song Jianbo v Sunmax Global Capital Fund 1 Pte Ltd* [2022] SGHC 229 (at [32]):

> … The whole point of a deeming provision is to establish a factual paradigm upon the satisfaction of certain factual parameters. It is then left to the party who wishes to rebut this factual paradigm to adduce evidence to do so, within what may be permissible within the relevant statutory regime. …

51 At the hearing, the court can then engage in a holistic exercise of judicial discretion as to whether the winding-up application should be dismissed, notwithstanding the deeming provision in limb (*a*) of s 125(2) IRDA being in operation. At that stage, full payment of the statutory demand amount would clearly be a material factor. Thus, in *Guy Holdings*, Zeeman J stressed (at 584) that while the presumption may have remained operative as at the date of the hearing, he still retained the discretion to decide whether to grant or deny the winding-up order. Since the company had fully satisfied the debt in the statutory demand prior to the hearing and there appeared to be no other debts due, Zeeman J exercised his discretion to dismiss the winding-up application (at 585):

> Adopting the principle that, in the case of an application under s 459P where the debt the subject of the statutory demand has been paid after the filing of the application, the application ought to be dismissed unless there is established some positive reason that a winding up order ought to be made, I conclude

> that this application ought to be dismissed. It has not been established that the respondent owes anything to the applicant …

52 In conclusion, I prefer the approach in the third category. Assuming that there is no substantial and *bona fide* dispute in respect of the debt, once the debtor company neglects to satisfy the statutory demand within the statutory three-week deadline, the deeming provision in limb (*a*) of s 125(2) IRDA is engaged and the company is deemed unable to pay its debts. The deemed inability is presumed to exist as at the expiry of the statutory three-week deadline *onwards,* up to the hearing of the winding-up application. Full satisfaction of the statutory demand after expiry of the statutory three-week deadline does not disengage the deeming provision, which remains in operation until the hearing of the winding-up application. On this, I am also mindful that in *Sun Electric Power*, the Court of Appeal observed (at [108]) that

> … if the position in the third category is adopted, even full payment would not stave off winding up, much less partial payment. The other two categories give effect to full payment and it would seem therefore that partial payment would be insufficient.

To the extent that the third category suggests that once the presumption is engaged, a winding-up order is somehow inevitable despite full satisfaction of the statutory demand, I would respectfully differ. As will be explained in the following section, the court retains the discretion to deny the winding-up application, even in the face of a presumption that remains in operation. In this respect, full satisfaction of the statutory demand will be a material consideration that the court can take into account at the hearing, when exercising that discretion.

53 Applying the above approach to this case, I find that the deeming provision in limb (*a*) of s 125(2) IRDA came into operation once the Defendant

failed to satisfy the SD within the statutory three-week deadline and *remained* in operation until the hearing of this application. The deeming provision was not disengaged just because the Defendant had, prior to the hearing, sought to address the entire undisputed portion of the SD amount by making the March 2024 Payments of $48,000 and providing security of $36,000 cash in escrow.

54 The next step would then be to determine if the winding-up application should be dismissed, notwithstanding the deeming provision in limb (*a*) of s 125(2) IRDA being in effect.

**Whether the winding-up application should be denied, notwithstanding the deeming provision in s 125(2)(*a*) IRDA being in operation**

55 In determining how the court's discretion should be exercised, a preliminary question would be this: Once the deeming provision in limb (*a*) of s 125(2) IRDA is triggered and the company is presumed to be unable to pay its debts, can that presumption be *rebutted*? Presumably, an attempt at such rebuttal would entail adducing evidence that the company *can* pay its debts after all.

56 The plain wording of limb (*a*) of s 125(2) IRDA does not explicitly provide for such rebuttal. Thus, in *Pac-Asian Services Pte Ltd v European Asian Bank AG* [1987] SLR(R) 6, the Court of Appeal referred to limb (*a*) of s 254(2) of the Companies Act (Cap 185, 1970 Rev Ed) (*ie*, the predecessor to s 125(2) IRDA) and observed (at [14]) that: "[t]he presumption that the company is unable to pay its debts does not appear to be a rebuttable one." Still, the Court of Appeal phrased this view in a rather open fashion, choosing to use the term "does not appear to be" as opposed to "is not". In this respect, there is a line of High Court cases suggesting that once the deeming provision in limb (*a*) of s 125(2) IRDA has been engaged, it is still open to a company to rebut the presumption (that it is unable to pay its debts) by showing that it was solvent:

see *Tarkus Interiors Pte Ltd v The Working Capitol (Robinson) Pte Ltd* [2018] SGHC 105 ("*Tarkus Interiors*") at [31].

57 At this juncture, I see no need to decide whether the presumption in limb (*a*) of s 125(2) IRDA is technically rebuttable. Whatever the answer to that question, the court retains the discretion as to whether to wind up the company, given that s 125(1) IRDA states that the court *may* (rather than "must") order the winding up if, *inter alia*, the company is unable to pay its debts (see also *BNP Paribas* at [5]). The discretion was alluded to in *Adcrop Pte Ltd v Gokul Vegetarian Restaurant and Cafe Pte Ltd (Rajeswary d/o Sinan and another, non-parties)* [2023] 5 SLR 1435, where Andrew Ang SJ observed (at [48]):

> … the court also retains a general residual discretion to consider all other relevant factors when deciding whether a company should be wound up, *even if the statutory grounds for doing so have been technically established* …
>
> [emphasis added]

As to the matters which the court may take into account in exercising that discretion, the Court of Appeal in *Sun Electric Power* held (at [84]–[85]):

> 84 … [W]here a company is unable or deemed to be unable to pay its debts, the creditor is prima facie entitled to a winding-up order *ex debito justitiae* …
>
> 85 That said, there are exceptions to this general rule and in exercising its discretion, the court should consider factors such as the viability of the company, and the economic and social interests of the company's employees, suppliers, shareholders, non-petitioning creditors, customers and other companies in the group enterprise. …

58 Given the myriad of considerations that the court may properly take into account (including the company's viability), any evidence that a company *is able to pay its debts after all* would be critical. Whether such evidence is adduced by way of an attempt to "rebut" the presumption under limb (*a*) of s 125(2) IRDA (assuming one accepts that the presumption *is* rebuttable), or

pursuant to a broader endeavour to persuade the court to exercise its residual discretion under s 125(1) IRDA to dismiss the application (notwithstanding the presumption remaining in operation), the evidence would serve to stack against winding up. However, given the operation of the presumption in both these permutations, the burden of proof lies on the company resisting the winding up to adduce such evidence. How then is that burden to be discharged?

59 So long as the amount of the statutory demand remains unsatisfied, there is generally no need for the court to engage in a detailed analysis of the company's solvency status, before relying on limb (*a*) of s 125(2) IRDA to wind up the company. As was held by Choo Han Teck J in *BW Umuroa Pte Ltd v Tamarind Resources Pte Ltd* [2020] 4 SLR 1294 ("*BW Umuroa*") at [25]:

> … if the defendant is genuinely solvent as it claims, it should have satisfied the statutory demand. It is no defence to a valid statutory demand for the defendant to say that it is solvent, but that it refuses to pay, compound or secure the debt. ….

However, the situation is quite different once payment is made by the company, even if this is after the statutory three-week deadline. A company's payment of the *full* portion of the statutory demand amount that is not subject to a substantial and *bona fide* dispute would, in my view, be strongly indicative that it *is* able to pay its debts after all. The extinguishing of that debt alters the very state of affairs on which the presumption (that the company was unable to pay its debts) was first grounded. Thus, in *Guy Holdings*, Zeeman J held that the payment of the debt in the statutory demand sufficed to warrant the exercise of his discretion to deny the winding-up application (see para 52 above).

60 I do not suggest that the discretion should *necessarily* be exercised in favour of dismissing the winding-up application, just because the statutory demand amount is fully paid prior to the hearing of the winding-up application.

It is not possible at this point for me to rule out the prospect of there being other countervailing factors which may merit winding up, despite the statutory demand having been (belatedly) satisfied in full. To take an example, in *Guy Holdings*, Zeeman J observed (at 585) that even if the debt demanded had been paid up, there could yet be other factors militating against dismissal of the winding-up application:

> I would not wish to be taken as necessarily agreeing that a creditor, who has served a statutory demand under the Law and who has been paid the debt the subject of that demand, ordinarily ought not to be granted an order for the winding up of the company even though it establishes that the company is indebted to it in some other amount. *Particularly if such other debt arose after the service of the statutory demand, its existence, in the absence of other relevant considerations, might well be sufficient reason to make the order.* I observe that in *De Montford* the nature of the other alleged debts was such that none of them were actually payable … In one sense the circumstances existing in that case may be equated with those existing in the present case, *namely a deemed insolvency with no evidence of any other debt being due and payable by the company to any person.* It is implicit from *De Montford* that in a case such as the present there must be some positive reason for ordering that the respondent be wound up going beyond the mere deemed insolvency. To the extent that that case relies on that principle I follow it.
>
> [emphasis added]

61 Returning to the present case, the Defendant maintains that it *is* able to pay its debts. The Defendant relies on the fact that it has already taken steps to pay or provide security for the SD amount, to the tune of $84,000 (comprising the March 2024 Payments of $48,000 and the security of $36,000 cash placed in escrow). However, there are two possible objections to the Defendant's reliance on these steps:

(a) Firstly, the payment and security furnished by the Defendant, amounting to $84,000 in total, accounted for only *part* of the SD amount of $145,161.30. The question thus arises as to whether the failure to

address the balance of the SD amount undermines the Defendant's claim that it is able to pay its debts.

(b) Secondly, this is not a case where the company's belated attempt to satisfy the statutory demand comprised *entirely* of making payment of the amount of $84,000. Part of the purported satisfaction comprised providing security for $36,000. The question is whether providing such security, in lieu of making actual payment, undermines the Defendant's claim that it is able to pay its debts. Claimant's Counsel argues that allowing the provision of such security to stave off winding up means that debtor companies can create the "illusion of solvency" by simply depositing the debt into escrow, notwithstanding there being no genuine dispute as regards the debt.[45]

I will examine each of these objections in turn.

***Objection 1: The Defendant's payment and provision of security addresses only part of the SD amount***

62 I have explained at para 40 above that a company seeking to satisfy a statutory demand *within* the statutory three-week deadline does not need to pay, or to secure or compound for, that portion of the statutory demand amount which is the subject of a substantial and *bona fide* dispute. The same reasoning can be extended to the present scenario, where the company seeks to pay, secure or compound only *after* expiry of the statutory three-week deadline (where the deeming provision is already in effect), pursuant to its bid to persuade the court to exercise its discretion to dismiss the winding-up application. There is similarly no need for a company embarking on this endeavour to satisfy that

[45] Minutes of hearing on 26 March 2024; Claimant's further submissions at para 21.

portion of the statutory demand which is the subject of a substantial and *bona fide* dispute, given that the applicant's status as a creditor for that portion is still in issue. Thus, in *Re a company* [1984] 3 All ER 78, the creditors of a company served a statutory demand on a company, demanding payment of £12,435.4375. The company disputed the quantum of the debt and offered to pay £2,234.4338 instead. The company eventually paid the smaller sum, *after* the statutory deadline for payment had passed and the creditors had already presented a winding-up petition. The court held that the balance of £10,201.4337 was *bona fide* disputed on substantial grounds and proceeded to dismiss the winding-up petition, even though the company had *not* paid that balance.

63 As such, in persuading this court to dismiss the winding-up application, the Defendant is entitled to satisfy only $84,000 of the $145,161.30 demanded by the SD. The balance is the subject of a substantial and *bona fide* dispute, which is better left to be determined by a civil action.

***Objection 2: The Defendant merely provided security for the SD amount, instead of making payment***

64 As regards the salary claim for the Disputed Months (which amounts to $36,000), I have explained why I do not think that the Defendant has succeeded in raising a substantial and *bona fide* dispute in respect of this portion of the SD amount (see para 38 above). The Defendant has nevertheless sought to secure this portion of the claim by depositing $36,000 into an escrow account (see para 8 above). Does the fact that the Defendant merely provided security for the claim, instead of paying it (which would have been the Claimant's preferred mode of satisfaction), in any way abate the Defendant's efforts to establish that it is able to pay its debts?

65 Under limb (*a*) of s 125(2) IRDA, a company which (among other

things) provides security for the statutory demand amount *before* expiry of the statutory three-week deadline will stop the deeming provision from being engaged, if the security is to the reasonable satisfaction of the creditor (see the discussion at para 42 above). The situation in the present case is different, in that the Defendant furnished security only after expiry of the deadline. I have stated my view (at para 52 above) that *payment* of the statutory demand amount after expiry of the deadline would not suffice to disengage the deeming provision in limb (*a*) of s 125(2) IRDA. It follows that *provision of security* after expiry of the deadline would similarly not disengage the deeming provision.

66 Nevertheless, I have also stated my view (at para 59 above) that *payment* of the SD amount after expiry of the statutory three-week deadline would still be a salient factor when the court is exercising its discretion as to whether the winding-up application should be granted. In the same vein, I take the view that provision of security after expiry of the deadline would (subject to the security being to the reasonable satisfaction of the creditor – see para 42 above) similarly be a salient consideration. In *BNP Paribas*, the company and its banker had taken certain foreign exchange positions as against each other. On these positions being closed out, the bank alleged that the company had crystallised its loss at US$50 million, which stood as a debt owing to the bank. The company nevertheless disputed the bank's claim and offered to place sufficient funds in escrow to cover any judgment in favour of the bank. The bank rejected the offer and proceeded to serve a statutory demand on the company. The Court of Appeal affirmed the High Court's decision granting an injunction to restrain the commencement of winding-up proceedings. In its oral grounds, the Court of Appeal held (see [11] of the oral grounds, extracted at [2] of the Court of Appeal's reported grounds of decision):

> In our view, [the bank] should have accepted [the company's] offer to pay the amount of the crystallized loss into an escrow

> account and thereafter commenced an action against [the company] to recover the alleged debt. We hold that *in a case where a solvent company does not admit the debt and is prepared to offer security to defend the claim, the court should not as a matter of principle, in the exercise of its discretion, allow a claimant to file a winding up petition against the solvent company*, with all the potentially disastrous consequences that may result from the filing of the petition. It is inappropriate to use the threat of winding up to force a company to pay the unadmitted debt, in such circumstances.
>
> [emphasis added]

The provision of security for the statutory demand amount in that case thus persuaded the court against allowing the winding-up proceedings to continue.

67 Claimant's Counsel seeks to distinguish *BNP Paribas* by pointing out how the security in that case was offered even before the relevant statutory demand was served. In the present case, payment of the $36,000 into the escrow account was made many months *after* expiry of the statutory three-week deadline, when the deeming provision in limb (*a*) of s 125(2) IRDA had long set in.[46] Be that as it may, I am of the view that a company's act of putting up cash security to cover the entire debt, even if done after expiry of the statutory three-week deadline, still serves to demonstrate the company's ability to pay the debt. Contrary to the Claimant's submission that putting the funds into an escrow amount merely creates the "illusion of solvency" (see para 61(b) above), the fact that the company possesses cash on hand matching the size of the amount demanded, as well as the financial wherewithal to *ringfence* that cash while going about its daily business, tends to show that the company *is* in a position to pay that amount. In the absence of any other countervailing factors, this would in turn support the broader inference that the company is able to pay its debts, thereby militating against winding up.

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[46] Minutes of hearing on 26 March 2024.

68 One may conceivably fault the Defendant for holding the $36,000 in escrow, instead of simply paying it forthwith to the Claimant, thereby discharging the Defendant's liability in respect of the salary for the Disputed Months. The Defendant's avowed intent to defend the salary claim for the Disputed Months could be viewed (at best) as overly optimistic, given my finding at para 38 above that there is no substantial and *bona fide* dispute as regards this facet of the SD amount. However, in *BNP Paribas*, the Court of Appeal noted that while the winding-up jurisdiction should not for used for deciding a debt that is disputed on substantial grounds, the issue of substantiality is no longer relevant once an offer to secure the debt had been made (at [7]):

> Where … an offer [to secure the disputed debt] has been made, *the issue of substantiality or insubstantiality falls by the wayside as it is no longer a relevant consideration given that the debtor is not unable to pay its debts*. That is why, in our view, the issue of whether there were triable issues with respect to BNP's claim was not even relevant in the present case.
> [emphasis added]

The Court of Appeal further held (at [9]):

> … even in the case of an admitted debt, the debtor company is not deemed to be unable to pay its debts if it has not neglected to secure the debt demanded under the statutory notice.

69 Claimant's Counsel contends that this outcome prejudices the Claimant, as he now has to bring his claim to a full trial.[47] I disagree. If the Claimant's case is as strong as he makes it out to be, he can obtain summary judgment, in which case the need for a full trial would be averted. There would also be no risk of him being foisted with a paper judgment, given the solicitor's undertaking which now clads the escrow monies (see para 42 above). However, if the Claimant's case turns out to be weaker than what has been portrayed here and

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47 Minutes of hearing on 26 March 2024.

summary judgment is ultimately denied, this would mean that the Claimant ought not to have brought a winding-up application (in respect of salary for the Disputed Months) to begin with – see the discussion at para 12 above. In either eventuality, I see no prejudice to the Claimant.

70 The approach above is consistent with that taken in *BW Umuroa*, which involved a defendant company that had neglected to pay the debt in a statutory demand. Choo Han Teck J concluded that the defendant company had failed to raise any *bona fide* dispute on substantial grounds in respect of the debt, before opining as follows (at [25]):

> [I]f the defendant is genuinely solvent as it claims, it should have satisfied the statutory demand. It is no defence to a valid statutory demand for the defendant to say that it is solvent, but that it refuses to pay, compound or secure the debt. … I was thus prepared to grant the application *with a stay of execution for two weeks for the defendant to pay, secure or compound the debt*. However, the plaintiff's counsel informed the court on 2 April 2020 that it had received a letter on 28 March 2020 from the newly-appointed receivers and managers of the defendant, indicating that the defendant had been placed in receivership.
>
> [emphasis added]

Choo J was thus prepared to *stay* the winding up if the defendant company could, among other measures, *secure* the debt (although this ultimately did not happen as the defendant company was placed in receivership). Returning to the present case, as the Defendant has *already* provided $36,000 cash to secure the salary claim for the Disputed Months, there is even stronger cause for pause before winding up the Defendant.

71 Based on the above, I conclude that the provision of security for the $36,000 in this case was demonstrative of the Defendant's ability to pay that portion of the SD amount.

72 Before leaving this point, I should qualify that my decision is in part premised on the fact that the Defendant has provided security by way of *cash*, ringfenced in an escrow account. In the event that a company has to resort to putting up an *illiquid* asset as security, this may (depending on the characteristics of the asset) warrant a different outcome. If the assets are illiquid and cannot be promptly realised to satisfy what is due and owing, this might run counter to the suggestion that the security is demonstrative of the company's ability to pay its debts. However, without the benefit of arguments, I say no more on this.

***Conclusion on whether the winding-up application should be denied***

73 To conclude, the fact that the amount demanded by the SD has (to the extent that it is *not* the subject of a substantial and *bona fide* dispute) either been paid (*vide* the March 2024 Payments) or secured (by the $36,000 placed in escrow) supports the conclusion that the Defendant is able to pay that amount. This is in turn a significant factor supporting the inference that despite the non-satisfaction of the SD within the statutory three-week deadline, the Defendant has since demonstrated its ability to pay its debts, and the court should consequently be slow to grant a winding-up order. I also observe that the Claimant has not raised any possible countervailing factors that might justify granting a winding-up order, notwithstanding the Defendant having furnished the payment and security.

74 In the round, the Defendant has succeeded in persuading me that notwithstanding the deeming provision in limb (*a*) of s 125(2) IRDA, I should exercise my discretion against granting the winding-up application.

**Whether the Defendant has been proven to be unable to pay its debts under s 125(2)(*c*) IRDA.**

75 The Claimant also maintains that the Defendant is unable to pay its debts, *taking into account its contingent and prospective liabilities,* and that it is thus deemed unable to pay its debts under limb (*c*) of s 125(2) IRDA.

76 To succeed on this front, the Claimant must show that the Defendant is insolvent under the cash flow test set out in *Sun Electric Power*. In that case, the Court of Appeal examined limb (*c*) of s 254(2) of the Companies Act (Cap 50, 2006 Rev Ed) (which provision has since been transposed to limb (*c*) of s 125(2) IRDA) and held that the sole test applicable to this provision is the cash flow test (at [65]):

> For clarity, the cash flow test assesses whether the company's current assets exceed its current liabilities such that it is able to meet all debts as and when they fall due. We agree … that "current assets" and "current liabilities" refer to assets which will be realisable and debts which will fall due within a 12-month timeframe, as this is the standard accounting definition for those terms.

77 The cash flow test assesses whether the company's current assets exceed its current liabilities, such that it is able to meet all debts as and when they fall due. In this regard, "current assets" and "current liabilities" refer respectively to assets which will be realisable and debts which will fall due, within a 12-month timeframe: *Sun Electric Power* at [65]. The Court of Appeal also set out a non-exhaustive list of factors which should be considered under the cash flow test (at [69]):

> (a) the quantum of all debts which are due or will be due in the reasonably near future;
>
> (b) whether payment is being demanded or is likely to be demanded for those debts;

> (c) whether the company has failed to pay any of its debts, the quantum of such debt, and for how long the company has failed to pay it;
>
> (d) the length of time which has passed since the commencement of the winding-up proceedings;
>
> (e) the value of the company's current assets and assets which will be realisable in the reasonably near future;
>
> (f) the state of the company's business, in order to determine its expected net cash flow from the business by deducting from projected future sales the cash expenses which would be necessary to generate those sales;
>
> (g) any other income or payment which the company may receive in the reasonably near future; and
>
> (h) arrangements between the company and prospective lenders, such as its bankers and shareholders, in order to determine whether any shortfall in liquid and realisable assets and cash flow could be made up by borrowings which would be repayable at a time later than the debts.

78 As seen from items (f) and (g) of the list extracted above, the company's profitability is one of the salient factors feeding into the analysis. On this, the Claimant argues that the Defendant has conceded at various junctures in its affidavits that it "started to run into financial difficulties" or "ran into financing issues".[48] However, I note that this argument takes the Defendant's concessions out of context. The Defendant was pointing to its own dire situation *prior* to being acquired by HRIG. To demonstrate its *post*-acquisition position, the Defendant adduced its profit and loss statement for the calendar year 2023,[49] which indicated that the Defendant turned a profit of $12,408.

79 Even then, the Claimant takes issue with this profit and loss statement,

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48 Claimant's submissions at para 59.

49 Rajesh Nair's 2nd affidavit at para 19 and p 15.

highlighting various entries which it finds to be unsatisfactory.[50] For example:

(a) The total cost of the Defendant's sales was $373,397, while expenses added up to $1,659,512. The total recurring costs thus totalled $2,032,909 on an annualised basis, translating into monthly outgoings of $170,000 every month. With outgoings of this magnitude, the Claimant projects that the injection of $150,000 from HRIG (mentioned at para 4 above) would be wiped out within a single month.

(b) There were also revenue items, such as "other revenue" of $5,000 and "Government Grants" of $6,825, which the Claimant regards as having been insufficiently explained.

(c) Finally, the Claimant suggests that the Defendant might have understated its expenses. For example, it is suspicious how $59,777 of expenses had simply been written off.

The Claimant thus submits that the Defendant has failed to adduce the necessary evidence to substantiate its financial health under the cash flow test.[51]

80 In my view, the Claimant's submission ignores the fact that the burden of proving the insolvency contemplated by limb (*c*) of s 125(2) IRDA *rests on the applicant seeking a winding-up order*. In *Re Ascentra Holdings, Inc (in official liquidation) and others (SPGK Pte Ltd, non-party)* [2023] SGHC 82, Vinodh Coomaraswamy J observed that limb (c) of s 125(2) IRDA, unlike limb (a), is not truly a deeming provision (at [44]):

> Although s 125(2) expressly frames its three limbs as deeming provisions, s 125(2)(*c*) is not in truth a deeming provision. Only

50 Claimant's 3rd affidavit at paras 36–37.

51 Claimant's submissions at para 67.

> ss 125(2)(*a*) and 125(2)(*b*) are true deeming provisions. The effect of those two provisions is to deem proof of a single objective factual predicate as establishing that a company is unable to pay its debts. …

Under limb (*a*) of s 125(2) IRDA, the creditor simply needs to show the non-payment of the statutory demand, upon which the burden shifts to the company to show that it *is* solvent: see *Tarkus Interiors* at [31]. In contrast, the burden of proof in respect of limb (*c*) of s 125(2) IRDA remains squarely on the Claimant. It is thus not open to him to blandly assert that the Defendant is cash flow insolvent and then sit back and wait for the Defendant to prove otherwise.

81 The Claimant contends that the onus is on the Defendant to show how it is able to meet its current liabilities as they fall due.[52] He cites the Court of Appeal's observation in *Sun Electric Power* (at [83]) that it was incumbent on the company in that case to adduce evidence of deferred payment plans to prove that its current liabilities had been deferred for later payment or had been compounded.[53] However, this submission fails to cite the Court of Appeal's observations in its proper context. The relevant passage from *Sun Electric Power* at [83] reads:

> … *the court had evidence that the appellant's current liabilities exceeded its current assets, and this was sufficient to make the finding of insolvency*. It was incumbent on the appellant to refute this, for example, by adducing evidence of deferred payment plans to prove that the current liabilities had been deferred for later payment or had been compounded. …
>
> [emphasis added]

As can be seen from the passage above, the court in *Sun Electric Power* already had evidence before it that the company's current liabilities exceeded its current

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52 Claimant's submissions at para 72.

53 Claimant's further submissions at para 47.

assets: see *Sun Electric Power* at [73]. It was against this backdrop that the court opined that it was incumbent on the company to show that there were deferred payment plans to postpone the due date of the company's current liabilities. In the present case, the Claimant has not even crossed that first milestone of showing that the Defendant's current liabilities exceed its current assets.

82 Additionally, I would observe that the Claimant's submissions mischaracterise HRIG's cash injection of $150,000 as a one-off event. The Defendant's affidavit made it clear that the $150,000 was the *first* capital injection from HRIG.[54] The evidence thus contemplates that more injections may be forthcoming.

83 Accordingly, I find that the Claimant has failed to establish the Defendant's inability to pay its debts, under the cash flow test contemplated by limb (*c*) of s 125(2) IRDA.

**Conclusion**

84 In light of the above, I dismiss the winding-up application.

85 Parties will be filing their submissions on the issue of costs.

Christopher Tan
Judicial Commissioner

Toh Yunyuan Selina and Lin Yuankai (Premier Law LLC) for the Claimant;
Celine Liow Wan-Ting (Forte Law LLC) for the Defendant;
Kwang Jia Min for the Official Receiver.

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54 Rajesh Nair's 2nd affidavit at para 18.