

HONG KONG / JUDGMENT

RE DAI YUMIN

[2022] HKCFI 950

COURT

Court of First Instance

DECIDED

31 March 2022

CASE / FILE NUMBER

HCB7582/2020

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HCB 7582/2020

[2022] HKCFI 950

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

BANKRUPTCY PROCEEDINGS NO 7582 OF 2020

Re:

DAI YUMIN

Ex-Parte:

DUNDEE GREENTECH LIMITED

Before: Hon Au-Yeung J in Court

Date of Hearing: 26 August 2021

Date of Judgment: 31 March 2022

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INTRODUCTION

This is the substantive hearing of:

(1)

The Amended Petition, first presented on 12 November 2020 and amended on 8 June 2021; and

(2)

The Summons of the Debtor (“the Debtor”) dated 21 December 2020 seeking dismissal, alternatively a stay pending disposal of 2 arbitrations.

The Amended Petition is based on 3 dishonoured cheques dated 25 April 2019, 25 June 2019 and 25 September 2019 respectively, for a total sum of HK\$165m (the “Debt”).

There were 3 further cheques dated 25 December 2019, 25 March 2020 and 25 June 2020 respectively, also for a total sum of HK\$165m, which have also been dishonoured.

The six cheques will be collectively referred to as the “Six Cheques”. They were provided by the Debtor to the Petitioner pursuant to a Settlement Agreement dated 25 March 2019 (the “2019 Settlement Agreement”).

The Debtor opposes the Amended Petition on the following grounds:

(1)

Improper service of the statutory demand;

(2)

The Amended Petition should be dismissed or stayed pending arbitration;

(3)

There is a bona fide dispute on substantial grounds as to the existence of the Debt on the basis that:

(a)

There is dispute as to the parties’ relationship;

(b)

The Debtor did not have any liability to the Petitioner under an Option Deed;

(c)

There existed a 2017 Settlement Agreement which discharged the Debtor's obligations under the Option Deed;

(d)

There was no debt claim and the Petitioner had failed to mitigate its loss;

(e)

The Six Cheques were procured by duress to the person and/or economic duress; and

(f)

There was total failure of consideration as the Petitioner's obligations under the 2019 Settlement Agreement, which were the consideration for the Six Cheques, have been rescinded by reason of duress.

BACKGROUND

The background facts are taken from the summaries in the written submissions for the Petitioner and the Debtor.

B(1). Petitioner's case

As stated in the recitals to the 2019 Settlement Agreement:

(1)

The Petitioner as seller and the Debtor as buyer had entered into an Option Deed dated 26 July 2016 (the "Option Deed"), as amended and supplemented by a Deed of Amendment to the Option Deed dated 9 January 2017 (the "Deed of Amendment").

(2)

Pursuant to the Option Deed, the Debtor granted the Petitioner a put option to require the Debtor to purchase all of the 789,500,000 option shares as defined in the Option Deed in a company called E-Rental Car Company (now known as China Wood International Holding Co, Limited) (the "Company" and the "Option Shares") from the Petitioner at the consideration of HK\$330,000,000 ("Put Option"). The Put Option was exercisable at any time from 29 December 2016 until 31 March 2017, both days inclusive.

(3)

By a put option notice dated 30 March 2017 (the "2nd Put Option Notice") which was sent to the Debtor in accordance with the Option Deed, the Petitioner duly exercised the Put Option. The Debtor was obliged under the Option Deed to purchase the Option Shares at the consideration of HK\$330m on 21 April 2017.

(4)

In breach of the Option Deed, and despite demands from the Petitioner, the Debtor failed to pay the Petitioner HK\$330m on 21 April 2017 for the purchase of the Option Shares.

After the Debtor failed to perform his obligations under the 2nd Put Option Notice, the Petitioner and the Debtor had various meetings and discussions (with the Debtor sometimes approaching the Petitioner through other persons) about the matter. No resolution was reached. The Petitioner engaged MinterEllison LLP (“MELLP”) to send a demand letter to the Debtor on 8 February 2019, requiring the Debtor to purchase the Option Shares at the agreed consideration of HK\$330m.

By a letter dated 22 February 2019, the Debtor through Mr Clifford Ip (“Mr Ip”), wrote to MELLP, stating, amongst others, that he had

“assumed that Liu [i.e. Ms Liu Jiangyuan, to whom the Debtor claimed he had relinquished control and management of the Company] had already duly attended to completion of the sale and purchase of the Option shares earlier on 21 April 2017”; and

“in order to properly and fully understand the matter, I shall have to get in contact with Liu at this juncture for purposes of ascertaining from them the exact facts of the case, and the relevant events that transpired earlier in 2017 that had ultimately led to her inability to complete the sale and purchase of the Option shares on 21 April 2017. For this, I should, therefore, be most grateful if your client [i.e. the Petitioner] could allow me some time to get things into order in this regard, and, ultimately, be in a position to straighten things out with the said individual [i.e. Ms Liu Jiangyuan] re the subject sale and purchase transaction at this stage – so as to be able to facilitate completion of the same in due course.”

Mr Ip was the in-house Legal Counsel of China Regenerative Medicine International Limited, a listed company of which the Debtor was major shareholder.

On 4 March 2019, there was a meeting between Mu Tong, Emily (“Ms Mu”) (for the Petitioner) and the Debtor upon the latter’s request. The terms of a settlement agreement and a payment schedule for the Debtor’s purchase of the Option Shares were discussed. No consensus was reached at that meeting. The Debtor introduced Mr Ip to Ms Mu and said that Mr Ip would act on his behalf to provide a payment schedule, whereupon Ms Mu and Mr Ip exchanged contact numbers by WhatsApp.

On 5 March 2019, Mr Ip presented a proposed payment schedule (“Payment Proposal”) to the Petitioner by an email to Mr Tsen, the then in-house legal counsel of the Petitioner’s adviser, Grandis Capital (HK) Limited (“Grandis”). Mr Ip also sent Ms Mu a WhatsApp message to inform her of the same.

Accordingly, also on 5 March 2019, the Petitioner instructed MELLP to prepare a settlement agreement based on the Payment Proposal. By an email dated 13 March 2019, Mr Tsen provided a draft settlement agreement to Mr Ip for his and the Debtor’s consideration.

By an email dated 22 March 2019 sent at 4:53 pm, Mr Ip sent to Ms Mu (and another of Grandis) scanned copies of (i) the signing page of the 2019 Settlement Agreement duly executed by the Debtor, with Mr Ip as the witness; and (ii) copies of the Six Cheques prepared in accordance with the Payment Proposal to the Petitioner. Mr Ip later arranged for the originals of those items to be delivered to Grandis' office address.

The 2019 Settlement Agreement was executed by the Petitioner on 25 March 2019. The material terms were as follows:

(1)

The Debtor agreed to pay to the Petitioner a settlement sum of HK\$330,000,000 ("Settlement Sum") by 6 instalments from 25 April 2019 to 25 June 2020 (with the sum of HK\$330m due under the Option Deed having been payable since 21 April 2017): Clause 2.1.

(2)

The amount payable for each instalment of the settlement sum of HK\$330m shall be paid into the Petitioner's designated account on or before the due date of the relevant instalment, time being of the essence: Clause 2.2.

(3)

Upon signing of the 2019 Settlement Agreement, the Debtor would deliver to the Petitioner 6 signed personal cheques payable to the Petitioner, post-dated in accordance with the due date for each instalment under Clause 2.1, and drawn for the amount payable under the relevant instalment: Clause 2.3.

(4)

In the event that the Debtor failed to make full payment of any instalment amount on or before the relevant due date under Clauses 2.1 and Clause 2.2, the Petitioner may, amongst others, deposit the post-dated cheque in respect of the relevant unpaid instalment any time after the due date of the relevant instalment: Clause 4.

The Debtor did not make payment in accordance with Clause 2.2 in spite of (i) reminders from Ms Mu by iMessage from 26 June 2019 to 18 July 2019; (ii) a reply by iMessage from the Debtor to Ms Mu on 26 June 2019 saying "yes" to her request that he paid up the relevant sum by the end of the month; and (iii) after subsequent reminders from Ms Mu that he had not yet paid even the April 2019 instalment, his response on 18 July 2019 that he was making coordination and would reply to her in a few days' time.

The Petitioner presented the Six Cheques for payment during the period from 25 April 2019 to 25 June 2020, but all Six Cheques had been dishonoured.

The Petitioner issued a statutory demand for the Debt on 21 November 2019 (“Statutory Demand”). As the Debtor could not be personally served at his last known address, the Petitioner advertised the Statutory Demand in 2 local newspapers 16 December 2019.

On 30 December 2019, Mr Ip sent an email to MELLP, referring to “the Statutory Demand dated 20 December 2019” and stating the Debtor’s request for extension of time to repay the Debt by 2 specified instalments and the balance of HK\$165m on or before 31 December 2020.

On 7 January 2020, Ms Mu met with the Debtor to discuss the latter’s settlement proposal, which the Petitioner rejected. The Debtor made another settlement proposal on 15 January 2020 about making part payment to the Petitioner, but it was also not accepted by the Petitioner.

On 12 November 2020, the Petitioner presented the Bankruptcy Petition, which was later amended on 8 June 2021.

On 4 December 2020, the Debtor issued 2 Notices of Arbitration Notice to commence arbitrations under the Option Deed and the 2019 Settlement Agreement.

B(2). The Debtor’s case

The Debtor’s case was revealed only after presentation of the Petition. In gist, he alleges that:

(1)

When he received the 2nd Put Option Notice, he was no longer interested in acquiring the Option Shares. Ms Ma Hongyan on behalf of the Petitioner, one Mr Zhang Zhenxin (“Mr Zhang”) and the Debtor agreed over the phone to what the Debtor has called a “2017 Settlement Agreement”, whereby Mr Zhang or his associate would take up the Option Shares in place of the Debtor at the same consideration under the Option Deed, and the Debtor would be discharged.

(2)

The Petitioner was actually controlled by Mr Xiao Jianhua (“Mr Xiao”) who was neither a director nor a shareholder. After Mr Xiao came to be detained in the PRC, a working group was set up by the Central People’s Government (“CPG Working Group”). The CPG Working Group assumed control of the affairs of the Petitioner. Ms Mu acted under the CPG Working Group’s directions and instructions to collect and realize Mr Xiao’s assets in Hong Kong. According to the Debtor, as Mr Zhang had not taken up the Option Shares pursuant to the 2017 Settlement Agreement, the CPG Working Group required the Debtor to purchase all the Option Shares by signing the 2019 Settlement Agreement.

(3)

Ms Mu told the Debtor that if he did this, he would not face any trouble from the CPG Working Group; otherwise he might face the same fate as Mr Xiao and be taken away from Hong Kong to Mainland China for the alleged purpose of assisting in the investigation, which would carry both physical and financial consequences (“Alleged Threats”). Allegedly acting under such duress, the Debtor signed the 2019 Settlement Agreement.

The case on duress was denied by Ms Mu and the Petitioner.

The Petitioner filed evidence (including documentation) about, amongst others, what had occurred in February and March 2019. The Debtor then claimed in his 2nd affirmation that his “initial recollection” of the events in the lead up to the signing of the 2019 Settlement Agreement “was not complete and contained some chronological inaccuracies”, partly because the events occurred some time ago, partly because he did not have the relevant documents at the time, and because he had “been under immense pressure by reason of Mu’s threat which still affects [him] today”.

The Debtor now alleged that the Alleged Threats were made by Ms Mu at a meeting on 11 February 2019. He also alleged that the letter dated 22 February 2019 to MELLP (paragraph 9 above) was something that he had asked Mr Ip to write, but that Mr Ip’s Mandarin was poor and had misunderstood what the Debtor had told him. According to the Debtor, contrary to what that letter stated on the face of it, he did not mean to suggest that he would be willing to complete the purchase of the Option Shares himself.

As for the meeting that took place on 4 March 2019 (which the Debtor claimed was initiated by Ms Mu), the Debtor alleged that Ms Mu showed him a copy of the draft Settlement Agreement at this meeting, but he could not read English and Ms Mu did not leave him with a copy. Ms Mu repeated the Alleged Threats, and also said that the CPG Working Group’s position was that the Debtor should repay the HK\$330m in one go. If he wanted to make payment by instalments, he would have to “persuade” the CPG Working Group in accordance with a predetermined timetable of payments.

The Debtor alleged that that was how the Payment Proposal came about: that Ms Mu dictated that timetable, which the Petitioner would “agree” to. The Debtor claimed that he protested to Ms Mu that his obligation to acquire the Option Shares had already been discharged under the alleged 2017 Settlement Agreement, but that she refused to accept his explanation and continued to threaten him. According to the Debtor, it was because of the Alleged Threats that he asked Mr Ip to write to the Petitioner to “propose” the Payments Proposal, which Mr Ip did on 5 March 2019.

On 22 March 2019, Ms Mu telephoned the Debtor and allegedly gave him an ultimatum to sign the Settlement Agreement, otherwise he might face the same fate as Mr Xiao and be taken away from Hong Kong to Mainland China. The Debtor claimed that that was why he signed the 2019 Settlement Agreement and issued the Six Cheques.

I now deal with the grounds in opposition as set out in paragraph 5 above.

IMPROPER SERVICE OF THE STATUTORY DEMAND

Mr Man SC (leading Mr Danny Tang and Mr Keith Chan), counsel for the Debtor, dispute the service of the Statutory Demand as improper, in that the requirements of s.6A(1)(a) of the Bankruptcy Ordinance (Cap 6) have not been satisfied.

Under the Bankruptcy Rules (Cap 6A):

(1)

The creditor shall do all that is reasonable for the purpose of bringing the statutory demand to the debtor's attention and, if practicable in the particular circumstances, to cause personal service of the demand to be effected (r.46(2)).

(2)

If a creditor has not been able to serve the debtor at the address which he has in his records but has other information or other means available which might enable him to obtain an address for service, he should make use of them, where it is reasonable to expect him to do so, with a view to bringing the statutory demand to the attention of the debtor. What is reasonable is to be judged objectively in the light of the information actually or constructively available to the creditor at the time: *Re Pang Mei Lan May* [2005] 1 HKC 319, §§25-27 (Barma J, as he then was).

(3)

The debtor bears the initial burden of showing that the creditor has not done all that was reasonable for the purpose of bringing the statutory demand to the debtor's notice, by reference to the information actually or constructively available to the creditor at the time service was attempted. Once the debtor has done this, the burden is on the creditor to show that the steps which allegedly should have been taken could not or would not have resulted in the statutory demand coming to the debtor's attention: *Re Pang Mei Lan May*, §37.

Rule 46(2) does not make personal service of the statutory demand mandatory: *Li Xiaoming* [2020] HKCFI 361, *Mimmie Chan J*, §24. Personal service is only required "if practicable in the particular circumstances" and it is not practicable if the exact whereabouts of the debtor is unknown to the petitioner at the time of the attempted service. Where personal service is impracticable, other modes of service are permissible. *Re Li Shu Chung*, HCB 5475/2018, 11 October 2019, §§67-68, *Au-Yeung J*.

Rules 46 and 49 of the Bankruptcy Rules provide for the manner of proof of service of the statutory demand.

There must be filed in Court, with the petition, an affidavit proving service of the demand, which must be made by a person having direct personal knowledge of the means adopted for serving the statutory demand, and must:

(a)

give particulars of the steps which have been taken with a view to serving the demand personally;

(b)

state the means whereby (those steps having been ineffective) it was sought to bring the demand to the debtor's attention; and

(c)

specify a date by which, to the best of the knowledge, information and belief of the person making the affidavit, the demand will have to come to the debtor's attention (rr.49(1) and (5)).

The importance of proper service has been recently summarized by Mimmie Chan J in *Re Li Xiaoming*, §§8-11:

(1)

Proper service of the statutory demand is a prerequisite for the commencement of bankruptcy proceedings under s.6A. The requirements as to service of the statutory demand must be strictly adhered to.

(2)

Failure to serve the statutory demand properly is an extremely serious matter. That the petitioning debt is apparently not in dispute is wholly immaterial. Failure to serve the demand is not just a formal defect or irregularity, it renders defective the petition founded on the demand.

(3)

It is wrong to say that so long as the statutory demand came to the attention of the debtor, it should not matter how this came about. If this were correct, the Bankruptcy Rules would not go to such elaborate lengths specifying requirements as to service as well as to what is required by proof of service. Requirements as to and proof of service must be strictly adhered to because of the importance of establishing with certainty the period within which a debtor has to comply with the statutory demand.

The Court will scrutinize the act of service with utmost strictness.

Mr Man SC submits that the requirements under rules 46 and 49 have not been complied with in that:

(1)

Attempts to effect personal service on the Debtor by way of service to Rooms 3006-10, 30/F, China Resources Building, 26 Harbour Road, Wanchai, Hong Kong ("Last Known Address") had failed. There is no evidence that the letters and emails to the debtor had been delivered and read.

(2)

Lo Man Ching 1st stated that the receptionist informed the process server that the Debtor “appeared to be in Mainland China” (§10). Accordingly, Lo stated that “it appears that at those times when the attempts to effect personal service of the Statutory Demand were made, it is possible that the Debtor might or might not have been in Hong Kong” (§20).

(3)

Whilst the affidavit went on to state that “it appears that the Debtor would attend at the Debtor’s Last Known Address from time to time” (§21), the basis of this statement was unclear. The receptionist at the Last Known Address had never told the process server the same. On the first visit, the receptionist merely said that the Debtor had last attended that address around 2 months ago. On the subsequent visits, the receptionist did not give any further information.

(4)

Further, the Petitioner’s solicitors conducted a directorship search on the Debtor and obtained 3 residential addresses, to which the Petitioner then attempted to serve the Petition (§§10-13 of Lo 2nd). There was no reason and no explanation as to why the Petitioner’s solicitors could not have done the same to effect personal service of the Statutory Demand on the residential addresses. That was in breach of the principle in Pang Mei Lan May.

(5)

Given that (a) attempts at personal service had failed; (b) the Petitioner had taken no steps to find other addresses at which the Debtor may have been served; and (c) the Debtor may have been in Mainland China and not in Hong Kong, there were simply no factual bases for Lo’s purported belief that the Statutory Demand must have come to the Debtor’s attention on or around 16 December 2019 when it was advertised: *Re Li Xiaoming*, §27. It cannot be said that the Petitioner had taken all reasonable steps to bring the Statutory Demand to the Debtor’s attention.

(6)

The mere fact that Mr Ip (on behalf of the Debtor) emailed the Petitioner’s solicitors on around 30 December 2019 with a settlement proposal did not mean that the Petitioner should be allowed to escape from the consequences of defective service of the statutory demand. The requirements of service must be strictly adhered to, and it matters not that the Statutory Demand came to the notice of the Debtor later if the rules of service were not properly followed.

In the premises, Mr Man SC submits that the Petitioner had plainly not complied with the requirements for service of the Statutory Demand under rules 46 and 49. It follows that the Petition is defective and ought to be dismissed on the ground of service alone.

With respect to Mr Man SC, those are desperate arguments.

Firstly, Clause 16.3.2 of the Settlement Agreement stipulated that all notice, demand or other communication or in connection with this Agreement shall be delivered to the Last Known Address, the address of a listed company of which the Debtor was a substantial shareholder. No other address had been given by the Debtor to the Petitioner.

Secondly, the Debtor's own affirmations filed in answer to the Amended Petition stated his current address to be precisely the Last Known Address. In fact, when representatives of the Petitioner and the Debtor met on 7 January 2020, the meeting place was the Last Known Address. See the WhatsApp message between Ms Mu and the Debtor on 6 January 2020.

Thirdly, it was impracticable in the particular circumstances to effect personal service as the Petitioner's solicitors had tried 3 times at the Last Known Address (on 21 November, 27 November and 2 December 2019), but failed. The letters which the Petitioner's solicitors left at that Address (the first one dated 21 November 2019 even enclosed the statutory demand) were never returned undelivered.

Fourthly, Rule 46(3) governing service by advertisement is inapplicable here as it only applies to statutory demands based on judgment debts. Lo Man Ching 1st stated that he "could not comment on whether the fact that the Debtor did not appear at the Debtor's Last Known Address was for the reason of evading service of the Statutory Demand" was irrelevant.

Save for Rule 46(3), the Bankruptcy Rules do not require the creditor to exhaust other means of service before advertising a statutory demand. Advertisement, which does not require leave of the Court, is but one mode of bringing a statutory demand to the notice of the debtor. Of course, if the Master (before giving approval to file a petition) is not satisfied that the advertisement was reasonable to bring a statutory demand to the notice of the debtor, he/she can always raise requisition and require the creditor, eg to ascertain the residential/business address of the debtor and attempt to effect service there.

Fifthly, after the advertisements, in Mr Ip's email to MELLP on 30 December 2019, by which the Debtor made a settlement proposal, Mr Ip expressly referred to the Statutory Demand. Hence, in just over a month's time since the first attempt, it was plain that the Statutory Demand had been brought to the actual attention of the Debtor. The Debtor never denied that Mr Ip had his authority to make the settlement proposal. In the premises, it was not unreasonable for the Petitioner not to have done a directorship search or effect further service.

Sixthly, the Debtor has not deposed to the fact that he was in Mainland China at the time of service of the Petition. It is not open to Mr Man SC to submit that the Debtor might have been in Mainland China and not in Hong Kong when the Statutory Demand was served. The Rules do not require the Debtor to be in Hong Kong on the day of service either.

For the reasons given in this Section, there is no merit in the challenge to service of the statutory demand.

STAY OF AMENDED PETITION PENDING ARBITRATION

D(1).

Arbitration of the underlying dispute

In the absence of exceptional circumstances (such as risk of dissipation of assets or other circumstances that would justify appointment of provisional liquidators, concerns about fraudulent preferences or the need to invoke transaction avoidance provisions, etc), a winding up petition should generally be dismissed where:

(1)

The debtor disputes the debt relied on by the petitioner;

(2)

The contract under which the debt is alleged to arise contains an arbitration clause that covers any dispute relating to the debt; and

(3)

The debtor takes the steps required under the arbitration clause to commence the contractually mandated dispute resolution process, and files an affirmation to demonstrate this.

See *Re Southwest Pacific Bauxite (HK) Ltd (“Lasmos”)* [2018] 2 HKLRD 449, §31, Harris J.

In the present case, there can be no dispute that conditions (1) and (3) in *Lasmos* have been satisfied. There are 2 sets of ongoing arbitration between the Petitioner and the Debtor. The arbitrator has indicated that the substantive hearing will be fixed for the latter half of 2022. The Debtor submits that the Petition should be stayed or dismissed without examination of the merits.

The only question is whether on its true construction, the arbitration clauses cover the dispute over the dishonoured Cheques.

D(2). Dispute as to the dishonoured Cheques

It is well-established that a cheque itself is a contract separate from the underlying contract and that bills of exchange are generally regarded as the equivalent of cash. In *CA Pacific Forex Ltd v Lei Kuan Ieong* [1999] 1 HKLRD 462, 466D-467A, Seagroatt J held that there must be an express inclusion of bills of exchange if an arbitration clause is to cover a dispute over a cheque. The rights on a dishonoured cheque cannot be taken away by implication.

Thus Mimmie Chan J held that there must be a “plain manifestation” in an arbitration clause that it is to apply to bills of exchange before the presumption against taking bills of exchange into arbitration is to be rebutted: *T v W*, [2020] HKCFI 2918, §§8-13; applying *CA Pacific*. Her Ladyship rejected the defendant’s submission that the court should depart from *CA Pacific* and adopt the “one-stop shop dispute resolution presumption” laid down in *Fiona Trust & Holding Corporation & others v Privalov & others* [2007] UKHL 40 and *Uttam Galva Steels Ltd v Gunvor Singapore Pte*

Ltd [2018] 2 Lloyd's Rep 152.

Her Ladyship's decision was upheld on appeal and the Court of Appeal declined to depart from CA Pacific: T v W, [2022] HKCA 95, §§26 and 33, handed down on 14 January 2022, after the present hearing.

In T v W (CA),

(1)

G Lam JA pointed out that Fiona Trust was not a case concerned with bills of exchange, to which a competing principle was also applicable, as discussed in Nova (Jersey) Knit v Kammgarn Spinnerei GmbH [1977] 1 WLR 713 and CA Pacific (§26).

(2)

G Lam JA held that while it may be said that rational businessmen are likely to intend to have a single forum for the resolution of any dispute arising out of the transaction they have entered into, it may also be said – and has been said in CA Pacific – that rational businessmen will not readily forgo their rights on a dishonoured cheque, which include the right to sue in court for judgment. As a corollary a party who has given a bill of exchange may generally be taken to appreciate that its dishonour may be actionable in proceedings separate and independent from the underlying dispute: §26.

(3)

CA Pacific has been applied in Singapore, where her Court of Appeal concluded that a negotiable instrument such as a promissory note was not governed by an arbitration agreement in an underlying contract unless the agreement has been expressly incorporated in that instrument (§30).

(4)

G Lam JA accepted that there was a trend in certain jurisdictions and internationally to include summary determination procedures in their arbitration regimes. However, he held that these developments do not denude Seagroatt J's reference to the rights on a dishonoured cheque of all content, for a payee may still prize the right to sue on the cheque alone in the courts of an appropriate jurisdiction (§31).

(5)

Whether or not an action on a bill falls within the scope of an arbitration clause in the underlying written agreement is a question of construction. The clause has to be construed in the context of the agreement as a whole against the factual matrix which includes all relevant circumstances. The reference to “plain manifestation” in an arbitration clause simply reflects that in the ultimate analysis, the object of the exercise is to find the intention of the parties from their written agreement properly construed: §35.

In the present case, the arbitration clause relied on by the Debtor in the arbitration in HKIAC/A20280 is clause 19 of the 2019 Settlement Agreement:

“Any dispute, controversy, difference or claim arising out of or relating to this Agreement, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration...”. (underline added)

The arbitration clause relied on by the Debtor in HKIAC/A20281 is clause 19.2 of the Option Deed and Clause 9 of the Deed of Amendment:

“Any dispute, controversy or claim arising out of or relating to this Deed [and the Deed of Amendment], including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration...”. (underline added)

Applying CA Pacific, a dispute under the Six Cheques is under an agreement separate from the Settlement Agreement or the Option Deed. It cannot be said that payment under the Six Cheques was a “non-contractual obligation” within the meaning of the arbitration clauses, as there is an obligation to pay them under a separate agreement.

The next question is whether, as a matter of construction, the arbitration clauses are broad enough to include a dispute on the Cheques.

I accept the submission of Mr Man SC that the words “arising out of or relating to” are words of wide import and has the widest possible meaning of any expression intended to convey some connection between the 2 subject matters to which the words refer, ie a “dispute” and the Settlement Agreement/Option Deed: *Moody’s Investors Service Hong Kong Limited v SFC* (2018) 21 HKCFAR 456, §35 (Lord Neuberger NPJ).

In the context of an arbitration clause, “relating to” would include disputes which, whilst not arising under the contract, are related to or connected with it: *Yingde Gases Investment Ltd v Shihlien China Holding Co Ltd*, HCA 2059/2012, 20 January 2014, §38, Mimmie Chan J.

Mr Man SC submits that:

The Six Cheques were some form of security for the Petitioner, who may deposit them in respect of the relevant unpaid instalment. Therefore, the issuance of the post-dated Cheques was part and parcel of the contractual scheme under the 2019 Settlement Agreement. Dishonour of those Cheques must be a dispute “arising out of” or “relating to” the Agreement.

Suppose, before any court proceedings are brought on the strength of the Cheques, the Debtor has already obtained a declaration by an arbitration that the 2019 Settlement Agreement was invalid (say, on grounds of duress), then there can be no doubt that no court action on the Cheques could succeed. There could be no doubt that the Debtor was entitled to arbitrate the question of whether the 2019 Settlement Agreement was invalid on ground of duress, even if the intention was to use the resultant declaration to defeat court proceedings on the Cheques.

(3)

As the parties to the 2019 Settlement Agreement were also the drawer and payee of the Cheques. There was no third party involved. It would make no commercial sense for the breach of contract to be determined in arbitration but for the action on the related Cheques, which arose out of precisely the same facts, to be determined by the court. Mr Man SC invites the Court to construe the arbitration clauses in the light of the one stop shop dispute resolution presumption rejected by Mimmie Chan J.

With regard to limb (1) of Mr Man SC's submission, the issue of cheques pursuant to a commercial transaction is almost always related to or arising from that commercial transaction, in the sense of being eg for payment of goods, to settle a loan or as security. That in itself cannot disapply the principle in CA Pacific set out above.

With regard to limb (2), if the arbitration is concluded in the Debtor's favour before a court action on the Cheques, it goes without saying that the Debtor can take advantage of the arbitration ruling in his favour. However, that is not the situation here.

With regard to limb (3), it has been dealt with in T v W (CA). Despite the wide wording of the arbitration clauses and as a matter of construction, it is readily apparent that there is no "plain manifestation" of the kind described by Seagroatt J and Mimmie Chan J in the arbitration clauses that expressly, or by implication, takes away the Petitioner's right to sue in court on the Six Cheques.

Mr Man SC tries to distinguish CA Pacific and T v W. He submits that in the former, the underlying contract made no mention of the cheque sued upon, and the cheque in question was issued for payment 6 months after the date of the agreement. In the latter, reference was made to the cheque in question, but it was referred to as "evidence" of the loan and of the agreement to repay the loan (\$18). Unlike the contractual scheme in the 2019 Settlement Agreements, the underlying contract in those cases did not impose any rights or obligations in connection with the cheque in question. With respect, those distinctions have no substance.

In T v W (CFI), the arbitration clause was differently worded: that "in the case of any disputes, they shall be dealt with through arbitration in Hong Kong." Mimmie Chan J held that reading the loan agreement as a whole, the parties had intended the cheque to be offered and retained as security (similar to the present case) for the defendant's repayment of the loan on the due date (\$18).

In CA Pacific, the arbitration clause was as wide as the present ones: that “in relation to any dispute between the dealer and the client” the matter shall be referred to arbitration. Dispute was defined in the Leveraged Foreign Exchange Trading (Arbitration) Rules as “any dispute relating to or arising out of a client agreement or ... any transaction that is regulated by the Ordinance.” Seagroatt J did not find the arbitration clause to have taken away the plaintiff’s rights on the dishonoured cheque to sue in court than to arbitrate.

For the reasons given in this Section, I am thus not persuaded that the wide terms of the arbitration clauses in the present case reveal a plain intention to cover the dispute over the Six Cheques. I decline to grant a dismissal or stay of the Amended Petition pending arbitration.

BONA FIDE DISPUTE ON SUBSTANTIAL GROUNDS

Rules 48(5)(a) and (b) of the Bankruptcy Rules permit the Court to set aside a statutory demand if, amongst others, the debt is disputed on grounds which appear to be substantial.

A bankruptcy petition may be dismissed on the same ground: *Re Hong Kong Investments Group Ltd* [2018] HKCFI 984, §11, Ng J.

Bankruptcy proceedings are summary in nature and not intended to be used for the purpose of debt collection. The jurisdiction to make a bankruptcy order will only be exercised in very clear cases. If a debtor opposes a petition on the basis of a bona fide dispute on substantial grounds, he bears the burden of proof. He must adduce sufficiently precise factual evidence which is believable; and must establish that he actually has a defence of substance, not just a fair probability of one. See *Re Hong Kong Investments Group Ltd*, supra, §§11-14.

FIRST TRIABLE ISSUE AS TO THE RELATIONSHIP BETWEEN THE PARTIES

Mr Man SC goes at length in his written submission to try and establish that Xiao was in control of the Petitioner prior to his arrest in early 2017, as to the authority of Ma to handle matters relating to the Option Deed on behalf of the Plaintiff and as to whether Zhang controlled the Company. He submits that these factual disputes impact on the inherent probability of the 2017 Settlement Agreement and the allegation that the 2019 Settlement Agreement was signed under duress.

With respect, these are at best matters of background and credibility of witnesses. Even if they are established, they cannot, in themselves, raise a triable issue. Ultimately, it is the 3rd to 6th issues that should be considered to decide if there are triable issues of substance.

SECOND TRIABLE ISSUE AS TO WHETHER THE DEBTOR HAS ABILITY TO THE PETITIONER UNDER THE OPTION DEED

The Debtor's primary case is that he does not have any liability under the Option Deed, either because such liability has been released by the 2017 Settlement Agreement, or because the Petitioner failed to mitigate. There was thus nothing to settle by way of the 2019 Settlement Agreement and he has a defence of total failure of consideration to both the 2019 Settlement Agreement and the Cheques issued thereunder.

Again, I am of the view that this issue has no independent existence, and must stand and fall with the next 4 issues.

THIRD TRIABLE ISSUE AS TO THE EXISTENCE OF THE 2017 SETTLEMENT AGREEMENT

The Debtor claims that he had been discharged from his obligations under the Option Deed by way of the oral 2017 Settlement Agreement. The Petitioner disputes the existence of that Agreement.

The Debtor's case is that there was a discussion among him, Xiao and Zhang when Xiao expressed that he would be happy to have Zhang, rather than the Debtor, repurchase the Option Shares. Subsequent to the detention of Xiao and when Zhang had already been in complete control of the Company, for the purpose of resolving the issues relating to the Put Option Notice, Ms Ma Hongyan (acting on behalf of the Petitioner), Zhang and the Debtor reached the tripartite 2017 Agreement. Zhang was to take up all of the Option Shares from the Petitioner in lieu of the Debtor; in consideration whereof, the Petitioner forever released the Debtor from all claims arising out of the Option Deed. The 2017 Agreement shall be effective notwithstanding Clause 12.1 of the Option Deed. The oral agreement would not be reduced into writing as Zhang was concerned about involving himself in any potential regulatory issue. Ms Ma denies knowing anything about the same.

According to the Debtor, he asked his acquaintance, Liu JY (on behalf of Zhang), to approach Ms Mu for settlement negotiations. Ms Mu herself acknowledged that she had a meeting with Liu JY in April 2017. She stated that during this meeting, the Debtor suggested that Zhang should be responsible for taking up the Option Shares.

Further, it is undisputed that for about 2 years since breach of the Option Deed, the Petitioner had not sued the Debtor. The Debtor suggests that that was entirely consistent with there being a 2017 Settlement Agreement. He suggests that the Petitioner now denies the existence of that Agreement because Zhang did not acquire the Option Shares as promised and his sudden death in September 2019 left his businesses in great difficulty. Accordingly, the Petitioner turns to the Debtor for recovery of the Debt.

There is not a shred of paper to evidence the 2017 Settlement Agreement. Even on the Debtor's own evidence, the representatives of the Petitioner and Liu JY were negotiating detailed arrangement for purchase of the Option Shares by Zhang, again without a shred of documentation. In my view, it is unbelievable that the Debtor's liability under the Option Deed could so lightly be discharged when the detailed arrangement of purchase and transfer to the new obligee was still in the negotiation stage.

The Debtor's reference to Ms Mu's acknowledgement that there was a meeting with Liu JY in April 2017 does not assist the Debtor. The Petitioner has not denied that there had been discussions towards amicable settlement. It would thus not be surprising if the idea of Zhang taking over the obligations of the Debtor was floated. That did not detract from the fact that there was nothing beyond negotiation for settlement.

What is even more incredible is that when MELLP sent a demand letter dated 8 February 2019 to the Debtor, requiring him to purchase the Option Shares at the agreed consideration of HK\$330m, the Debtor made no mention at all about the 2017 Settlement Agreement or Zhang. He did the contrary of writing back by a letter dated 22 February 2019 to ask for more time for him to get things into order and, ultimately, arrange for the completion of the sale and purchase transaction.

The Debtor would already have received the Alleged Threats by 22 February. If, by stating that he would try to straighten things out with Liu JY so that Zhang would purchase the Option Shares, the Debtor had dared to act contrary to the wish of Ms Mu, plainly not under fear.

The Debtor now blames it on Mr Ip for misunderstanding what the Debtor told him. Ms Mu met Mr Ip on 4 March 2019, and claimed that he did not appear to not understand Mandarin. As the Petitioner disputes Ip's ability to understanding Mandarin, the Debtor suggests that this raises yet another triable issue.

In my view, it is wholly incredible that a seasoned businessman like the Debtor would employ someone who could not communicate effectively with him as the in-house counsel of a company of which he was a substantial shareholder, especially when that company was essentially a Mainland Chinese company.

What is more, Mr Ip has not gone on affidavit to acknowledge his misunderstanding of the Debtor's instructions.

This incredible story of there being a 2017 Settlement Agreement, unsupported by any document or Mr Ip's evidence, is incapable of giving rise to a triable issue.

FOURTH TRIABLE ISSUE AS TO NO DEBT CLAIM AND PETITIONER'S FAILURE TO MITIGATE

It is trite law that where a party to a contract repudiates it:

The other party has an option to accept or not to accept the repudiation.

If the other party does not accept it, the contract subsists for the benefit of both parties and no need to mitigate arises.

(3)

If the repudiation is accepted, this results in an anticipatory breach of contract in respect of which suit can be brought at once for damages, and, although the measure of damages is still *prima facie* assessed as from the date when the defendant ought to have performed the contract, this amount is subject to being cut down if the plaintiff fails to mitigate after its acceptance of the repudiation.

See McGregor on Damages, 21st ed, §9-021; *Inspiring Investments Limited v Chun Hu Hing* [2018] HKCFI 925, §132, in which L Chan J rejected a complaint that the plaintiff had failed to mitigate its loss by not assisting in the sale of certain shares to mitigate its loss.

A plaintiff does not need to take steps to mitigate loss, after the defendant's performance of the contract which he has repudiated falls due, by accepting the repudiation and suing for damages. A plaintiff is entitled, where he can do so without the defendant's assistance, to perform his side of the contract and claim in debt for the contract price: McGregor on Damages, §9-024.

The Debtor suggests that even if there was no 2017 Settlement Agreement and he was liable for breach of the Option Deed, the Petitioner has no debt claim as it has failed to mitigate its loss.

Mr Man SC submits that under the principle in *White & Carter (Councils) Ltd v McGregor* [1962] AC 413, 431 (Lord Reid), a contracting party cannot maintain a debt claim where:

(1)

It has no legitimate interest in performing the contract, including where damages are an adequate remedy and the claimant's insistence on maintaining the contract is wholly unreasonable; and/or

(2)

The contract cannot be performed without the cooperation of the other party.

Mr Man SC submits that neither of the 2 conditions in *White & Carter* are satisfied.

Firstly, he submits that the Petitioner does not have a legitimate interest in performing the contract (ie compelling the Debtor to take the Option Shares) and claiming for the price. Damages are an adequate remedy.

According to the Debtor, there was a readily available market between 28 December 2016 to 18 November 2020 for the Option Shares in the Hong Kong Stock Exchange. Had the Petitioner sold those shares, its loss would have been reduced significantly or to zero, but the Petitioner did not mitigate. The fact that the trading volume and price were low was no answer to the duty to mitigate.

Mr Man SC submits that where damages are an adequate remedy, a claimant's insistence on maintaining the contract is wholly unreasonable or perverse: *Isabella Shipowner SA v Shagang Shipping Co Ltd (The Aquafaith)* [2012] 1 CLC 899, §44, Cooke J. The only purpose of keeping the contract alive is to enable the innocent party to earn the price: *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] 2 CLC 272, §43, Moore-Bick LJ. Thus, an innocent party cannot use his contractual rights to penalise the other party by taking a particular course, if there was another course available which was equally advantageous to the innocent party: *Fuji Xerox (Hong Kong) Ltd v Vigers Hong Kong Ltd* (CACV 311/2016, 30 March 2007), §7 (Rogers VP).

With respect, this contention has no merits. The obligations of the Debtor under the Option Deed had been subsumed in the 2019 Settlement Agreement, with the Six Cheques given thereunder. There is no basis for accusing the Petitioner for failing to mitigate its loss under the Option Deed. The Petitioner demanded for no more and no less, which was totally legitimate.

In complaining about the Petitioner's failure to mitigate, the Debtor is essentially seeking to insist that the Petitioner ought to have accepted the Debtor's repudiation of the Option Deed and proceeded to sell the Option Shares on the market. This is against the principles set out in paragraphs 88-89 above, and against the Court of Appeal's holding in *Fuji Xerox*.

With reference to Lord Reid's dicta in *White and Carter*, Rogers VP has this to say in *Fuji Xerox*, §7:

My reading of Lord Reid's judgment is that he was not laying down any new proposition of law, rather he was affirming the general proposition that a party may enforce his contractual rights as he sees fit whether it be in a reasonable or unreasonable way: see page 430. For the most part Lord Reid was dealing with losing arguments in the case. The furthest he went was to suggest that a party could not use his contractual rights to penalise the other party by taking one course if there was another course which was equally advantageous to him. In the first place, the plaintiff is not seeking to penalise the defendant but simply to enforce the contract. In the second place, on the findings of the judge, any alternative course would not have been equally advantageous to the plaintiff who might have been in the position of being left with useless and unsellable second-hand machines." (underline added)

The interpretation of Lord Reid's dicta is binding on this Court.

The present case is unlike the cases of *Aquafaith* or *MSC Mediterranean Shipping*, as the Petitioner is not seeking to penalize or saddle the Debtor with further expenses.

Secondly, Mr Man SC submits that the price cannot be earned without the Debtor's cooperation. Pursuant to clause 6.2(b) of the Option Deed in order for the Petitioner to earn the price, at completion, the Debtor is required to take delivery of the instruments of transfer and sold notes (in respect of the Option Shares not deposited with CCASS); or to notify the Petitioner of the CCASS stock account to which the Option Shares deposited with CCASS should be transferred.

With respect, these steps are but necessary procedural steps in every sale of shares. They cannot be said to be cooperation on the part of the Debtor to enable the Petitioner to earn the price.

The 4th issue is not triable.

FIFTH TRIABLE ISSUE AS TO TOTAL FAILURE OF CONSIDERATION

In the context of bills of exchange, total failure of consideration occurs when the party against whom liability is sought to be enforced received no part of the benefit for which he bargained in the transaction which led to him becoming a party to the bill. As between immediate parties, a total failure of consideration has the same effect as its original and total absence of consideration, and is thus a complete defence to an action brought on the bill: *Xie Shili v Cheung Wai Keung* [2018] HKCFI 2431, §13 (DHCJ Dawes SC).

Even where the failure of consideration is only partial (as where, for example, no claim for debt can be brought, and the claim for damages is substantially reduced by reason of failure to mitigate), that is a *pro tanto* defence to an action on the bill of exchange, provided that the failure is in respect of a liquidated and ascertainable amount: *Byles on Bills of Exchange and Cheques*, §19-037.

Since I have found against the Debtor on the existence of the 2017 Settlement Agreement, no debt claim and failure to mitigate, the issue on total failure of consideration falls away.

sIXTH triable issue as to duress

K(1). Legal principles on duress

Re Li Xiaoming [2019] HKCFI 2782 is a case, like the present one, concerning bankruptcy proceedings where the debtor argued that he had signed a settlement agreement under duress, which rendered the settlement agreement voidable. DHCJ William Wong SC summarized the legal principles on duress in §§25-28, set out below, which were upheld on appeal: [2021] HKCA 779, §34,

“25.

First, there are two elements in the wrong of duress. First, pressure amounting to compulsion of the will of the victim. Second, the illegitimacy of the pressure. The legitimacy of the pressure must be examined from two aspects. First, the nature of the pressure and second, the nature of the demand which the pressure is applied to support...

26.

Secondly, duress of the person is a threat to the life, health or liberty of an individual to induce the person threatened to enter into a contract or to make a payment. An unlawful detention or an illegitimate threat to imprisonment can constitute duress, even though there is no threat to life or limb...

27.

Thirdly, in the case of duress of the person, the complainant only needs to prove that the pressure was a reason why he entered into the contract and the court will conclude that the illegitimate pressure induced the contract unless there is evidence that the illegitimate pressure in fact contributed nothing to the decision to enter the contract. It follows that it is unnecessary for the complainant in the case of threats to the person to demonstrate that he had no practical alternative but to enter into the challenged contract...

28.

Fourthly, the legal principles in relation to economic duress are succinctly summarised by Mr Justice G Lam in *Zebra Industries (Orogenesis Nova) Ltd v Wah Tong Paper Products Group Ltd* [2016] 1 HKC 213 at 234 – 237 as follows:

(1)

Economic pressure may be sufficient to amount to duress, provided at least that the economic pressure may be characterised as illegitimate and has constituted a significant cause inducing the plaintiff to enter into the relevant contract;

(2)

Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct. But the categories are not closed;

(3)

In determining whether there has been illegitimate pressure, the court takes into account a range of factors. These include whether there has been an actual or threatened breach of contract; whether the person allegedly exerting the pressure has acted in good or bad faith; whether the victim had any realistic practical alternative but to submit to the pressure; whether the victim protested at the time; and whether he affirmed and sought to rely on the contract.” (emphasis added)

The Court must be careful in distinguishing aggressive (yet legitimate) commercial activities from “illegitimate pressure” involving unconscionable or unlawful conduct. It is the illegitimacy of the suggested pressure that would amount to economic duress. See *Esquire (Electronics) Ltd v HSBC* [2007] 3 HKLRD 439, §§154 (CA); *DBS Bank (Hong Kong) Ltd v Young & Fortune Limited*, HCMP 1838/2014, 15 January 2016, §19, Au-Yeung J.

Insofar as settlement agreements are concerned, the factors identified by G. Lam J (as he then was) at §86 of *Zebra Industries (Orogenesis Nova) Ltd v Wah Tong Paper Products Group Ltd* [2016] 1 HKC 213, are apposite. Two matters have to be borne in mind when examining a plea of economic duress raised to impugn a settlement agreement:

*“86. There is no dispute that settlement agreements, just like other contracts, can be vitiated by economic duress; see for an example *Borrelli v Ting* [2010] UKPC 21; *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep 620, 629-630. It seems to me, however, that two matters have to be borne in mind when examining a plea of economic duress raised to impugn a settlement agreement. First, a settlement agreement, or a compromise, is by definition an agreement reached between parties who are in dispute. They are opponents rather than collaborators, engaged in adversarial positions. Typically they are, or are about to be, involved in litigation or arbitration. Each side usually threatens to pursue its professed rights in court or in arbitration, in the absence of settlement, in the hope that the other side will succumb to its demands. Their negotiations may sometimes involve bringing ruthless pressure to bear on each other. The risk of the adjudicator agreeing with the other side, the time and cost of the exercise, and the sheer uncertainty inherent in the process are often reason enough to lead parties to settle. Illegitimate pressure in the context of economic duress, if so broadly defined as to encompass the ordinary burdens of litigation, may unravel many a genuine compromise based on perfectly acceptable commercial considerations. Secondly, and in the same vein, the courts have an interest in upholding agreements to compromise disputes. As Butler-Sloss LJ said in *Colchester Borough Council v Smith* [1992] Ch 421, 435:*

*‘Where parties to a dispute reach a compromise which brings that dispute to an end and avoids the need for litigation or further litigation, such a compromise is a valuable part of the resolution of disputes within the machinery of the administration of justice. The compromise has to be genuine, entered into freely by all parties to it without concealment of essential information or undue advantage taken by one party of another party, and preferably with the assistance of lawyers. Consequently, an agreement to compromise an action or a dispute which may lead to litigation is binding and is enforceable against the party seeking subsequently to repudiate it. As Roskill LJ said in *Binder v Alachouzos* [1972] 2 QB 151, 160, ‘Any other course would cause very great difficulty in the administration of justice.’” (underline added)*

Factors that the Court will take into account to determine whether there has been duress includes:

(1)

Whether the complainant had access to independent advice: *Pao On v Lau Yiu Long* [1980] AC 614, 635D; *Re Li Xiaoming*, §46.

(2)

Whether the alleged victim of duress had time to consider the document in question and made complaint: *Nilesh Murli Sajnani v Yohan Simonian*, HCA 1355/2014, 12 October 2015, §§94 & 102.

(3)

Whether the complainant took steps to avoid the contract: *Pao On v Lau Yiu Long*, 635D.

Since a contract entered into under duress is voidable, not void, a party who has entered into a contract under duress has a choice to either avoid or to affirm the contract. If that party voluntarily acts under it with full knowledge of all the circumstances, he may be held bound on the ground of ratification. Or if, after escaping from the duress, he takes no steps to set aside the transaction, he may be found to have affirmed it. For there to be affirmation, there needs to be an unequivocal act. See *Mir v Mir* [2013] 4 HKC 213, §§59-60.

K(2). Debtor's case

The Debtor's case on duress has been set out in paragraph 22(2) and (3) above. He claims to have signed the 2019 Settlement Agreement under Ms Mu's Alleged Threats with duress of the person and/or economic duress. Therefore, the 2019 Settlement Agreement and the Cheques issued pursuant to it are liable to be rescinded and have been rescinded by his issuance of the Notices of Arbitration dated 4 December 2020.

Mr Man SC submits that there is a bona fide dispute on substantial grounds as to what whether the Alleged Threats were made:

Firstly, the circumstances in which the dispute between the Petitioner and the Debtor arose, and the identity of and relationships between the parties involved, make it inherently likely that the Alleged Threats were made by Ms Mu at the 11 February 2019 meeting:

(1)

The Petitioner was one of the many corporate interests controlled by Xiao in Hong Kong and predominantly in Mainland China. Moreover, Xiao was an extremely prominent and wealthy businessman, who acted as a banker of all sorts for the Chinese ruling class, and assisted the families of the Chinese leadership (including President Xi) in their financial transactions. Given his role, the scale of his corporate interests, and the high profile nature of his arrest in early 2017, it was entirely reasonable for the Debtor to believe Ms Mu's claim that the CPG had set up a Working Group to assume control over the affairs of the Petitioner (and of the many other companies controlled by Xiao).

(2)

It also stands to reason that, by reason of her close association with Xiao, Ms Ma Hongyan would fear being detained and would avoid contacting others including the Debtor.

(3)

The fact that the CPG Working Group had directed Ms Mu to collect and realise Xiao's assets in Hong Kong, and that the Working Group required the Debtor to purchase all the Option Shares, was entirely consistent with the media reports that the Mainland authorities had begun to carve up Xiao's business interests and had demanded that Xiao's group of companies divest themselves of significant amounts of assets to repay bank loans. Ms Mu would have been the obvious choice to do this task, given that Ms Ma Hongyan was uncontactable and Ms Mu was (on her own case) a

person who was well familiar with the affairs of the Petitioner. There was no reason why the Debtor would disbelieve the same.

(4)

Given that the Petitioner had originally acquired shares in the Company from the Debtor, and had then entered into an Option Deed with the Debtor to sell the shares, it was reasonable to believe that the Debtor would be seen as the most logical person to acquire the Option Shares.

(5)

Further, given that Xiao had been detained and brought back to the Mainland China to ‘assist’ in an investigation into his financial assets and affairs, the Debtor would have found it credible that others (including himself) might face the same fate if they refused to cooperate with the Mainland authorities. Plainly, if this were to occur to the Debtor, he would suffer similar physical and financial consequences as Xiao did (namely, disappearance or detention and liquidation of his assets).

(6)

As stated in §32 of the Debtor 1st and §37.2 of Debtor 2nd, Ms Mu referred to an incident on 15 October 2018 in which the Debtor was detained in Shenzhen/Hong Kong border checkpoint. This incident had been kept in confidence amongst the Debtor’s close associates, and the Debtor had never informed Ms Mu. This gave great credence to the Alleged Threats. Notably, the Petitioner never specifically denied this allegation in their affirmations.

(7)

The Threats, if made out, would plainly amount to duress to the person, being a threat of unlawful abduction or imprisonment and economic duress.

Secondly, these matters were not only affirmed to by the Debtor himself but was corroborated by Liu JY in §§12-13 of his affirmation, as the Debtor had informed Liu JY and Zhang of the same during a meeting in late February or early March 2019. This is particularly credible given that Liu JY was one of Zhang’s subordinates (rather than the Debtor’s), and had no reason to favour the Debtor especially given that the Debtor had been complaining at the very same meeting about Zhang’s refusal to take up the Option Shares.

Thirdly, the Debtor’s case is that the Alleged Threats were repeated in a further meeting on 4 March 2019. There is no dispute that this meeting occurred and was attended by Ms Mu and the Debtor. Details of that meeting are factual disputes that should only be resolved at trial.

In my view, the Alleged Threats have to be viewed in context. The assertion of a 2017 Settlement Agreement was made without a shred of documents. Assuming he had only received the Statutory Demand for the first time after the advertisements, the Debtor by a letter dated 30 December 2019 (drafted by Mr Ip) asked for time to pay the debt of HK\$165 million. After the email dated 30 December 2019, the Debtor continued to make settlement proposals until around 15 January 2020.

Just as he has never asserted the existence of the 2017 Settlement Agreement, the Debtor has never asserted duress in response to all of the Petitioner's demands for payment, but had always indicated agreement to pay and asked for time to pay. He never relied on duress to apply to set aside the Statutory Demand. His first assertion of there being the 2017 Settlement Agreement and duress only arose, for the first time, in the 2 Notices of Arbitration, after the Petition was issued.

Ms Mu has demonstrated that there could not have been a meeting with the Debtor on 11 February 2019 as she was not in Hong Kong. She exhibited air ticket confirmations, boarding pass and roaming records to show that she was in Japan between 5 and 12 February 2019.

To that, Mr Man SC could only submit that she has not shown her passport records and that the precise timing of the meeting was immaterial because events occurred some time ago and the Debtor did not have all the relevant documents with him (§24 of Debtor 2nd).

With respect, (i) it was not suggested that Ms Mu anticipated the allegation of Alleged Threats so as to fabricate eg boarding passes (which would not be issued if she had not checked in her flights); and (ii) none of the documents exhibited to Debtor 2nd could or were said to have assisted the Debtor's memory of the date of the Alleged Threats.

Further, since the 2019 Settlement Agreement was (as proven by documentary evidence) already executed by the Debtor on 22 March 2019, there was no point in Ms Mu "repeating" the Alleged Threats on 4 March 2019.

Assuming there was duress, I am prepared to accept that Ms Mu's denial of ties with the CPG or any working group set up by it was irrelevant. This is because, for the purposes of establishing duress, it is not necessary to show that the person making the threat was telling the truth, or that she had authority to make the threat from the entity which she was purporting to represent. It suffices to show that what the person said in fact constituted illegitimate pressure on the victim, which caused the victim to enter into the agreement. The threats of abduction and imprisonment were obviously illegitimate pressure. Hence if the Debtor genuinely believed in them, that would suffice to establish duress.

Even so, the case of duress has no substance for the following reasons.

Firstly, the Debtor had had time to consider whether to enter into the draft 2019 Settlement Agreement. He was given the draft since 13 March 2019, and did not sign it until over a week later on 22 March 2019 (allegedly under an ultimatum from Ms Mu). That time gap was not at all consistent with his allegation that he signed under duress. He would have time to seek legal advice.

Secondly, the last of such Threats allegedly occurred on 22 March 2019 but the Debtor has never taken any steps to set aside the 2019 Settlement Agreement until 20 months later. Meanwhile, Ms Mu had been chasing the Debtor for payment (see paragraph 15 above). In response to her message on 26 June 2019, the Debtor claimed to be in Toronto, ie out of the jurisdiction where the Alleged Threats could possibly have been executed, but he took no steps to set aside the 2019 Settlement Agreement. When he returned to Hong Kong, he even invited Ms Mu to meet and they did meet on the 7 January 2020. All of these were contrary to his assertion of having been “under immense pressure by reason of Mu’s threat which still affects [him] today”. If that assertion was true, he has not explained what released him from that immense pressure and prompted him to expose the duress in the Arbitration Notices.

Thirdly, the Debtor has unequivocally ratified the duress by agreeing to make payment under the 2019 Settlement Agreement, asking for time to pay and making payment proposals to the Petitioner until as late as 15 January 2020.

Fourthly, the Debtor clearly had access to legal advice from Mr Ip throughout, which strongly militated against the Debtor’s suggestion that he was acting under duress. It was Mr Ip who prepared the Payment Proposal and emailed it to the Petitioner, and whatsapped the Petitioner to confirm the same. It was Mr Ip who witnessed the Debtor’s signature of the 2019 Settlement Agreement, sent scanned copies of its signing page duly executed by the Debtor on 22 March 2019 and subsequently arranged for originals and the Six Cheques to be delivered to the Petitioner.

For all the reasons given in this Section, I am not satisfied that there is a triable issue on the question of duress. Even if duress had occurred, the Debtor’s conduct showed that he had ratified or affirmed the 2019 Settlement Agreement.

CONCLUSION

I accept the Petitioner’s case. I find that the Statutory Demand was validly served. The dispute on the Six Cheques is not covered by the arbitration clauses. None of the issues raised are triable. They are but a cloud of dust to blur the true picture. I make a bankruptcy order against the Debtor and dismiss his summons.

On a nisi basis, I make an order that the Petitioner shall have the costs.

I thank counsel for their able assistance.

(Queeny Au-Yeung)

Judge of the Court of First Instance

High Court

Mr Victor Dawes SC leading Ms Queenie Lau, instructed by Minterellison LLP for the Petitioner

Mr Bernard Man SC leading Mr Danny Tang and Mr Keith Chan, instructed by Jones Day for the Debtor

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Prepared on 27 October 2026 · Esheria