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

[2024] SGHC 192

Companies Winding Up No 87 of 2024

Between

Gunvor SA

… *Claimant*

And

Atlantis Commodities Trading Pte Ltd

… *Defendant*

EX TEMPORE JUDGMENT

[Insolvency Law — Winding up — Grounds for petition — Company owing debts — Whether company unable to pay its debts — Whether debt disputed — Sections 125(1)(*e*) and 125(2)(*a*) Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed)]
[Insolvency Law — Winding up — Service of statutory demand — Whether statutory demand served at registered office of company — Section 125(2)(*a*) Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed)]
[Insolvency Law — Winding up — Service of statutory demand — Whether statutory demand served at registered office of company — Rule 68(1)(*b*) Insolvency, Restructuring and Dissolution (Corporate Insolvency and Restructuring) Rules 2020]

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Hri Kumar Nair J:

Introduction

1 The claimant issued a statutory demand seeking payment of US$1,030,575.76 (the "Outstanding Sum") from the defendant (the "Statutory Demand").[1] This was purportedly served on the defendant at its registered address, although the defendant contests this.

2 Having received no payment, the claimant filed the present application *vide* HC/CWU 87/2024 ("CWU 87") to wind up the defendant.

3 The claimant's sole basis for CWU 87 is that, in failing to satisfy the Statutory Demand, the defendant is deemed to be unable to pay its debts under s 125(2)(*a*) of the Insolvency, Restructuring and Dissolution Act 2018

[1] Affidavit of Theirry Jacot dated 27 March 2024 ("1st Aff Jacot") at para 13, pp 54–55.

("IRDA") and the Court may therefore order the winding up of the defendant pursuant to s 124(1)(*c*) read with s 125(1)(*e*) of the IRDA.[2]

4 The defendant opposes CWU 87 on several grounds: (a) it was not validly served the Statutory Demand; (b) it was not validly served copies of the originating application and the supporting affidavit of Thierry Jacot dated 27 March 2024 (the "Cause Papers"); (c) it disputes the Outstanding Debt; and (d) it has a cross-claim of US$8,253,053.00 against the claimant.

Issues

5 There are three main issues:

(a) whether the Statutory Demand and the Cause Papers were properly served;

(b) whether there are triable issues with respect to the Outstanding Debt; and

(c) whether the defendant has a genuine cross-claim against the claimant.

The law on winding up

6 Before addressing the issues, I briefly set out the applicable law. Section 124(1)(*c*) read with s 125(1)(*e*) of the IRDA empowers the Court to wind up a company on the application of a creditor if the company is unable to pay its debts. Per s 125(2)(*a*) of the IRDA, a company is deemed to be unable to pay its debts if:

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[2] 1st Aff Jacot at para 16; Claimant's Written Submissions dated 12 June 2024 ("Cl Subs") at para 17.

> [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[.] [emphasis added]

7 In addition, r 68(1) of the Insolvency, Restructuring and Dissolution (Corporate Insolvency and Restructuring) Rules 2020 ("CIR Rules 2020") sets out the service requirements that apply to every winding up application:

> Every winding up application in respect of a company and every affidavit supporting the application (called in this rule the supporting affidavit) must be served on the company at least 7 clear days before the hearing of the application —
>
> > (a) by leaving a copy each of the application and the supporting affidavit with any member, officer or employee of the company at the registered office of the company or, if there is no registered office, at the principal or last known principal place of business of the company;
> >
> > (b) *in a case where no member, officer or employee of the company can be found at the registered office or place of business mentioned in sub-paragraph (a) — by leaving a copy each of the application and the supporting affidavit at the registered office or place of business, as the case may be*; or
> >
> > (c) by serving a copy each of the application and the supporting affidavit on any member or members of the company as the Court may direct.
>
> [emphasis added]

The Statutory Demand and the Cause Papers were not properly served

8 The defendant argues that the Statutory Demand and the Cause Papers were not served on it in compliance with s 125(2)(*a*) of the IRDA and r 68(1) of the CIR Rules 2020, respectively.[3]

9 The defendant's registered office address is 10 Collyer Quay, #37-50, Ocean Financial Centre, Singapore 049315.[4] Level 37 of Ocean Financial Centre ("Level 37") is occupied by "The Executive Centre", which operates a co-working space.[5]

10 It is not disputed that the Statutory Demand was left at the reception of "The Executive Centre" located on Level 37 ("the Reception").[6] The defendant does not challenge the claimant's assertion that the Reception serves all the occupants of "The Executive Centre".

11 In contrast, there is a dispute as to how the Cause Papers were served. The claimant alleges that the Cause Papers were left at the Reception,[7] but the defendant claims that they were found in the "mailbox for The Executive Office (*sic*)", located at the basement of the same building.[8]

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3 Defendant's Opening Statement dated 12 June 2024 ("Df Subs") at para 3(a).

4 1st Aff Jacot at para 4; Affidavit of Christopher Anthony Newman dated 18 May 2024 ("1st Aff Newman") at para 15; Cl Subs at para 22; Df Subs at para 10.

5 Affidavit of Theirry Jacot dated 2 July 2024 ("2nd Aff Jacot") at para 13; Affidavit of Tan Sheng Min dated 10 July 2024 ("Aff Tan") at para 2.

6 2nd Aff Jacot at para 15; 1st Aff Newman at para 7; Aff Tan at paras 1, 3.

7 Cl Subs at para 28; 2nd Aff Jacot at paras 17–18.

8 Df Subs at para 14; 1st Aff Newman at paras 12, 17; Affidavit of Christopher Anthony Newman dated 25 June 2024 ("2nd Aff Newman") at para 9.

12 With respect to the Cause Papers, the claimant's evidence is unsatisfactory. The affidavit of the claimant's service agent simply asserts that he had left the Cause Papers at the defendant's registered address without any further detail; it does not state that they were left at the Reception[9], which is the case advanced by the claimant at the hearing. Further, the endorsement on the originating application exhibited to the said affidavit states that the Cause Papers were served at unit "*#37-05*".[10] It is therefore unclear how service of the Cause Papers was effected.

13 For the sake of argument, I take the claimant's case at its highest that the Cause Papers were left at the Reception. The key question is whether the Statutory Demand and the Cause Papers were left at the registered address of the defendant, *ie*, unit #37-50 of Ocean Financial Centre. It is the claimant's burden to prove this.

14 The claimant argues that this should be answered in the affirmative. Its argument appears to be that unit #37-50 does not exist or is not open and accessible to the public,[11] and relies on the following:

(a) the tenant directory of Ocean Financial Centre lists both "The Executive Centre" and the defendant as occupying the same units, namely #37-01/10, and there is no unit #37-50 listed on the directory;[12]

(b) on a subsequent visit made to "The Executive Centre" after CWU 87 was filed and the issue of service was raised, the claimant's

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9 Affidavit of Bani Muhamad Malaysia dated 12 April 2024 ("Aff Bani") at para 1.

10 Aff Bani at p 4.

11 Claimant's Additional Written Submissions dated 22 July 2024 ("Cl Supp Subs") at para 6(a).

12 Cl Supp Subs at para 9a.

service agent asserted that the rooms within "The Executive Centre" were not numbered and there was no unit marked "#37-50";[13] and

(c) no records for the defendant's registered address were found when it conducted an IRAS "Annual Value of Property" search.

15 I find that the claimant has failed to discharge its burden of proof.

16 First, it is irrelevant what the building tenant directory states. The directory is not an authoritative document, nor was it generated by the defendant. There is no evidence from the building landlord to explain the contents of the directory. Ultimately, what is of consequence is the *registered address of the defendant* and not the address reflected on the building tenant directory.

17 Second, there is no evidence that the claimant had made any inquiries about whether unit #37-50 exists or where it is located. Instead, from the affidavit of the claimant's service agent who served the Statutory Demand, it appears that he simply assumed that it was sufficient to leave the Statutory Demand at the Reception. The claimant could have made inquiries with "The Executive Centre" but did not do so and certainly made no effort to ascertain if there was a unit #37-50. The service agent made a second visit to "The Executive Centre" after the claimant became aware that the issue of service was disputed, and allegedly spoke with "the receptionist" of "The Executive Centre". All he claims he was told is that the Reception serves all the occupants of "The Executive Centre" (which would include the defendant) such that letters addressed to any of the occupants delivered to the Reception, will in turn be handed to the respective occupant. Even if such assistance was provided by

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[13] Cl Supp Subs at para 9(b).

"The Executive Centre", that does not meet the requirement under s 125(2)(*a*) of the IRDA to serve the Statutory Demand at the defendant's registered address. Curiously, the claimant did not make any inquiries about the existence or accessibility of unit #37-50, which is the material issue.

18 It appears undisputed that the rooms within "The Executive Centre" do not display any unit numbers on their respective doors or entrances. However, that does not mean that there is no such internal designation within "The Executive Centre". Indeed, the defendant has adduced a photograph of a unit within "The Executive Centre" with a sign bearing its name next to the door.[14] While this does not conclusively prove that the unit in the photograph is unit #37-50, it suggests at the very least that the defendant was in fact designated a specific unit within "The Executive Centre". The claimant points out that it is "not at all clear where this door is located",[15] suggesting that the defendant's unit may not be accessible to the public. The claimant's service agent's affidavit – which was made after his second visit – acknowledged that there were names displayed on the doors but claimed not to have seen the defendant's name displayed on any of them.[16] However, it is not his evidence that he saw any units which were not accessible to the public. I reiterate that the claimant did not make basic inquiries with "The Executive Centre" and must bear the consequences of that failure. I therefore accept the defendant occupied a designated unit within "The Executive Centre" which was identifiable from the sign next to the door of the unit.

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14 Affidavit of Christopher Anthony Newman dated 18 July 2024 ("3rd Aff Newman") at pp 34–35.

15 Cl Supp Subs at para 9(b).

16 Aff Tan at para 7

19 Third, the claimant's reliance on the IRAS search is flawed as it simply assumes, without explanation, that the fact that the defendant's registered address does not show up in the search means there is no such unit.

20 The defendant's evidence is not entirely satisfactory. It has not explained how the unit assigned to it in "The Executive Centre" is unit #37-50, nor has it explained how that unit came to be specified as its registered address. No contractual or other documents between the defendant and "The Executive Centre" were disclosed. Nonetheless, the legal burden to demonstrate that service had been effected at the registered address is on the claimant, and I find that it has failed to shift the evidential burden to the defendant.

21 In sum, the claimant has not proved that the Statutory Demand and the Cause Papers had been left at the defendant's registered office address as statutorily required. In so far as the Cause Papers are concerned, it is unclear how they were served at all.

22 For completeness, the claimant also submits that:

(a) The Reception functions as the reception/concierge of all occupants of "The Executive Centre", and that service of papers on the Reception would effectively constitute service of papers on the defendant.[17] This submission presumes that there is no unit #37-50 or that such unit is inaccessible to the public, which submission I reject for the reasons above;

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17 Cl Supp Subs at para 6(b).

(b) On the premise that there is no unit #37-50, the defendant's office address is that of "The Executive Centre".[18] Even if I accept that premise – which I have expressly rejected above – there is no basis to effectively deem that a different address is the registered address of the defendant; and

(c) The Cause Papers were in any event provided to the defendant's solicitors by way of e-mail on 11 April 2024, at the request of the defendant.[19] While this event is undisputed,[20] such method of service unmistakeably falls short of the statutory requirement under r 68(1)(*b*) of the CIR Rules 2020 for the Cause Papers to be served at the registered office address of the defendant.

23 Given my findings, CWU 87 must be dismissed. Even if the Outstanding Debt exists, the claimant cannot rely on the statutory presumption that the defendant is unable to pay its debts as they fall due and has led no other evidence to support its application. I nonetheless deal with the issue of the Outstanding Debt below.

The Outstanding Debt is disputed

24 The defendant submits that the Outstanding Debt is disputed on *bona fide* and substantial grounds.[21] Conversely, the claimant argues that the

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18 Cl Supp Subs at para 10.

19 Df Subs at para 29.

20 1st Aff Newman at para 11.

21 Df Subs at paras 3(b), 6.

defendant has only raised "a cloud of contentions" to resist CWU 87 but has not adduced any evidence in support of its contentions.[22]

25 It is well established that a debtor-company need only raise triable issues to obtain a stay or dismissal of the winding up application. To raise such triable issues, the company can show that there exists a substantial and *bona fide* dispute, whether in relation to a cross-claim or a disputed debt: see *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [25], citing *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal [2008] 2 SLR(R) 491 ("Pacific Recreation")* at [23] and [25]. This standard of "triable issues" is no more than the standard for resisting a summary judgment application: *Pacific Recreation* at [23].

26 Where the debtor-company has raised a triable issue, the court will typically dismiss or exceptionally stay the winding up application, because the claimant would usually be found to have established neither its standing as a creditor to bring the application nor its grounds for obtaining the order it seeks: see *Founder Group (Hong Kong) Ltd (in liquidation) v Singapore JHC Co Pte Ltd* [2023] 2 SLR 554 at [28(a)].

27 With these principles in mind, I turn to the parties' respective cases.

28 According to the claimant, the parties had entered an undated sale and purchase contract (the "S&P Contract") wherein the claimant agreed to buy from the defendant "30,000 MT +/– 5% in seller's option" of oil (the "Goods").[23]

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22 Cl Subs at para 33.

23 1st Aff Jacot at para 7, pp 17–30.

29 As the defendant failed to deliver the Goods in accordance with the S&P Contract,[24] the parties entered into a settlement agreement dated 10 June 2022 (the "Settlement Agreement"). The Settlement Agreement included a buy-back contract, wherein the defendant agreed to buy back the Goods at a price to be determined:[25]

> 1. [The defendant] agrees to buy back (the "Buy back Contract") the Goods being the subject of the [S&P Contract] on the following terms:
>
> Price: Dated Brent minus a discount of 1.10USD/BBL.
>
> Pricing period: 16–22 June 2022 (both dates inclusive).
>
> Price Trigger option: declarable by [the defendant] at any time until 16 June 2022.
>
> Deemed quantity: 30,000 MT
>
> 2. [The claimant] shall calculate the net difference between the price calculated under Buy back Contract and the [S&P Contract] (the "Difference"). In the event the Difference is negative the Parties agree such difference shall be deemed to be zero.

The total settlement sum was to be paid in six equal instalments.[26] The buy-back contract did not involve any actual transfer of goods but appeared to be a mechanism to calculate the damages payable by the defendant.

30 By way of an e-mail dated 28 June 2022, the claimant notified the defendant that the total sum payable under the Settlement Agreement was determined by the claimant to be US$9,283,628.74.[27] Taking this amount, each

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24 1st Aff Jacot at para 7.

25 1st Aff Jacot at p 33.

26 1st Aff Jacot at para 8, pp 32–43.

27 2nd Aff Jacot at para 24(a), p 114.

of the six equal instalments was calculated to be US$1,547,271.46.[28] I note that there is a rounding error of two cents when dividing the total sum above by six.

31 Subsequently, after having made payments totalling US$4,641,750, the defendant defaulted on some payments under the Settlement Agreement.[29] This led to the parties entering into a payment deferral agreement dated 17 November 2022 (the "Payment Deferral Agreement").[30] The Payment Deferral Agreement sought to, *inter alia*, defer the payment of the defaulted sum – which was US$1,547,335.84 – while acknowledging the defendant's liability to make the other future instalments.[31] This defaulted sum was to be paid in four equal parts across December 2022, and the last two instalments under the Settlement Agreement was to be paid on 10 January and 10 February 2023 respectively.[32]

32 The defendant subsequently defaulted on the last instalment of the Settlement Agreement by making only part payment of that instalment. The shortfall is the Outstanding Debt, *ie*, US$1,030,575.76.[33] In total, the defendant had paid the claimant the sum of US$8,253,053, which amount is the subject of the defendant's cross-claim[34] referred to below.

33 The defendant alleges that it did not enter the S&P Contract, the Settlement Agreement or the Payment Deferral Agreement (collectively, the

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28 2nd Aff Jacot at p 114.

29 1st Aff Jacot at para 9; p 46.

30 1st Aff Jacot at para 9, pp 45–50.

31 1st Aff Jacot at p 47.

32 1st Aff Jacot at p 47.

33 1st Aff Jacot at para 10.

34 1st Aff Newman at paras 23–24.

"Alleged Contracts").[35] To support its position, the defendant raises three arguments. First, it argues that its owner and director,[36] Mr Christopher Anthony Newman ("Mr Newman") neither signed nor authorised the Alleged Contracts,[37] and that his signatures on the Settlement Agreement and the Payment Deferral Agreement were forged. Accordingly, the Alleged Contracts are not binding on the defendant.[38] In this regard, the defendant asserts that the two persons whom the claimant dealt with, namely Mr Murat Turel ("Mr Turel") and Mr Vladimir Shtrykin ("Mr Shtrykin"), were independent contractors and not employees of the defendant, and were not authorised to enter into the S&P Contract or any settlement arising thereof.[39] Second, while the defendant acknowledges the payments made by it to the claimant referred to at [31]–[32] above, it maintains that they were not made pursuant to the Alleged Contracts, but to various pre-payment invoices issued by the claimant for gasoline to be delivered by the claimant to the defendant (the "Pre-Payment Invoices).[40] Lastly, the defendant highlights that the settlement sum in the Settlement Agreement is neither stipulated or capable of objective ascertainment in the absence of an agreed conversion factor and the quantity of goods conflicts with the S&P Contract,[41] and it would not have agreed to such terms.[42]

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35 1st Aff Newman at paras 9, 18, 19.

36 Affidavit of Chan Ji Kin Thaddaeus dated 10 July 2024 ("3rd Aff Chan"), enclosing the draft 4th Affidavit of Theirry Jacot ("Draft 4th Aff Jacot"), at pp 48, 53.

37 2nd Aff Newman at para 14, 16.

38 1st Aff Newman at para 19.

39 1st Aff Newman at paras 21, 29.

40 1st Aff Newman at para 22.

41 1st Aff Newman at para 18.

42 1st Aff Newman at para 18.

34 In rebuttal, the claimant alleges that Mr Newman, as an authorised signatory of the defendant, had signed a Compliance Registration Form dated 18 May 2017 (the "Compliance Form") which recorded Mr Shtrykin as a "[t]rader authorised to transact business on [the defendant's] behalf with [the claimant]". However, the defendant claims that Mr Newman's signature on the Compliance Form was also forged.

35 I find that there is a substantial and *bona fide* dispute as to whether the Outstanding Debt is due to the claimant.

36 First, the claimant has not led any evidence to explain how the (alleged) damages arising from the breach of the S&P Contract were calculated. Its case on the Outstanding Debt is entirely based on the defendant's (alleged) admissions in the Settlement Agreement and the Payment Deferral Agreement, and therefore, turns on the validity of those documents.

37 In that regard, the defendant claims that Mr Newman's signatures on the Settlement Agreement and the Payment Deferral Agreement were forged, and the said documents are hence not binding on the defendant.[43]

38 The claimant has characterised the defendant's position of forgery as a "bare assertion".[44] It is trite that there must be some cogent evidence supporting the defendant's position to prove a triable issue: see *B2C2 Ltd v Quoine Pte Ltd* [2018] 4 SLR 1 at [5]. However, that is not to say that the allegation of forgery must be determinatively proved at this stage. I am satisfied that there is sufficiently cogent evidence to raise a triable issue on the authenticity of the signatures:

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43 2nd Aff Newman at para 14.

44 Cl Subs at para 43.

(a) There are some irregularities on the face of these documents that appear to lend some support to the defendant's allegations. Mr Newman's name was spelled incorrectly in the Settlement Agreement as "*Chistopher* Newman" [emphasis added] and omitted altogether in the Payment Deferral Agreement.[45] Further, the signatures do not, on their face, appear to be identical to Mr Newman's signature at the end of the "Directors' Statement" in the defendant's unaudited financial statements of the financial year ending 2016[46] – but that is a matter for expert evidence;

(b) Several key terms of the Settlement Agreement were unexplained, such as how the price of the buy-back contract came to be agreed. No evidence was led from the claimant on why the defendant would agree to such terms or even how the Settlement Agreement was negotiated, and no documentary evidence was adduced evidencing such negotiations. Further, I note that the S&P Contract was for a sale of "30,000 MT +/– 5%", *ie*, a quantity with some acceptable variance that allowed the defendant to deliver as much as 1500 MT below the quantity of "30,000 MT" (see above at [28]). However, the Settlement Agreement was based on a fixed quantity of "30,000 MT" (see above at [29]), which is *higher* than the minimum quantity deliverable under the S&P Contract. As such, the settlement for the breach of the S&P Contract was calculated on a larger quantity which the defendant was not obliged to deliver. This, in my view, appears to be unfavourable from the defendant's perspective and raises questions as to how this term came to be agreed;

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45 2nd Aff Newman at para 14.

46 3rd Aff Chan at p 54.

(c) There is no evidence that the claimant had any direct communications with Mr Newman about the Settlement Agreement and the Payment Deferral Agreement. According to the claimant, it communicated only with Mr Turel and Mr Shtrykin on this matter.[47] The documents were sent to and received from particular e-mail addresses of the defendant. The claimant simply asserts without justification that those e-mails would have been received by Mr Newman.[48] Mr Newman however has clarified that he does not receive e-mails sent to those addresses, and thus would not have had sight of those documents.[49] There is no reason at this stage to doubt Mr Newman's evidence;

(d) The claimant's failure to deal directly with Mr Newman on the issue of the damages payable and the settlement terms is unusual. It would know from the corporate documents in its possession that the defendant is entirely owned by Mr Newman,[50] who is also one of the defendant's two directors (the other being one Mdm Serene Wai, who does not feature in this dispute).[51] It bears highlighting that the defendant's exposure under the Settlement Agreement could be significant depending on the price of oil when the claimant exercised the "Price Trigger option" under the Settlement Agreement and indeed, the defendant was (allegedly) required to pay a substantial sum of US$9,283,628.74. Yet, the claimant did not at any time reach out to

47 Draft 4th Aff Jacot at paras 23, 25.

48 Draft 4th Aff Jacot at para 15.

49 3rd Aff Newman at paras 20–22.

50 3rd Aff Chan at p 48, 53.

51 3rd Aff Chan at p 54.

Mr Newman or at the very least copy him on the e-mails discussing the settlement;

(e) Instead, the claimant dealt entirely with Mr Turel and/or Mr Shtrykin on the issue of settlement without first ascertaining whether either of them had the authority to do so. Critically, none of the claimant's traders who dealt with Mr Turel and/or Mr Shtrykin in relation to the Alleged Contracts filed any affidavits – there is therefore no evidence of what those traders believed Mr Turel's and/or Mr Shtrykin's authority to be and what the basis of that belief was. In particular, there is no evidence that those traders relied on the Compliance Form in the course of their dealing with Mr Turel and/or Mr Shtrykin. To this end, I note that the very portion of the Compliance Form which the claimant relies on was altered: the field "Contact Person" in the blank form sent to the defendant was changed to "[t]rader authorised to transact business on [the defendant's] behalf with [the claimant]" and the details of Mr Shtrykin inserted in the corresponding field.[52] The claimant simply accepted this change without inquiry. This suggest that the claimant was not seeking the defendant's confirmation of Mr Shtrykin's authority. In any event, the evidence shows that the claimant dealt with different employees of the defendant on other (earlier) trades. For the claimant to now argue that that it had relied on the Compliance Form appears to be an afterthought. For completeness, I highlight that the claimant did not even deal directly with Mr Newman with respect to the Compliance Form although he was stated to be the defendant's authorised signatory on that form; and

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[52] 3rd Aff Chan at pp 44, 48.

(f) In addition, the Compliance Form, even if valid, does not assist the claimant. It only states that Mr Shtrykin is a "[t]rader authorised to transact business on [the defendant's] behalf", but there is no evidence that the Settlement Agreement and the Payment Deferral Agreement can be considered "trades" which are part of the defendant's business. In any event, and more importantly, the claimant did *not* rely on Mr Shtrykin's authority as the Settlement Agreement was allegedly signed by Mr Newman, and the person who signed the Payment Deferral Agreement was not identified. Instead, from the e-mails disclosed, the claimant appears to have relied on Mr Turel and/or Mr Shtrykin to obtain the approval *of the authorised signatory* of the defendant for these documents.[53] For the same reason, in so far as the claimant is arguing that Mr Shtrykin and/or Mr Turel had express, implied actual and/or ostensible authority to enter into the Settlement Agreement and the Payment Deferral Agreement, that argument is misplaced.

39 The assertion that the claimant honestly believed that Mr Newman's signatures on the Settlement Agreement and the Payment Deferral Agreement were genuine is irrelevant. The question is whether the signatures were forged, and that is an issue which cannot be settled by the affidavits filed herein.

40 Third, the validity of the S&P Contract, which gave rise to the Outstanding Debt, is also in issue. Here, the claimant dealt with Mr Shtrykin and relies on the Compliance Form[54] as evidence of his authority to transact on behalf of the defendant. However, as stated above, the defendant claims

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53 3rd Aff Chan pp 221-234, 236-249.

54 2nd Aff Jacot at pp 125–126.

Mr Newman's signature on the Compliance Form was forged.[55] Again, the claimant did not deal directly with Mr Newman and instead obtained the signed Compliance Form from Mr Shtrykin himself.[56] Even if Mr Turel and/or Mr Shtrykin had the implied or ostensible authority to enter into the S&P Contract on behalf of the defendant, that does not advance the claimant's case as it must establish the validity of both the Settlement Agreement and the Payment Deferral Agreement to prove the Outstanding Debt, and these agreements were allegedly signed by Mr Newman.

41 The claimant points out that the defendant has failed to disclose any communications between Mr Newman and Mr Shtrykin and/or Mr Turel questioning their entry into the Alleged Contracts. But it is the defendant's case that Mr Newman only had sight of the Alleged Contracts when the defendant was purportedly served the Cause Papers in April 2024,[57] and thus would only have realised then that his signature was forged. I do however note that Mr Newman would have at least known about the existence of the Alleged Contracts when he had sight of the Statutory Demand, which made mention of them, in November 2023.[58] In any case, the defendant's inadequacy in this regard does not displace the cogent evidence above which raise a triable issue on the validity of the Alleged Contracts.

42 Notwithstanding the above, there remains the question of why the defendant had made payments totalling US$8,253,053.00 to the claimant. These payments, which were authorised by Mr Newman, is consistent with the

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55 2nd Aff Newman at para 14.

56 3rd Aff Chan at pp 46–49.

57 1st Aff Newman at para 11.

58 1st Aff Jacot at p 54.

defendant acknowledging and affirming the Alleged Contracts. The defendant claims that it had made these payments pursuant to the Pre-Payment Invoices, *ie*, pre-payment invoices issued by the claimant for gasoline to be delivered by the claimant to the defendant.[59] The defendant produced the Pre-Payment Invoices, which bear the letterhead of the claimant, and points out that the date and amounts of each payment made by the defendant corresponded with the amounts reflected in the Pre-Payment Invoices and not the instalment amounts under the Alleged Contracts.[60]

43 The claimant denies entering into any agreement to deliver gasoline to the defendant as alleged.[61] The claimant also alleges that the Pre-Payment Invoices were not issued by it, that the claimant did not know of their existence and that the invoices issued pursuant to the Alleged Contracts appear to have been digitally manipulated to produce the Pre-Payment Invoices.[62] The claimant comprehensively identified five separate features of the Pre-Payment Invoices which suggest they have been fabricated.[63]

44 The evidence demonstrates that the Pre-Payment Invoices were made contemporaneously: there are internal e-mails of the defendant attaching these Pre-Payment Invoices at and around the dates of those invoices.[64] At that point in time, there was no apparent need or motivation for the defendant to have fabricated these invoices to foreshadow a defence that it would have to run in the future. The fact that the payments made by the defendant corresponded to

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59 1st Aff Newman at paras 22–23; pp 19–22.

60 1st Aff Newman at para 23.

61 Cl Subs at para 57.

62 Cl Subs at para 58.

63 Cl Subs at para 59.

64 1st Aff Newman at pp 35–42.

the dates and amounts of the Pre-Payment Invoices supports the defendant's case that it made the payments pursuant to those invoices.

45 Despite this, there are some aspects of the defendant's case on this issue which are not satisfactory.

46 First, the defendant has been curiously passive with exercising its rights under the Pre-Payment Invoices. On its own case, the gasoline that it had pre-paid for from as early as 9 September 2022 had not been delivered. The defendant adduced a series of WhatsApp messages between Mr Newman and Mr Shtrykin wherein Mr Newman sought clarification from Mr Shtrykin with respect to a shortfall in the volume of gasoline owned by the defendant. These messages however only extended to 6 May 2023 and there is no evidence of the defendant's efforts to either demand delivery of the gasoline or its money back from the claimant for almost a year. Instead, the defendant only formally demanded the repayment on 10 May 2024, *after* CWU 87 was filed. No explanation has been offered for this delay.

47 Second, it would appear from the defendant's evidence that it had been misled by Mr Shtrykin and deceived by the Pre-Payment Invoices into paying the sum of US$8,253,053.00 to the claimant. Yet, there is no evidence that it has reported Mr Shtrykin to the authorities or taken any other action against him. As the defendant's counsel accepted at the hearing, it is even unclear from Mr Newman's affidavit if Mr Shtrykin (as well as Mr Turel) is still with the defendant, and if not, when he left. The defendant's failure to address such an obvious issue is suspicious.

48 Third, the defendant's evidence that Mr Turel and Mr Shtrykin are "independent contractors" is weak. The terms of Mr Shtrykin's "contract for

services" adduced by the defendant does not describe him as an independent contractor and is not inconsistent with him being an employee.[65] Mr Shtrykin's duties include the "management of trading operations of [the defendant]", the scope of which the defendant does not explain.[66] While the defendant asserts that Mr Shtrykin is not authorised to enter into the S&P Contract without Mr Newman's approval, Mr Shtrykin's contract for services contains no such qualification. No documents were produced in respect of Mr Turel's terms of service, which the defendant claims were informally agreed and concerned the provision of business development services to the defendant.[67]

49 These issues however do not displace the fact that there are triable issues as to the Outstanding Debt as set out above.

50 Ultimately, the Outstanding Debt is dependent on the validity of the Settlement Agreement and the Payment Deferral Agreement, which in turn depend on whether they were signed by Mr Newman. There are clear triable issues in respect of this. At the very least, the defendant's liability (if any) ought, in the interests of justice, to be determined by way of a writ action where there will be discovery, material witnesses can be cross-examined and expert evidence adduced with respect to the alleged forgeries : see *Re Bentimi Pte Ltd; In the Matter of Part X of the Companies Act, Chapter 50 (1994 Revised Edition) v In the Matter of Bentimi Pte Ltd* [2003] SGHC 92 at [8]. It is not appropriate for the claimant to short-circuit the process and insist on payment of the Outstanding Debt without having conclusively proved the same first.

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65 3rd Aff Newman at pp 38–41.

66 3rd Aff Newman at p 38.

67 3rd Aff Newman at para 18.

51 In these premises, even if there were no issues with respect to the service of the Statutory Demand, CWU 87 should still be dismissed.

The defendant's cross-claim

52 As summarised in *Strategic Construction Pte Ltd v JH Projects Pte Ltd* [2018] 4 SLR 1192 at [25], the requirements to be satisfied where winding up proceedings are sought to be stayed on the basis of a cross-claim is as follows:

(a) the applicant must show that there is a genuine cross-claim;

(b) the applicant must show that the cross-claim is greater than the claim of the creditor seeking the winding up; and

(c) there are no other special circumstances.

The standard of raising triable issues in relation to a cross-claim is the same as that of disputing the debt: the debtor-company must demonstrate a substantial and *bona fide* dispute (see above at [25]).

53 As I had explained (see above at [42]–[48]), there are a number of issues with respect to the defendant's claim for US$8,253,053.00 for payments made to the claimant pursuant to the Pre-Payment Invoices. Nonetheless, the cross-claim is intricately linked to the Alleged Contracts and the Outstanding Debt, and given my findings above, I need not make any separate findings in respect of the cross-claim.

Costs

54 It is well-established that it is an abuse of process for a creditor to try to use the winding up process to recover a disputed debt: *Pacific Recreation* ([25] *supra*) at [16]–[17]. Such an attempt will usually be restrained by the courts,

including by way of costs: see *Jurong Shipyard Pte Ltd v BNP Paribas* [2008] 4 SLR(R) 33 at [34]. In *Founder Group (Hong Kong) Ltd (in liquidation) v Singapore JHC Co Pte Ltd* [2023] SGHC 159 ("*Founder Group (HC)")* at [19], the court noted the following:

> The claimant has presented this winding up application without securing a binding adjudication that the defendant owes a debt to the claimant. *It is certainly open to a claimant to present a winding up application without an adjudication. But doing so is a high-risk strategy. If a claimant fails to establish that it is a creditor of the defendant, not only will the winding up application be dismissed with costs, it is also at risk that it will be ordered to pay those costs on the indemnity basis* (*Re A Company* (No. 0012209 of 1991) [1992] 1 WLR 351 at 354, per Hoffman J (as he then was)). [emphasis added]

55 Relying on these precedent cases, the defendant seeks indemnity costs against the claimant. The defendant points out that it had put the claimant on notice of its dispute with the Outstanding Debt and its cross-claim from as early as 10 May 2024.[68] Despite this, the claimant "has remained adamant in unreasonably proceeding with CWU 87".[69]

56 Since the application has been dismissed on account of the failure of the claimant to demonstrate that the defendant is unable to pay its debts, costs should be ordered against the claimant. However, the authorities do not go as far as to suggest that *indemnity* costs should be ordered in the regular course. Indeed, the court in *Founder Group (HC)* only suggests that there will be a *risk* that indemnity costs will be ordered.

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68 Df Subs at para 26.

69 Df Subs at para 29.

57 Given my views on the defendant's evidence above, I do not consider it appropriate to make an indemnity costs order. I hereby fix costs at $20,000 (inclusive of disbursements) to be paid by the claimant to the defendant.

Hri Kumar Nair
Judge of the High Court

Karnan s/o Thirupathy, Charlene Sim Yan and Chan Ji Kin Thaddaeus (Legal Solutions LLC) for the claimant;
Tan Poh Ling Wendy, Kelley Wong Kar Ee and Xu Hongli Terry (Morgan Lewis Stamford LLC) for the defendant.