IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 229

Originating Summons (Bankruptcy) No 47 of 2018
(Registrar's Appeal No 177 of 2018)

Between

Yashwant Bajaj

… *Plaintiff*

And

Toru Ueda

… *Defendant*

GROUNDS OF DECISION

[Insolvency Law] — [Bankruptcy] — [Statutory Demand]

Version No 1: 27 Oct 2020 (22:40 hrs)

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Yashwant Bajaj
v
Toru Ueda

[2018] SGHC 229

High Court — Originating Summons (Bankruptcy) No 47 of 2018 (Registrar's Appeal No 177 of 2018)
Valerie Thean J
30 July 2018

22 October 2018

Valerie Thean J:

Introduction

1 The plaintiff, Mr Yashwant Bajaj, and the defendant, Mr Toru Ueda, former partners in a fund management business, sued each other in the High Court as a result of disputes concerning the cessation of their partnership. After mediation, their claim and counterclaim were compromised with a settlement agreement ("Settlement Agreement"). The Settlement Agreement envisaged final calculations to be effected by an independent accountant. Following an evaluation process that did not go smoothly, the appointed independent accountant issued a qualified opinion but set out a calculation according to the rubric provided by the Settlement Agreement. This calculation resulted in a sum owing from Mr Bajaj to Mr Ueda.

2 Mr Ueda followed on with letters asking Mr Bajaj to pay the sum

calculated by the accountant, an additional sum specified by the Settlement Agreement and Mr Bajaj's share of the accountant's fees. These letters were ignored. Subsequently, Mr Ueda served a statutory demand on Mr Bajaj on 17 April 2018 (the "Statutory Demand") claiming the same.

3 Mr Bajaj applied to set aside the Statutory Demand. On 13 July 2018, an Assistant Registrar dismissed Mr Bajaj's application. On 30 July 2018, I dismissed Mr Bajaj's appeal therefrom. Mr Bajaj has filed an appeal against my decision and I set out the grounds of my decision.

Background

4 Mr Bajaj and Mr Ueda were partners involved in a fund management business. The fund they managed was known as the Hachiman Japan Fund. The parties managed the fund through the use of several corporate entities:[1]

(a) Hachiman Capital Management ("Hachiman Cayman"), a fund management company incorporated in the Cayman Islands in 2004;

(b) Hachiman Capital Management Private Limited ("Hachiman Singapore"), a wholly owned subsidiary of Hachiman Cayman incorporated in Singapore;

(c) TY Advisors ("TY Cayman"), a company incorporated in the Cayman Islands; and

(d) TY Advisors Japan ("TY Japan"), a branch of TY Cayman registered in Japan.

1 Plaintiff's Bundle of Cause Papers ("PBP") Volume 1 Tab 4, p 6.

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5 I shall refer to Hachiman Cayman and Hachiman Singapore collectively as the "Hachiman Entities", and to TY Cayman and TY Japan as the "TY Entities". The parties were the directors and equal shareholders of Hachiman Cayman and TY Cayman. They managed the Hachiman Japan Fund together from Japan from 2004 to 2009. For tax and regulatory reasons, the parties conducted their business activities in Japan though TY Japan. TY Japan would provide sub-advisory services to Hachiman Cayman, the offshore fund management company. From 2009 to 2011, the parties managed the Hachiman Japan Fund from Singapore through Hachiman Singapore.[2] In the course of their business, the parties made use of the services of two unrelated companies for corporate support:

(a) Tricor Singapore Pte Ltd ("Tricor") a company in Singapore which provided services such as book keeping and the running of a trust account for Hachiman Singapore; and

(b) Kaneyama & Associates ("Kaneyama") a business in Japan which handled the financial records of TY Japan.

6 Sometime in September 2010, the parties agreed to wind up their joint business and end their partnership. They entered into an agreement for how the assets of their business ought to be divided. Unfortunately, shortly after this agreement, there was a dispute over certain subsequent transactions and business decisions, as well as a dispute as to the precise nature and scope of their agreement. While these disputes were ongoing, Mr Bajaj resigned as a director of the TY Entities around March 2011, and also resigned as a director of the Hachiman Entities in May 2011, to enable him to take up a directorship in another fund management company.[3]

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2 PBP Volume 1 Tab 4, pp 6–7.

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7 Mr Ueda commenced a suit against Mr Bajaj on 13 March 2013 ("the Suit"). Mr Bajaj filed a counterclaim. The parties agreed to refer the dispute to mediation and eventually resolved the Suit by entering into the Settlement Agreement on 19 August 2014.[4]

8 The Settlement Agreement is central to the present dispute. Its key terms are the following:[5]

(a) Clause 1 provides that "[t]he parties are to jointly appoint an Independent Accountant to calculate and populate the entries" in "Tables X and Y", two tables enclosed in the Settlement Agreement. Clause 2 provides a calculation formula premised on figures found in Tables X and Y ("the Settlement Amount").

(b) Clauses 3 and 4 provide for payment of the Settlement Amount to either Mr Bajaj or Mr Ueda, depending on whether the Settlement Amount calculated is a positive or negative sum.

(c) Clause 6 provides that all "costs, fees and expenses of the Independent Accountant" as well as Singapore Mediation Centre's ("SMC") fee for appointing the Independent Accountant shall be borne by Mr Bajaj and Mr Ueda equally.

(d) Clause 8 provides that all parties "will take all necessary steps to procure that the parties and the Independent Accountant are to be given free and unfettered access to all documents of [Hachiman Cayman] and all related entities" for the purposes of Clause 1.

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3 PBP Volume 1 Tab 4, p 11.

4 PBP Volume 1 Tab 4, p 2.

5 PBP Volume 1 Tab 4, pp 40–44.

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(e) Clause 9 provides that the "Independent Accountant's calculations shall be final and binding".

(f) Clause 10 provides that "[Mr Bajaj] is to pay [Mr Ueda] USD50,000".

(g) Clause 14 provides that "[t]his Settlement Agreement represents a full and final settlement and/or compromise of all disputes and/or claims whatsoever arising out of or in connection with [the Suit, Hachiman Cayman, Hachiman Japan Fund, Hachiman Singapore, TY Cayman, TY Japan] or otherwise.

(h) Clause 15 provides that parties undertake to make all reasonable endeavour to implement the terms of the Settlement Agreement.

(i) Clause 16 provides that the parties undertake to return before Mr George Lim SC ("the Mediator") for further mediation to resolve any disputes or issues arising out of the performance of this Settlement Agreement.

(j) Clause 17 provides for payment of the sums due under the Settlement Agreement by instalments, and also provides for such sums to become immediately payable upon a failure to pay any instalment within the time stipulated.

9 On 14 November 2014, pursuant to a Neutral Evaluation Agreement, the parties consented to the appointment of Mr Sajjad Akhtar ("Mr Akhtar") to provide a "Neutral Evaluation Service". It was not disputed that this was in effect appointing Mr Akhtar as the "Independent Accountant" under Clause 1 of the Settlement Agreement. Under the Neutral Evaluation Agreement, the

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parties agreed to a "Documents-only" Neutral Evaluation and also agreed that the terms of the SMC's Neutral Evaluation Rules (the "Neutral Evaluation Rules") were incorporated.[6]

10 The neutral evaluation process was marred by delays and various incidents. The parties initially agreed to submit an agreed statement of facts to Mr Akhtar. A draft was forwarded by Mr Ueda's solicitors to Mr Bajaj on 12 December 2014; however, Mr Bajaj refused to finalise the agreed statement of facts.[7] Case statements as well as replies to the case statements were filed by both parties between 12 January 2015 and 3 February 2015.[8] These case statements contained the documents necessary to calculate and populate Tables X and Y.[9] Mr Ueda provided an 86-page folio of documents comprising various transaction records, bank statements from 2011 and management accounts provided by Tricor.[10]

11 After reviewing the case statements and the replies, Mr Akhtar had several queries.[11] He thus proposed a clarification hearing to be attended by both parties. There were difficulties in arranging for a common time for this hearing, and Mr Ueda's solicitors initially proposed that Mr Akhtar meet with each party individually instead. Mr Bajaj, however, insisted on having both parties present at the hearing.[12] Finally, both parties agreed via email on a common hearing date of 2 April 2015. Mr Ueda flew in from Tokyo to attend the hearing and provide

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6 PBP Volume 2 Tab 1, pp 6, 53–54.

7 PBP Volume 1 Tab 4, p 76.

8 PBP Volume 1 Tab 4, p 76.

9 PBP Volume 2 Tab 1, p 17.

10 PBP Volume 2 Tab 1, pp 249–334

11 PBP Volume 2 Tab 2, p 18.

12 PBP Volume 2 Tab 2, p 16.

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explanations. Mr Bajaj did not appear. Mr Ueda and Mr Akhtar proceeded with the hearing in Mr Bajaj's absence.[13] In his 2nd affidavit, Mr Bajaj claimed that he did not agree to meet on 2 April 2015[14] but Mr Ueda countered with a copy of Mr Bajaj's email of 3 March 2015 agreeing to the date. [15]

12 Subsequent to the hearing, Mr Akhtar requested an explanation for Mr Bajaj's absence. Mr Bajaj claimed that he was overseas and did not receive Mr Akhtar's email notification reminding the parties of the hearing. In his detailed description of the neutral evaluation process annexed to his Report, Mr Akhtar expressed doubt about the reasons provided by Mr Bajaj for his absence. The notification email was sent to Mr Bajaj's usual email address and Mr Akhtar did not receive any notification of non-delivery. Mr Akhtar also noted that Mr Bajaj had previously agreed to the date.[16] In his 3rd Affidavit, Mr Bajaj contended that he was in Italy organising a rock festival at the time and his residence in Italy did not have internet connectivity.[17] Mr Ueda highlighted that this was unlikely for three reasons: (i) Mr Bajaj was operating as a fund manager at the time; (ii) Mr Bajaj was organising a rock festival; and (iii) his residence in Italy was described, in a news article, as a "luxury villa".[18]

13 In order to push the process forward, Mr Ueda waived his right under Clause 7 of the Settlement Agreement to be represented in all meetings with the Independent Accountant and consented for Mr Akhtar to meet Mr Bajaj without Mr Ueda's representatives in a separate clarification meeting.[19]

[13] PBP Volume 1 Tab 4, pp 76.

[14] PBP Volume 2 Tab 2, p 10.

[15] PBP Volume 2 Tab 3, p 14.

[16] PBP Volume 1 Tab 4, p 77.

[17] PBP Volume 2 Tab 4, pp 4–5.

[18] PBP Volume 2 Tab 3, pp 4–5.

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Notwithstanding, despite Mr Akhtar's efforts to set up a meeting, Mr Bajaj effectively ignored him. Mr Akhtar sent several emails during the month of April 2015 requesting a suitable meeting date from Mr Bajaj, but Mr Bajaj ignored the emails.[20] Finally, on 3 July 2015, Mr Bajaj responded, proposing to make himself available on or after 24 August 2015. Mr Ueda was concerned about the delay in the process, and his solicitors suggested by way of an email on 10 July 2015 that the clarification hearing take place through a conference call, instead of waiting until August. Mr Bajaj firmly rejected this suggestion and insisted on a face to face meeting in August.[21]

14 On 4 and 19 August, Mr Akhtar contacted Mr Bajaj to confirm a meeting date. Mr Bajaj once again failed to respond.[22]

15 On 26 August 2015 Mr Akhtar consulted SMC on how to proceed. SMC recommended that he proceed to issue his opinion in light of the fact that the matter had become unduly protracted. Mr Akhtar wrote to both parties on 13 October 2015 stating that since Mr Bajaj had refused to provide reasonable alternative dates for a clarification hearing, Mr Akhtar would issue his opinion on the basis of the documents submitted to date.[23]

16 The next day, 14 October 2015, Mr Bajaj finally responded, stating that he would not accept Mr Akhtar's opinion unless he was given a chance to be heard. Mr Bajaj subsequently began alleging bias on the part of Mr Akhtar and wrote to the SMC and Mr Ueda's solicitors, proposing that Mr Akhtar be

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19 PBP Volume 2 Tab 1, p 9.

20 PBP Volume 1 Tab 4, p 77.

21 PBP Volume 2 Tab 2, p 22.

22 PBP Volume 1 Tab 4, p 77.

23 PBP Volume 1 Tab 4, p 77.

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replaced. His proposal was rejected by both the SMC and Mr Ueda. Mr Akhtar continued to engage Mr Bajaj but Mr Bajaj refused to reciprocate, maintaining his position that Mr Akhtar was biased. Mr Akhtar, with the support of SMC, wrote to Mr Bajaj and informed him that he would proceed to issue his report on 27 November 2015 if Mr Bajaj did not meet him prior to this.[24]

17 Mr Bajaj finally met Mr Akhtar for a clarification hearing on 25 November 2015. During this meeting, Mr Bajaj raised reservations that he had no access to certain source documents of the Hachiman Entities and the reliability of the accounts provided by Mr Ueda.[25] For the first time, Mr Bajaj expressed a concern that the accounting records did not reflect a loan given by Hachiman Cayman to TY Japan ("Hachiman Loan").

18 To address these concerns, Mr Akhtar went to Tricor's offices in January 2016 to review the accounting records of Hachiman Cayman maintained by Tricor. Mr Akhtar appeared to be satisfied with the accounts after his review. In particular, he examined the accounting records for the Hachiman Loan and found that it had been repaid, and hence was rightfully no longer reflected on the accounts.[26] He emailed parties his results with various detailed working documents enclosed on 24 February 2016.

19 Mr Bajaj did not query Mr Akhtar's calculations or working documents. He remained dissatisfied, however, and wanted further access to the source documents. Mr Ueda initially resisted Mr Bajaj's requests for the source documents. Finally, however, at Mr Akhtar's request, Mr Ueda in June 2016 instructed Tricor to provide access to the documents they had available and also

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24 PBP Volume 1 Tab 4, p 78.

25 PBP Volume 1 Tab 4, p 79, 88–90.

26 PBP Volume 1, Tab 4, pp 92 and 94.

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wrote to Kaneyama, authorising Kaneyama to release all document relevant to the Hachiman Entities.[27] It appears that Kaneyama did not respond to Mr Bajaj's subsequent requests for documents.[28]

20 Tricor retrieved further documents from a warehouse and forwarded copies of the documents to Mr Bajaj in August 2016.[29] The documents received by Mr Bajaj from Tricor were, nonetheless, not to his satisfaction. Broadly, Mr Bajaj wanted two further sets of documents.

21 First, certain documents kept by Cayman National Bank ("CNB") in relation to Hachiman Cayman's bank account with CNB including:[30]

(a) Bank statements from CNB for the months of July, August, November and December 2010;

(b) CNB debit advice slips for the 4th quarter of 2010;

(c) Hachiman Singapore Wire Instructions for the 4th quarter of 2010.

22 Second, certain documents rendered and managed by Kaneyama in relation to TY Japan for the period of June 2010 to March 2011. These documents included:[31]

(a) TY Japan's general ledger of accounts and invoices;

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27 PBP Volume 1 Tab 4, pp 79–80.

28 PBP Volume 1 Tab 4, pp 23–24.

29 PBP Volume 1 Tab 4, p 80.

30 PBP Volume 1 Tab 4, pp 13–14.

31 PBP Volume 1 Tab 4, p 14.

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(b) TY Japan's monthly balance sheet;

(c) TY Japan's payroll account statements and government pension contributions;

(d) TY Japan's tax invoices of sub-advisory services rendered to Hachiman Cayman;

(e) TY Japan's trust account statements with Kaneyama; and

(f) TY Japan's other deposit statements.

23 I shall refer to the documents collectively as the "CNB and Kaneyama Documents".

24 Mr Bajaj insisted that without the CNB and Kaneyama Documents to verify the accounts rendered by Tricor, Tables X and Y would be populated with "false information".[32] Hachiman Cayman's CNB bank account had, however, been terminated, and Mr Ueda had no access to the statements unless he opened the account again. Mr Ueda's position was that these documents were not in his possession or power and he had no obligation to procure them.[33]

25 This impasse continued throughout 2016 and 2017. In September and October 2016, SMC attempted to arrange a meeting between the parties and Mr Akhtar, but these attempts were unsuccessful. In November 2016, SMC proposed a meeting between the parties, Mr Akhtar, and the Mediator. Mr Ueda agreed to attend.[34] Mr Bajaj, on the other hand, responded on 19 and 21

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32 PBP Volume 1 Tab 4, p 85.

33 PBP Volume 2 Tab 1, p 22.

34 PBP Volume 1 Tab 4, p 66.

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November 2016, refusing to attend any meeting until he received the CNB and Kaneyama Documents. Mr Bajaj also raised a new allegation: that Mr Ueda had wound up Hachiman Singapore without his consent, and may have sequestered around $150,000. Mr Bajaj used this allegation as further grounds for refusing to consent to any meeting between the parties, Mr Akhtar and the Mediator. Over the period of December 2016 to April 2017, the parties exchanged emails, but no progress was made. Mr Bajaj continued to demand the outstanding documents and allege impropriety in the winding up of Hachiman Singapore. Mr Ueda rebutted Mr Bajaj's allegations while acknowledging that Mr Bajaj was free to present his allegations in an appropriate forum.[35]

26 In May 2017, Mr Akhtar made a final attempt to get the parties to return to mediation but stated that if they did not agree to return to mediation, he would issue a report with appropriate qualifications. Mr Ueda disagreed, as he "[did] not consider that parties will realistically make any headway by returning to mediation after such extended correspondence on various issues and having explored the various approaches suggested by [Mr Akhtar] …".[36] Mr Bajaj replied in an email dated 14 May 2017.[37] He agreed to return to mediation, stating that: "[Mr Akhtar's] issuance of a qualified calculation would invalidate the agreement that I made with Mr Ueda and I am therefore willing to return to mediation in an attempt to get him to release the access to the source information such that a non qualified statement can be obtained". Mr Bajaj insisted that even a qualified report could not be issued due to various alleged improprieties on the part of Mr Ueda, including:[38]

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35 PBP Volume 1 Tab 4, pp 80–81.

36 PBP Volume 1 Tab 4, p 82.

37 PBP Volume 1 Tab 4, p 135.

38 PBP Volume 1 Tab 4, pp 135–136.

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(a) the allegation that Mr Ueda wound up Hachiman Singapore without his consent and funds in Hachiman Singapore were not accounted for;

(b) the allegation that Mr Ueda had not accounted for funds that were left in the accounts of the TY Entities. Mr Bajaj's position was that the TY Entities was put into liquidation sometime around mid-2010.[39] Hence the suggestion appeared to be that Mr Ueda had sequestered all funds remaining in the accounts of the TY Entities, which was improper because Mr Bajaj, as a shareholder of TY Cayman, was entitled to a share of the funds.

27 Mr Akhtar stressed in his reply on 29 June 2017 that the winding up of Hachiman Singapore occurred after 2011 and hence the issues surrounding the winding up was outside of his remit, which was merely to obtain net asset value ("NAV") figures for Hachiman Cayman in 2010 and 2011, populate Tables X and Y, and calculate the Settlement Amount. Nevertheless, Mr Akhtar requested a response from Mr Ueda on the allegation pertaining to the funds left in the accounts of the TY Entities. Mr Ueda's reply was that any issue pertaining to the accounts of the TY Entities was entirely irrelevant to the NAV of Hachiman Cayman, since TY Cayman was neither a parent company nor a subsidiary of Hachiman Cayman. In his opinion, it was outside of the scope of Mr Akhtar's remit. Mr Ueda reiterated his position that Mr Bajaj ought to pursue his allegations in a separate action if he wished to do so.[40] The parties continued to exchange emails on this without any resolution.

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[39] PBP Volume 1 Tab 4, p 14.

[40] PBP Volume 1 Tab 4, p 83.

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28 On 31 July 2017, Mr Akhtar attempted to remedy the impasse by seeking additional supporting documents that pertained to the transactions between Hachiman Cayman and the TY Entities. Tricor confirmed that they did not have any further documents.[41] On 31 August 2017, Mr Akhtar informed the parties of this development, and also reiterated that events pertaining to the winding up of Hachiman Singapore were outside his remit. On the same day, Mr Bajaj replied that Tables X and Y could not be "populated with false information" and stated that he would "separately contact" the Mediator and the SMC.[42]

29 On 25 September 2017, Mr Bajaj demanded that Mr Akhtar halt his activities until Mr Bajaj managed to contact the Mediator to "give guidance on next steps" stating that "I will keep everyone updated on the outcome of contact with the mediator, if he does not do so himself first". While SMC did communicate Mr Bajaj's request to the Mediator, and contact details were exchanged, Mr Akhtar did not receive any further communication regarding this. Hence he issued a qualified Neutral Evaluation Report on 23 November 2017 (the "Report").[43]

30 The Report would only be released to the parties upon payment of all outstanding amounts owing to the Neutral and SMC. Clause 6 of the Settlement Agreement provided that fees and expenses should be borne equally. Mr Bajaj refused to pay his share of the fees. Eventually, on 2 March 2018, Mr Ueda paid for Mr Bajaj's share of the fees, being the sum of S$32,399.60, in order to procure the release of the Report.[44]

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41 PBP Volume 1 Tab 4, p 84.

42 PBP Volume 1 Tab 4, p 85.

43 PBP Volume 1 Tab 4, pp 61 and 67.

44 PBP Volume 2 Tab 1, pp 31–32.

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31 Mr Akhtar's Report was released on 7 March 2017 and an amendment was made on 14 March 2017, clarifying a typographical error.[45] Nothing turns on the clarification, there was no dispute regarding the sum as corrected. The population of Tables X and Y and final calculations resulted in a sum of US$226,481.92 payable by Mr Bajaj to Mr Ueda.[46] As allowed by the Neutral Evaluation Rules, the Report was qualified to explain Mr Akhtar's constraints.

32 Following the issue of Mr Akhtar's Report, Mr Ueda's solicitors wrote to Mr Bajaj on 9 April 2018 to demand payment of his share of Mr Akhtar's fees. They also wrote to Mr Bajaj on the same date to demand payment of sums owing under the Settlement Agreement. Mr Bajaj ignored both letters.[47] Accordingly, Mr Ueda served the Statutory Demand on 17 April 2018 on Mr Bajaj demanding payment for three debts:[48]

> (a) The debt of US$50,000 pursuant to Clause 10 of the Settlement Agreement (the "Clause 10 Debt");
>
> (b) The Settlement Amount of US$226,481.92 pursuant to Clause 3 of the Settlement Agreement; and
>
> (c) Mr Bajaj's share of the fees under Clause 6 of the Settlement Agreement, being S$32.399.60 (the "Clause 6 Debt").

33 This was the Statutory Demand that Mr Bajaj applied to set aside.

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45 PBP Volume 2 Tab 1, p 33

46 PBP Volume 1 Tab 4, p 72; PBP Volume 2 Tab 1, p 61.

47 PBP Volume 2 Tab 1, p 32–34.

48 PBP Volume 2 Tab 1, pp 31–32 and 37–39.

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Preliminary issues

34 At the hearing on 30 July 2018, two preliminary objections were raised by counsel for Mr Ueda:

(a) First, there was improper introduction of new evidence in the form of annexes that were appended to Mr Bajaj's written submissions for the appeal.

(b) Second, the notice of appeal was served on Mr Ueda out of time.

I deal with these in turn.

New evidence

35 The new evidence sought to be adduced was divided into two annexes:

(a) Annex 1 involved emails that indicated that on 16 July 2018, Mr Bajaj had put in a Request for Mediation;

(b) Annex 2 involved a letter from counsel for Mr Bajaj enclosing certain documents purportedly obtained from the case statement made by Mr Ueda in 2015, pursuant to the neutral evaluation process (see [10] above). The letter alleged fraud and/or oppression on the part of Mr Ueda during the winding up of the TY Entities and Hachiman Singapore.

The annexes were appended to the back of Mr Bajaj's written submissions for the appeal dated 26 July 2018.

36 Order 38 r 2(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC") makes plain that the proper means by which evidence ought to be

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admitted before the Court in the context of proceedings such as the present is by way of affidavit:

> **Evidence by affidavit (O.38, r.2)**
>
> …
>
> (2) In any cause or matter begun by originating summons and on any application made by summons, evidence shall be given by affidavit unless in the case of any such cause, matter or application any provision of these Rules otherwise provides or the Court otherwise directs, but the Court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court.

37 The Court of Appeal in *WBG Network (S) Pte Ltd v Sunny Daisy Ltd* [2007] 1 SLR (R) 1133 ("*WBG Network*") had the opportunity to consider the admissibility of improperly adduced evidence. In *WBG Network*, the appellant in the court below had attempted to adduce evidence in the form of a letter containing three attachments. This was done in the context of an appeal from a summary judgment application. The letter was not produced in the form of an affidavit and instead was handed to the judge below by counsel at the hearing before the judge. The judge refused to admit the evidence (see *WBG Network* at [4]). The question before the Court of Appeal was whether the judge was entitled to do so. The Court of Appeal stated (at [5]):

> We are of the opinion that, based on the improper manner the evidence was adduced, the court would have been entitled to reject the documents. Documents do not amount to evidence unless they have been properly adduced and admitted into evidence by the court. Accordingly, the person adducing the evidence must do so on oath or affirmation as well as be subject to cross-examination, if necessary, so as to ascertain the relevance or authenticity of the evidence that is sought to be admitted. …

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38 *WBG Network* illustrates that the rules relating to the adducing of evidence are not premised on mere rigid adherence to technicality but are necessitated by the proper administration of justice. Where evidence is not adduced by affidavit and merely appended to written submissions or handed to the judge on the day of the hearing, it deprives the opposing counsel the opportunity to properly obtain instructions to make further comment on the evidence adduced. The opposing party, properly advised, may choose to reply by affidavit. The requirements of O 38 r 2(2) of the ROC provide further a safeguard as to the relevance and authenticity of the documents appended to an affidavit, by providing the option of cross-examining the party who affirms the affidavit. This is crucial because relevance, authenticity and reasons for late adduction are key in a decision whether to admit such evidence upon a Registrar's Appeal.

39 I therefore disregarded the two annexes. Somewhat surprisingly, despite counsel for Mr Ueda's objections, counsel for Mr Bajaj did not make any application – not even an oral one – to introduce the new evidence. Instead, the two annexes were appended to Mr Bajaj's written submissions and referred to in the body of the submissions as if they were already in evidence within the affidavits. Such conduct ought to be discouraged.

Service of notice of appeal out of time

40 On 13 July 2018, the unsealed notice of appeal was sent by Mr Bajaj's solicitors to Mr Ueda's solicitors. The sealed notice of appeal, however, which was issued on 16 July 2018, was not served on Mr Ueda's solicitors until 26 July 2018.[49] There was no dispute that this was due to the inadvertence of Mr Bajaj's solicitors. Order 56 r 1(3) of the ROC provides that the applicable time

[49] Exhibit A.

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frame for service of a Notice of Appeal is "within 7 days of it being issued". Order 3 r 2(5) provides that where the period of time specified is seven days or less, days other than working days "shall be excluded". It was common ground that the last date for proper service of the notice of appeal was 25 July 2018 and Mr Bajaj's solicitors were one day late.

41 Again, counsel for Mr Bajaj did not file any application for an extension of time for the service of the notice of appeal. When opposing counsel objected to the tardy service, he then – orally – asked the court for an abridgment of time. In my view, Mr Bajaj required an extension of the time frame beyond seven days in order to correct the procedural irregularity in service. *Black's Law Dictionary* (Thomson Reuters, 10th Ed, 2014) at p 8 defines "abridgment" as "the reduction or diminution of something concrete (as a treatise) or abstract (as a legal right)". Put in context, this was the shortening of the applicable time frame provided by law. Despite his insistence that the proper application was for an abridgment of time, in the interests of justice, I nevertheless considered the application on the basis of a request for an extension of time.

42 The Court of Appeal in *Lee Hsien Loong v Singapore Democratic Party and others and another suit* [2008] 1 SLR (R) 757 ("*Lee Hsien Loong*") at [18]–[28] has confirmed that the four factors of (a) the length of the delay, (b) the reasons for the delay, (c) the chances of succeeding on appeal and, (d) the degree of prejudice, are the factors to be considered when deciding an application to extend time to serve a notice of appeal. These four factors are of equal importance and must be taken into account and balanced amongst one another having regard to all the facts and circumstances of the case concerned; although, in considering the merits of appeal, the threshold is a low one (see *Lee Hsien Loong* at [19] and [28]). With regard to the factors of the length and reason for delay, the court also noted, at [21], that "it would generally be the case that an

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extremely short delay might be excused without the need for the court to inquire at length into the reasons for that delay".

43 Counsel for Mr Ueda focused his objection to the extension of time on the factor of "reason for delay". He highlighted that counsel for Mr Bajaj was responsible for the delay in serving the notice of appeal and hence Mr Bajaj could not be granted an extension of time. He cited two cases to support his position: the Malaysian case of *Ooi Chew Seng v Ultratech Sdn Bhd & Ors* [1997] 2 MLJ 344 ("*Ooi Chew Seng*") as well as the Singapore High Court decision of *Stansfield Business International Pte Ltd (trading as Stansfield School of Business) v Vithya Sri Sumathis* [1998] 3 SLR(R) 927 ("*Stansfield Business*").

44 I did not think either case went far enough to support Mr Ueda's position. *Ooi Chew Seng* merely confirms that service of an unsealed notice of appeal is invalid service (see *Ooi Chew Seng* at 349–350). This was not in dispute. As for *Stansfield Business*, while the case appears to suggest that a default on the part of the solicitors may disentitle a party from receiving an extension of time from the Court (see *Stansfield Business at* [33]), the Court of Appeal clarified in the later decision of *Nomura Regionalisation Venture Fund Ltd v Ethical Investments Ltd* [2000] 2 SLR (R) 926 (*"Nomura*"), that "there is no absolute rule of law which prescribes that an error on the part of a solicitor or his staff can never, under any circumstances be a sufficient ground" (at [28]). In *Nomura*, the Court of Appeal affirmed the decision of the judge, who granted the extension on the basis that the delay was not prolonged, the solicitors were not tardy in pursuing the appeal, the mistake was *bona fide*, the appeal was not utterly hopeless and there was no prejudice to the appellant (see *Nomura* at [34]–[35]).

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45 In the present case, there was a delay of only one day. There was also no prejudice occasioned by the mistake of Mr Bajaj's solicitors. Mr Ueda was aware of the appeal. His solicitors received the unsealed copy of the notice of appeal on 13 July 2018 when it was filed, and solicitors for Mr Bajaj followed on to apply for a *quia timet* injunction to restrain a bankruptcy application by Mr Ueda in order to prevent Mr Bajaj's appeal from being rendered nugatory. The date for the Registrar's Appeal was also made clear during the *inter partes* hearing of the *quia timet* injunction before a duty senior judge on 17 July 2018.[50] The issues raised in the appeal, on the low threshold envisaged by *Lee Hsien Loong*, merited consideration. In light of the short length of delay and lack of prejudice to Mr Ueda, I found it appropriate to exercise my discretion to grant an extension of time to Mr Bajaj for the service of his notice of appeal.

46 Having dealt with the preliminary issues, I turn, then, to the reasons why I did not set aside the Statutory Demand.

Application to set aside the Statutory Demand

47 Rule 97 of the Bankruptcy Rules (Cap 20, R 1, 2006 Rev Ed) ("Bankruptcy Rules") allows a debtor to apply to set aside a statutory demand for reasons specified in Rule 98. The applicable portion of Rule 98 reads as follows:

> **Hearing of application to set aside statutory demand**
>
> **98**.—(1) On hearing the application, the court may either summarily determine the application or adjourn it, giving such directions as it thinks appropriate.
>
> (2) The court shall set aside the statutory demand if —
>
> (a) the debtor appears to have a valid counterclaim, set-off or cross demand which is equivalent to or exceeds

50 HC/OSB 47/2018 Minute Sheet 17 July 2018, p 1.

> the amount of the debt or debts specified in the statutory demand;
>
> (b) the debt is disputed on grounds which appear to the court to be substantial …
>
> …

48 Paragraph 144(3) of the Supreme Court Practice Directions provides further guidance on how r 98(2) of the Bankruptcy Rules is to be applied:

> **144. Applications to set aside statutory demands made under the Bankruptcy Rules**
>
> …
>
> (3) When the debtor:
>
> (a) claims to have a counterclaim, set-off or cross demand (whether or not he could have raised it in the action or proceedings in which the judgment or order was obtained) which equals or exceeds the amount of the debt or debts specified in the statutory demand; or
>
> (b) disputes the debt (not being a debt subject to a judgment or order),
>
> the Court will normally set aside the statutory demand if, in its opinion, on the evidence there is a genuine triable issue.

49 From the provisions set out above, it is clear that in order to set aside a statutory demand on the basis of r 98(2)(a)–(b) of the Bankruptcy Rules, the debtor must show that there is a "genuine triable issue" in relation to either a valid counterclaim, set off or cross-demand (r 98(2)(a)) or a dispute over the debt on substantial grounds (r 98(2)(b)). In this context, the Court of Appeal in *Mohd Zain bin Abdullah v Chimbusco International Petroleum (Singapore) Pte Ltd and another appeal* [2014] 2 SLR 446 ("*Chimbusco*") has emphasised at [30] that a mere assertion of a triable issue is insufficient, :

> … The court must examine *all the facts* to ascertain whether the "genuine triable issue" test in para 144 of the Practice Directions is satisfied. The upshot of this is that the court will only set aside a statutory demand (and thereby require a

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> creditor to initiate a civil suit if he wishes to pursue the claimed debt further) where the debtor is able to adduce evidence on affidavit that raises a triable issue.

50 In this case, Mr Bajaj argued that, as envisaged in rr 98(2)(a) and (b) of the Bankruptcy Rules, the debts in the Statutory Demand were substantially disputed by the plaintiff, or alternatively, that Mr Bajaj had a valid counterclaim, set-off or cross claim that exceeded the value of the demanded sums.[51]

Is there a substantial dispute on the debt?

51 The Settlement Agreement formed the basis of the Statutory Demand. Mr Bajaj contended that the following gave rise to triable issues:

(a) Mr Ueda had breached various obligations of the Settlement Agreement in the neutral evaluation process which would disentitle him from deriving any benefit from the Settlement Agreement;[52]

(b) the opinion given by the Neutral was qualified and was not final and binding;[53]

(c) the proper course for parties, in view of Mr Bajaj's dispute, would be a return to mediation under Clause 16 of the Settlement Agreement;[54] and

(d) the Clause 10 Debt and the Clause 6 Debt were not due.[55]

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51 Plaintiff's Written Submissions at para 2.

52 Plaintiff's Written Submissions at para 47(a) and (f).

53 Plaintiff's Written Submissions at paras 5 and 46.

54 Plaintiff's Written Submissions at paras 77–78.

55 Plaintiff's Written Submissions at para 47(b)-(e).

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52 These issues deal with various issues of law relating to the Settlement Agreement and the neutral evaluation completed by Mr Akhtar. I therefore deal first with the arguments concerning the approach of the court on questions of law in the context of statutory demands.

Approach to questions of law in applications to set aside statutory demands

53 Counsel for Mr Bajaj submitted that "a statutory demand can be set aside where there is a question of law which amounts to one single genuine triable issue".[56] In the hearing before me, he relied on the case of *Ang Ai Tee v Resource Credit Pte Ltd* [2017] 5 SLR 402 ("*Ang Ai Tee*") to suggest that if there was a question on law before the court, the court exercising its bankruptcy jurisdiction would be compelled to set-aside the statutory demand and let the matter be decided at a court exercising civil jurisdiction at trial. Several of the issues identified above (at [51]) required the court to consider the legal effect of the words of the Settlement Agreement. Counsel for Mr Bajaj argued that because the legal effect of the words of the Settlement Agreement was disputed by parties, there was a genuine triable issue and the Statutory Demand had to be set aside.

54 It was not disputed that it is not the function of a bankruptcy court to conduct a full hearing of the dispute and adjudicate on the merits of the creditor's claim (see *Wong Kwei Cheong v ABN-AMRO Bank NV* [2002] 2 SLR(R) 31 at [3]). Nevertheless, the mere fact that a question of law has been raised by the debtor cannot and should not automatically result in the setting aside of the Statutory Demand. In *Ang Ai Tee* the court set aside a statutory demand that was served by a licensed moneylender on a borrower on the grounds that there was a substantial dispute over the debt (*Ang Ai Tee* at [72]).

56 Plaintiff's Written Submissions at para 45.

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A key issue before the court was whether the licensed moneylender had infringed certain provisions of the Moneylenders Act (Cap 188, 2010 Rev Ed) ("MLA") by imposing a 10% administrative fee for every loan refinancing arrangement (*Ang Ai Tee* at [36]–[38]). This was an issue that involved the interpretation of the Act in question. Instead of immediately declaring that there was a genuine triable issue, and deferring the matter to trial, the court embarked on an examination of the applicable provisions of the Act and the applicable subsidiary legislation and even discussed the parliamentary intent behind the enactment of certain provisions (*Ang Ai Tee* at [39]–[40], [49]–[53]). It was only after the court determined the legal effect of the MLA that the court turned to examine the facts and conclude that there were triable issues. (*Ang Ai Tee* at [54]). From this reading of *Ang Ai Tee*, it is clear that even a court exercising bankruptcy jurisdiction may legitimately determine questions of law.

55 This approach is consistent with the guidance of the Court of Appeal in *Chimbusco,* where it was emphasised that the affidavits must reveal a genuine issue for trial: see above, at [49]. An issue before the Court of Appeal in *Chimbusco* was whether it was possible for a court to grant a conditional stay of bankruptcy proceedings. The Court of Appeal held that it was appropriate to extend the analogy of a summary judgment application to the imposition of conditions for granting a stay of bankruptcy proceedings (see *Chimbusco* at [18]). The court at [22] highlighted that to hold otherwise would entail several difficulties:

> 22 If a bankruptcy court were unwilling to grant a conditional stay of bankruptcy proceedings and were to dismiss outright a bankruptcy application on the strength of a shadowy case, the creditor would necessarily have to safeguard his interest in different proceedings. This would involve his filing a writ and statement of claim and making a summary judgment application, whereupon the same issues that were canvassed before the bankruptcy court would have to be rehearsed in detail. This could involve the same waste of resources that

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> justifies the extension of summary judgment principles to the insolvency context in the first place (see [17] above). Worse still, it could unfairly prejudice the interests of the creditor as he faces the risk of the debtor using the delay to dissipate his assets. *The court should therefore be astute to avoid taking an overly formalistic approach in exercising its jurisdiction: matters that a bankruptcy court can determine as well as a civil court should be resolved to the fullest extent possible at the first opportunity.* After all, in Singapore, the bankruptcy court is the same court as the civil court, albeit exercising a different jurisdiction. [Emphasis added]

56 In my view, these concerns are equally pertinent in the context of setting aside a statutory demand. A creditor ought not to be put to unnecessary expense. If, after being made to commence a writ action, a creditor could obtain summary judgment on that writ action, he would have been put to wasted costs. The same rationale undergirds the remedy of summary judgment and the setting aside of statutory demands. If the interposition of a trial would add nothing to the information already available to the court to make a determination on a question of law, doing so would increase costs to no efficacious purpose, entail a waste of judicial resources and cause undue delay which would result in unfair prejudice to the creditor who has been kept waiting.

57 Therefore, to the extent that there were questions of law in relation to determining the legal effect of the words of the Settlement Agreement, I dealt with these in the manner explained below.

The Settlement Amount under Clause 3

58 I have given a detailed account of the evaluation process in the background section, because Mr Bajaj made many contentions which may be distilled as follows. First, Mr Ueda's non-compliance with his Clause 8 disclosure obligation disallows him the fruits of his conduct, the Settlement Amount. Second, because the independent accountant's report is qualified, the

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Settlement Amount is not binding on parties as envisaged in Clause 9 of the Settlement Agreement. And third, in these circumstances, the only course is to return to mediation as provided by Clause 16 of the Settlement Agreement.

Has Mr Ueda breached his obligations?

59 It was not disputed that the NAV of Hachiman Cayman in 2010 and 2011 were components of Table X and Y. It was also not disputed that Mr Ueda had agreed to supply the necessary documents. Mr Bajaj contended that Mr Ueda breached Clause 8 of the Settlement Agreement, which reads as follows:[57]

> 8. All parties will take all necessary steps to procure that the parties and the Independent Accountant are to be given free and unfettered access to all documents of [Hachiman Cayman] and all related entities for the purposes of [Clause 1] above;

Both tables contained a footnote (the "Underlying Documents Footnote"), which read as follows:[58]

> ^This is to be calculated relying on the underlying bank statements and any other document except for the audited accounts

Mr Bajaj's contention was that the CNB and Kaneyama Documents were necessary for the calculation of NAV in Table X, and were not made available.

60 The fundamental question, nevertheless, was whether the CNB and Kaneyama Documents were relevant to Mr Akhtar's task. The mere fact that Mr Bajaj desired the documents did not make it necessary for Mr Ueda to procure them. The obligation under Clause 8 is qualified by the phrase "for the purposes of [Clause 1] above". Mr Ueda was only obliged to take all necessary steps to

[57] PBP Volume 1 Tab 4, p 41.

[58] PBP Volume 1 Tab 4, p 45.

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procure documents for the purposes of Clause 1. Likewise, the Underlying Documents Footnote requires that the NAV of Hachiman Cayman (a component of Table X and Y) be calculated with reference to underlying bank statements *and other documents*. It does not suggest that it must be calculated solely on underlying bank statements, nor does it suggest that Mr Bajaj was entitled to demand any document he wished. Mr Ueda, in submitting his case statement containing 86 pages of documents such as management accounts, transaction records and bank statements at 2015 (see [10] above),[59] and further, in writing to all relevant parties to authorise access in 2016 (see [19] above), had sufficiently discharged his obligations under the Settlement Agreement. It is significant to note that both Clause 8 and the Underlying Documents Footnote were limited in scope to documents relevant for the purpose of calculating and populating Tables X and Y. Mr Akhtar was satisfied, as early as in 13 October 2015, that the documents made available were sufficient to populate Tables X and Y (see [15] above).[60]

61 Clause 8 must also be reasonably limited to documents within Mr Ueda's power or possession. The CNB account was closed and while the Kaneyama documents were not in his possession, Mr Ueda authorised Kaneyama to release documents to Mr Bajaj's satisfaction. Despite this, Mr Akhtar went further and reviewed the records at Tricor's offices and was satisfied with the adequacy of the records by 24 February 2016 (see [18] above).[61] This check was important because the request for the CNB and Kaneyama documents related to Mr Bajaj's allegations about a loan made to TY Japan that was subsequently recorded by Tricor as returned to a Tricor trust

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59 PBP Volume 2 Tab 1, pp 249–334.

60 PBP Volume 1 Tab 4, p 77.

61 PBP Volume 1 Tab 4, pp 92–94.

account. There is no merit in any of Mr Bajaj's contentions about the loan. Tricor is an independent third party against whom Mr Bajaj has made no allegations. Neither is there any merit in his allegations about missing proceeds from the liquidation of the TY entities, which was furnished as the reason for the request for the Kaneyama documents. Mr Bajaj was an equal shareholder and would receive half of those proceeds in liquidation; if not, his recourse would be with the liquidators. Mr Bajaj raised these last disclosure requests simply to stall completion of the process.

Parties' duty to cooperate

62 In this context, it is useful to deal with the duty to cooperate reposed on parties. Mr Bajaj raised the argument that Mr Ueda had breached his implied duty to cooperate. In my view, it was Mr Bajaj who was remiss in cooperating. I deal with it here as it is relevant to how Clauses 9 and 16 should be dealt with.

63 *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR (R) 634 ("*Evergreat*") formed the premise of Mr Bajaj's argument on this point. There, a main contractor and a sub-contractor were in a dispute over delayed construction works and agreed to a consent order, referring all pending claims to an Independent Assessor from the construction industry who would assess the respective claims as an expert rather than an arbitrator. The Independent Assessor held a first meeting with both parties, where various timelines regarding filing of claim papers, exchange of documents, payment of fees and hearing dates were unequivocally agreed to. The main contractor complied with the timeline for filing claim papers but disregarded every other timeline. It also did not pay for its share of the Independent Assessor's fees, which was a breach of the consent order. For the next few months, the main

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contractor continued to disregard a whole host of directives and attempts from the Independent Assessor to engage the main contractor, despite warnings from the Independent Assessor that an award would be issued on the basis of the evidence as submitted by the sub-contractor if the main contractor did not comply with the orders and attend the meetings/hearings as agreed.

64 The Independent Assessor, in his award, struck out the main contractor's claim and defence to the sub-contractor's counterclaim and awarded a sum of slightly over $350,000 to the sub-contractor. On an application to set the award aside, V K Rajah J (as he then was), found that the main contractor "was to all intents and purposes completely uninterested and unconcerned about the assessment procedure and/or outcome" and in "contumacious disregard" of the directions of the Independent Assessor (see *Evergreat* at [13] and [15]). Rajah J held, at [29], that in the absence of fraud or any corrupt colouring of the Independent Assessor's determination, there were no grounds to reopen the merits of the case, in light of the contractual bargain of the parties to have their case finally and irrevocably determined by an expert.

65 Rajah J, at [48]–[51], was of the view that parties must be assumed to intend the performance of a contract they agree to, and an implied duty to co-operate arose therefrom. Because the main contractor had repudiated its obligation, the subcontractor should be absolved from the consequences of the main contractor's conduct. The wider principle at play was that a party in default under a contract cannot take advantage of its own breach to gain a benefit or evade his contractual obligations. Rajah J stated at [52]:

> 52 In order to invoke this principle it must be shown that the contractual right or benefit that a party is asserting or claiming is a direct result of that party's prior breach of contract. The relevant breach, the factual consequences flowing from the breach and the advantage the contract breaker is

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> seeking to raise must be identified. The principle seeks to prevent the contract breaker from seeking an "advantage" arising from his default…

Therefore, the main contractor was not entitled to take advantage of the alleged breach of the terms of reference, which was caused by the main contractor's failure to co-operate.

66 I would highlight that in the present case, the duty to cooperate is express, and not merely implied. Clause 15 provides that "parties undertake to take all reasonable endeavours" to give effect to the Settlement Agreement. Mr Bajaj's behaviour over the course of this dispute is squarely a breach of his duty to cooperate. As set out at [10]–[30] above, Mr Bajaj embarked on a course of conduct that was completely antithetical to the smooth functioning of the neutral evaluation process. He did not show up for pre-arranged hearings, was tardy and unresponsive in his replies and gave dubious excuses for his absences. It was only after the threat of an opinion being issued in his absence that he sprang into action, making spurious allegations alleging bias on the part of Mr Akhtar.[62] Then, some seven months after the originally scheduled clarification hearing that Mr Bajaj failed to attend, Mr Bajaj raised for the first time the issue of access to source documents and his concerns about the reliability of the accounts.[63] Mr Akhtar's efforts to placate Mr Bajaj resulted in the dispute dragging on until November 2016. A proposal for a meeting with the Mediator at this point was rejected by Mr Bajaj, and he insisted on the receipt of the CNB and Kaneyama Documents before proceeding further; he also raised another new allegation which had no bearing on Tables X and Y.[64] It was only in August 2017, more than two years after the originally scheduled clarification meeting,

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62 PBP Volume 1 Tab 4, p 78.

63 PBP Volume 1 Tab 4, p 79, 88–90.

64 PBP Volume 1 Tab 4, pp 80–81.

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and six months after the proposal for a meeting with the Mediator was roundly rejected by Mr Bajaj, that Mr Bajaj suddenly claimed that he intended to contact the Mediator.[65] Even then, no contact appeared to have been made with the Mediator. It appeared to me that Mr Bajaj's actions were calculated to drag out the proceedings for as long as possible, rather than to seek a prompt resolution of the dispute pursuant to the terms of the Settlement Agreement. The delay of more than two years was caused by Mr Bajaj's disregard for agreed hearing dates, failure to answer emails, a demand for Mr Akhtar to recuse himself on grounds of bias, and then, as a last resort, a demand for documents with peripheral relevance.

67 If Mr Bajaj had promptly raised all his concerns at the proper time when the documents were supplied in February 2015 or at the agreed clarification date of 2 April 2015, it would have been easier to fault Mr Ueda for not doing more to provide the documents that Mr Bajaj desired. Mr Bajaj well knew that the passage of time would have had an impact on the ease of procuring the documents sought; their plan was to wind up their joint business which necessitated closure of accounts and liquidation of companies. His insistence on these documents, when he knew they were not within Mr Ueda's power, control or possession, resulted in the qualification of Mr Akhtar's Report. In considering whether Clauses 9 and 16 apply, on the basis of *Evergreat*, Mr Bajaj may not be allowed the benefit of his own misconduct.

68 Mr Bajaj's breach of his duty to cooperate, then, would have been sufficient to deal with his contentions on Clauses 9 and 16. Nevertheless, his contentions on those clauses were in any event without merit, and I turn to explain why.

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65 PBP Volume 1 Tab 4, p 85.

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Was Mr Akhtar's calculation final and binding?

69 The final and binding nature of Mr Akhtar's calculations is provided for in Clause 9 which states:[66]

> 9. The Independent Accountant's calculations shall be final and binding on both parties

70 The arguments focused on the qualifications made by Mr Akhtar in his Report, which stated:[67]

> 5. Although the terms of reference… stated this to be a "Documents only NE", Mr. Bajaj has all along claimed that he does not have documents to submit; supporting his stance by alleging that Mr. Ueda has refused to provide access to the underlying business and accounting documents, since Parties fell out with each other.
>
> 6. This was indeed a surprising revelation and should have been surfaced and addressed during the mediation. As it transpired, the only documents submitted to me came from Mr. Ueda …
>
> …
>
> 29. In view of the circumstances encountered, and for the reasons described below, I am unable to wholly carry out the terms of reference of my appointment as [Neutral Evaluator]:
>
>> …
>>
>> v) …I do not accept that in the event of no agreement between Parties as to the opening NAV, the [Independent Accountant] must take it upon himself to determine the amount. If [Hachiman Cayman's] consolidated accounts had been duly audited I could have made reference to such accounts in extracting the NAV at end 2010. In the absence of such audited accounts I expect Parties to confirm their agreement as to the books and records of [Hachiman Cayman] that represent the source from which the [Independent Accountant] is able to extract the relevant information. In the situation at hand we have one party (Mr. Ueda) presenting the NAV as extracted from the accounts prepared by Tricor; but the other party (Mr. Bajaj) is refusing to accept the NAV so

66 PBP Volume 1 Tab 4, p 41.

67 PBP Volume 1 Tab 4, pp 63, 68–69, 71–72.

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> submitted on the grounds that he has been denied access to the underlying source documents and information. This is a fundamental issue which parties should have dealt with either a) prior to entering into the Settlement Agreement, or b) by providing a procedure in the Settlement Agreement as to how the NAV at end 2010 was to be determined…
>
> vi) … In an effort to find a way forward I managed to obtain Mr. Ueda's agreement to allow Mr. Bajaj to have access to supporting documents that Mr. Bajaj demanded in order for him to be able to satisfy himself as to the propriety of the documents; and thereafter to either, i) accept that the information provided to me by Mr. Ueda is accurate; or, ii) to specifically identify the areas of his disagreement with appropriate explanations and the impact thereof on the Tables X and Y.
>
> vii) However, having received the documents from Tricor, Mr. Bajaj has continued to demand original bank statements from Cayman National Bank as well as documents (directly from Mr. Kaneyama of [TY Japan]) to support a full account of the amounts loaned by [Hachiman Cayman] to [TY Japan]. Mr. Ueda confirmed through his Counsel, WP, that he does not have original bank statements as they were never received form [*sic*] the bank; the bank always sent soft (scanned) copies electronically… Similarly, Mr. Ueda confirmed through Tricor that there are no original invoices from [TY Japan] for Sub-Advisory Fee charged to [Hachiman Singapore]. …
>
> 30. In my view, Parties must adopt either of the following to enable the [Settlement Agreement] to be implemented;
>
> i) Take the dispute back to mediation (in accordance with Clause 16 of the [Settlement Agreement]) to address and come to an agreement on the issue of appropriate underlying books and records, supporting documents and the financial statements to be used in determining the NAV and the consequential Settlement Amount. …
>
> ii) Alternatively, Parties should agree to appoint an independent auditor to perform an audit of the financial statements of [Hachiman Cayman] as at and for the period ended 31 December 2010 as well as 31 December 2011. …
>
> **D. QUALIFIED OPINION IN ACCORDANCE WITH RULE 10.5 6 OF THE NEUTRAL EVALUATION RULES**

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> 31. Based on the case statements and underlying documents submitted by Mr. Ueda, Tables X and Y of the Settlement Agreement, populated as required under clause 1 of the [Settlement Agreement], are attached herewith as **Annexures 3 and 4**. The settlement amount … amounts to **$226,481.92** payable by Mr. Bajaj to Mr Ueda. However, these numbers are subject to adjustments for the reasons described in Paragraph 29 above. Accordingly, the NAV as at 31 December 2011 as well as the settlement amount of S$226,481.92 are subject to changes depending on adjustments that may result from:
>
> a) Parties reaching agreement on disputed items described in paragraph 29 (and others, if any) through mediation; or
>
> b) Parties agreeing to resolve the disputed items by appointing an independent auditor to perform an audit of the financial statements of [Hachiman Cayman] for the periods ended 31 December 2010 and 31 December 2011.
>
> …
>
> [6]Rule 10.5: "If the Neutral is of the view that further investigations should be conducted after the Evaluation Session(s), parties should be informed accordingly. Unless parties agree to commission such an investigation, the Neutral shall render an opinion based solely on the submissions and evidence available. <u>The Neutral may qualify the opinion to explain the constraints under which the opinion was rendered."</u>
>
> [Emphasis in original]

71 I have set out the relevant parts of the Report here in some detail because Mr Bajaj's case rested on these extracts. The crucial point to consider was the effect of Mr Akhtar's qualifications, and whether they rendered the Report and the Settlement Amount calculated invalid. For the reasons which follow, I held that they did not.

72 It was not disputed that the neutral evaluation process which produced Mr Akhtar's Report was in the nature of an expert determination. *Evergreat* is of assistance on this point. There, Rajah J, in concluding, at [43] and [47] that the expert's terms of reference were not breached, set out, at [41]–[42], the

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situations where an expert determination in the context of an arbitration could be challenged:

> 41 The crux of the matter is that if the parties agree to appoint an expert to resolve a dispute, his report or award cannot be challenged unless the expert has departed from his instructions in some material respect. …
>
> 42 In *Commonwealth of Australia v Wawbe Pty Ltd* (BC 9805379, Lexis) Gillard J, correctly, in my view, observed:
>
>> *In each case the critical question must always be: Was the valuation made in accordance with the terms of a contract*? If it is, it is nothing to the point that the valuation may have proceeded on the basis of error or that it constitutes a gross over or under value. Nor is it relevant that the valuer has taken into consideration matters which he should not have taken into account or has failed to take into account matters which he should have taken into account. ***The question is not whether there is an error in the discretionary judgment of the valuer. It is whether the valuation complies with the terms of the contract.***
>
> [Emphasis in original]

73 These principles were reiterated in *Geowin Construction Pte Ltd (in liquidation) v Management Corporation Strata Title Plan No 1256* [2007] 1 SLR(R) 1004 ("*Geowin*") at [8]. *Geowin* was a case where one of the parties to a Settlement Agreement challenged an expert determination on the grounds that the expert had breached her contractual obligations by failing to make a proper assessment. The agreement provided that the decision of the expert was "final and no appeal [should] lie against such a decision". Rajah J examined the effects of expert decisions that were expressed to be final at [19]:

> 19 If the parties agree that an expert's decision is final, a court should not inquire (in the absence of a charge of fraud or collusion):
>
>> (a) how a decision has been reached;
>>
>> (b) into the basis for the decision; or

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> (c) whether the decision was indeed correct.
>
> To do so would be entirely contrary to the parties' contractual intentions to be bound by an expert's decision – particularly if the agreement itself expressly stipulates that the decision of the expert is final. I respectfully concur with Lord Denning MR's view in *Campbell v Edwards* ([16] *supra*) that the only errors that can be corrected by the court are those that appear on the "*face*" of the award or report (see at [17] above). In the context of a speaking award, the court should not stray beyond the actual report or award in considering how or why the decision was reached. The underlying evidence ought not to be re-examined or referred to as this would be tantamount to an appellate hearing and to that extent contrary to what the parties had solemnly agreed to. The right of review should be confined to correcting apparent mistakes that appear on the face of the report or award (*eg* apparent mathematical miscalculations) and to determining whether the expert has complied with his terms of appointment. If an expert answers the right question in the wrong way his decision will nevertheless be binding …

Hence Rajah J concluded, at [20], that the complaints were not sufficient to set aside the expert determination, being nothing more than a back-door attempt to reopen the merits of the case.

74 Therefore, in the present case, the question of whether Mr Akhtar's calculations in the Report can be relied upon turns on whether as a matter of contractual interpretation of the Settlement Agreement and the other terms agreed between the parties, Mr Akhtar had complied with his terms of reference.

75 I found that Mr Akhtar had complied with his terms of reference. The role of the "Independent Accountant" as expressed in the Settlement Agreement was a narrow one, as seen by the following:[68]

> 1. The parties are to jointly appoint an Independent Accountant to *calculate and populate* the entries in the enclosed Tables X and Y;

[68] PBP Volume 2 Tab 1, pp 165–166.

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> 2. The Settlement Amount is to be calculated as follows with reference to the enclosed Tables X and Y:
>
> a. Add the amounts at (i) Table X(E)(4) and (ii) Table Y(E)
>
> b. Divide the above sum [at 2(a)] by 2;
>
> …
>
> 9. The Independent Accountant's calculations shall be final and binding on both parties;
>
> [Emphasis added]

76 From the above, it is clear that Mr Akhtar's role was merely to "calculate and populate" the entries and once he had done so, his calculations would be final and binding on both parties. Mr Akhtar fulfilled this role. At paragraph 31 of the Report, based on case statements and underlying documents submitted by Mr Ueda, Mr Akhtar populated Tables X and Y and came up with a figure for the Settlement Amount.

77 Much was made about the fact that Mr Akhtar appeared to think that he did not "wholly carry out the terms of reference"[69] and also proposed that the parties return to mediation or seek an audit of the financial documents. Nevertheless, the Settlement Agreement only states that Mr Akhtar's *calculations* are binding on the parties. The scope of Mr Akhtar's remit did not extend to ruling on the legal effect of his award. That is the province of the court.

78 My conclusion that Mr Akhtar's role was intended to be narrow in scope is fortified by the type of evaluation the parties had agreed to. The parties had agreed to a "Documents only" Neutral Evaluation.[70] The Neutral Evaluation Rules provides that a "Documents-only Evaluation" although the Rule 10.1

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[69] PBP Volume 2 Tab 1, p 346.

[70] PBP Volume 2 Tab 1, pp 6–7.

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allowed the Neutral to seek clarifications.[71] Mr Akhtar's opinion was intended to have been served ten working days from the date of the last "Evaluation Session(s) or further investigation or site visit".[72] If Mr Bajaj had turned up on 2 April 2016 as agreed, the Report may have been issued in April 2016. Although the parties subsequently embarked on further hearings and meetings, this initial agreement reflected the understanding that the neutral evaluation process was not intended to be a detailed and drawn out process, but rather, a confined process concluding with an efficient expert calculation.

79 Therefore, I found that Mr Akhtar had complied with his terms of reference, his qualifications notwithstanding, and hence the calculation in the Report, and the Settlement Amount, was final and binding on the parties.

What is the effect of Clause 16?

80 Clause 16 states:

> 16. Parties undertake to return before [the Mediator] for further mediation to resolve any disputes or issues arising out of the performance of this Settlement Agreement

81 Mr Bajaj argued that there was a dispute between the parties as to Mr Akhtar's calculations, and Clause 16 operated such that Mr Ueda was obliged to go for mediation.[73] This was accompanied by a suggestion for a stay in aid of a mediation agreement pursuant to the s 8 of the Mediation Act (Act 1 of 2017).[74]

82 The question that confronts the court in this case is whether in the circumstances, Mr Bajaj is entitled to raise any dispute, however spurious, in

71 PBP Volume 2 Tab 1, p 200, Rule 10.1.

72 PBP Volume 2 Tab 1, p 201.

73 Plaintiff's Written Submissions at para 77.

74 Plaintiff's Written Submissions at para 78.

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order to defeat the final and binding calculations provided by Mr Akhtar. This cannot be the case. Clause 16 must be subject to a standard of reasonableness, made express in Clause 15, which states:

> 15. Parties undertake to take all reasonable endeavours to give effect to and implement the terms of this Settlement Agreement

83 It follows then, from the flow and form of the Settlement Agreement, that if a particular request to refer a dispute for mediation is not part of a reasonable endeavour to give effect to and implement the terms of this Settlement Agreement, such a request would fall outside the scope of Clause 16.

84 In my judgment, Mr Bajaj's belated attempt to return to mediation was merely the latest gambit, in a series of many, to delay the resolution of the dispute for as long as possible. When recourse to the Mediator was first suggested by the SMC in November 2016, Mr Ueda agreed but Mr Bajaj refused, insisting on receipt of the CNB and Kaneyama documents before proceeding further.[75] Mr Bajaj's change of heart only came in May 2017 when he realised that Mr Akhtar was intending to issue a report despite Mr Bajaj's various objections and allegations, albeit a qualified one.[76] His response at that point, which I detail at [26] above, also contained an insistence that he would not regard such a report as a valid one. Mr Ueda's refusal at that point was entirely reasonable. The attempt to refer the dispute to mediation was not a reasonable attempt to resolve issues relating to the enforcement of the Settlement Agreement but in fact an attempt to stymie, once again, its implementation. Clause 16 was not applicable.

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[75] PBP Volume 2 Tab 1, p 28.

[76] PBP Volume 1 Tab 4, p 135.

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The Clause 10 Debt

85 Mr Bajaj contended that Clause 17 of the Settlement Agreement "envisages that any payment made between the parties pursuant to the Settlement Agreement, would be made after the [Settlement Amount] is finalised." On this basis, the Clause 10 sum was conditional on the Settlement Amount being made final and binding.[77]

86 I was of the view, in any event, that the Settlement Amount was final. I highlight, nevertheless, that the effect of Clauses 10 and 17 is to make all sums, including that under Clause 10, payable once the first of 30 instalments is not made by the first business day of the month following the release of the Report. They read:

> 10. [Mr Bajaj] is to pay [Mr Ueda] USD50,000
>
> …
>
> 17. All payments arising from this Settlement Agreement are to be made in the following manner from the date of the Independent Accountant's report:-
>
>> a. In the event that payment is to be made by [Mr Bajaj], the same is to be made by equal instalments over a period of 30 months on the first business day of each month and the first instalment payment is to be due no earlier than 1 November 2014;
>>
>> b. In the event that payment is to be made by [Mr Ueda], the same is to be made by equal instalments over a period of 6 months on the first business day of each month;
>>
>> c. The first instalment payment by the paying party is to be paid one month after the date of issue of the Independent Accountant's report or on 1 November 2014 whichever is later;
>>
>> d. If any instalment payment is not made by the first business day of each month by the paying party to the receiving party, the paying party has a further 7 days,

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77 Plaintiff's Written Submissions at para 80.

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> or any further time period so agreed by the parties to effect payment, failing which, the sum of the remaining instalment payments will become immediately due and payable;

87 On the face of the Settlement Agreement, the event that triggers the obligation to pay the Clause 10 sum is the release of Mr Akhtar's Report. There is nothing to suggest that the Settlement Amount affects in any way the obligation to pay the Clause 10 sum.

The Clause 6 Debt

88 Mr Bajaj argued that because there were breaches of the Settlement Agreement on the part of Mr Ueda, the terms of the Neutral Evaluation Rules, which suggested that parties were jointly and severally liable for Mr Akhtar's fees, could not be relied upon by Mr Ueda.[78] The only relevant point is that parties agreed by Clause 6 of the Settlement Agreement to share equally all fees and expenses. Once the debt arose, Mr Bajaj's share was due.

Whether there was a valid cross claim

89 Counsel for Mr Bajaj claimed that Mr Bajaj had a valid cross claim in the form of an action "in fraud or oppression", in relation to:[79]

(a) The alleged non-repayment of the Hachiman Loan;

(b) The alleged failure to account for the sums remaining in the accounts of the TY Entities prior to the liquidation of the entities;

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78 Plaintiff's Written Submissions at para 88.

79 Plaintiff's Written Submissions at para 96.

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(c) The alleged winding up of Hachiman Singapore without the consent of Mr Bajaj and the alleged sequestering of the funds in Hachiman Singapore.

In this context, the use of the passing label of "oppression" was not explained. No assertion was made as to how this could ground a claim. Any remedy for oppression pursuant to s 216 of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act"), would only be available to "any member or holder of debenture of a company": s 216(1) of the Companies Act. It was not disputed that the relevant entities have been wound up.[80] I deal therefore only with the assertions of fraud in this section.

90 In my view, there was no basis for the contentions of fraud. Of relevance was the fact that all the documents relied on by counsel for Mr Bajaj in making this submission were located in the two annexes to his written submissions which, as I mention at [39], I did not admit into evidence. Counsel orally informed the court that the documents were obtained from the case statement folio tendered by Mr Ueda in early 2015. If this were so, it was inexplicable that a valid cross claim would be raised by way of annex to appellate submissions more than three years later.

91 The court was thus left with unsubstantiated assertions made in Mr Bajaj's affidavits. As highlighted by the Court of Appeal in *Chimbusco* (which I detail at [49] above), mere assertions of fraud are insufficient to establish a genuine triable issue. Indeed the evidence that was before the court indicated quite the opposite. The Report makes clear that Mr Akhtar had, in the course of his neutral evaluation, investigated the claim that the Hachiman Loan was not repaid. After reviewing the documents available at Tricor's offices, Mr Akhtar

[80] PBP Volume 1 Tab 4, p 14; PBP Volume 1 Tab 4, p 80

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was satisfied with the manner in which the Hachiman Loan was dealt with.[81] Further, Tricor was an independent party, and the management accounts prepared by Tricor for Hachiman Cayman stated that the Hachiman Loan was repaid into a Tricor trust account.[82] Mr Bajaj stated that: "it has never been my intention to challenge the work product of Tricor … However, my position has consistently been that Tricor's ability to generate a true and complete account of Hachiman Cayman, would be dependent on it being given access to the full set of Source Documents by [Mr Bajaj]…".[83] This assertion lacks premise: as the Tricor trust account was maintained by Tricor, there was no need to rely on external documents from Mr Ueda to track monies flowing into the Tricor trust account.

92 I accordingly found that there was no genuine triable issue in relation to any of the cross claims contended.

Whether it was appropriate to grant a conditional setting aside of the statutory demand

93 Counsel for Mr Bajaj suggested that if the court was not minded to set aside the Statutory Demand, the court ought to grant a conditional setting aside of the Statutory Demand. Such a stay was granted and upheld by the Court of Appeal in *Chimbusco.* The case involved guarantors of a loan and the creditor, Chimbusco International Petroleum (Singapore) Pte Ltd ("Chimbusco"). Chimbusco had issued a call on the guarantees, but the guarantors ignored the call and the subsequent statutory demands. The guarantors resisted bankruptcy proceedings on the basis of an allegation that there were oral representations

81 PBP Volume 1 Tab 4, pp 92 and 94.

82 PBP Volume 2 Tab 1, pp 323 and 329.

83 PBP Volume 2 Tab 2, p 7.

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that the guarantees were meant to be mere formalities and not binding on the parties. The judge below granted a conditional stay of bankruptcy proceedings as he found triable issues, albeit shadowy in nature.

94 I accept that in principle, the court can grant a conditional setting aside of a statutory demand. The circumstances in the present case were, however, markedly different from that of *Chimbusco*. The High Court, with whom the Court of Appeal agreed, found that the dispute was incapable of resolution through affidavit evidence alone, given the equivocal documentary evidence, and the fact that the allegations pertained to oral representations made. I did not have the same difficulty in the present case.

Conclusion

95 Mr Ueda and Mr Bajaj signed their Settlement Agreement on 19 August 2014. Their Neutral Evaluation Agreement, concluded on 14 November 2014, specified a documents-only evaluation by an independent accountant. One would have expected the calculation to be derived from two tables to have been a simple exercise for an expert. Mr Bajaj's conduct resulted in in a protracted process and a delayed Report, which was finally released to parties in March 2018 after Mr Ueda paid for Mr Bajaj's share of the fees. In the same manner that he has delayed each step of the implementation of the Settlement Agreement, Mr Bajaj has continued to delay the enforcement of sums owing under it, which form the basis of the Statutory Demand he sought to set aside.

96 In my judgment, there was no substantial dispute on the debts stated in the Statutory Demand nor was there a valid cross claim or counterclaim. I accordingly dismissed the Registrar's Appeal. Costs, after hearing parties, were awarded to the defendant and fixed at $5,000 (inclusive of disbursements).

Valerie Thean
Judge

Shaun Lee and Pravin Shanmugaraj Thevar (Bird & Bird ATMD LLP) for the plaintiff;
Jeremy Leong and Mohamed Najib (Acton Law LLC) for the defendant.

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