IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 124

Originating Summons (Bankruptcy) No 59 of 2017 (Summons Nos 5282 of 2017, 5361 of 2017, 5367 of 2017 and 5379 of 2017)

In the matter of Part V of the Bankruptcy Act (Cap. 20)

Aathar Ah Kong Andrew

… *Applicant*

GROUNDS OF DECISION

[Insolvency Law] — [Bankruptcy] — [Voluntary Arrangement]

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14 March 2018

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Valerie Thean J:

Introduction

1 Voluntary arrangement schemes were introduced by the Bankruptcy Act (Cap 20, 2009 Rev Ed) ("Bankruptcy Act") enacted by Parliament in 1995. This scheme allows an insolvent debtor to stave off bankruptcy by proposing an arrangement, which creditors may agree to accept, in full satisfaction of their claims. Such a debtor may at the same time apply for an interim order which, in effect, stays bankruptcy applications and prevents continuance of other legal process without leave of court. To obtain approval for a voluntary arrangement, a debtor must submit a proposal and appoint a nominee, who will, if the proposal is approved, supervise its implementation. Once approved by a special resolution of a three-fourths majority, such an arrangement binds all creditors who have notice and are able to vote. Dissatisfied creditors may seek curial intervention under s 54 of the Bankruptcy Act.

2 These four applications under s 54 of the Bankruptcy Act are those of four disgruntled creditors applying to set aside the approval obtained at a creditors' meeting for the proposal of Mr Aathar Ah Kong Andrew ("Mr Aathar") for a voluntary arrangement. The creditors are the following:

(a) CIMB Securities (Singapore) Pte Ltd ("CIMB");

(b) Citibank Singapore Limited ("Citibank");

(c) KGI Securities (Singapore) Pte Ltd ("KGI"); and

(d) OUE Lippo Heathcare Limited ("OUELH"), formerly known as International Healthway Corporation Ltd. OUELH further applied, in the alternative, for a declaration that it was not bound by the debtor's voluntary arrangement.

3 On 14 March 2018, I granted the order revoking the approval given for the voluntary agreement. Mr Aathar has appealed and I now furnish the grounds of my decision.

Facts

4 Citibank first filed a bankruptcy petition on 2 February 2016 against Mr Aathar.[1] On 5 May 2016, Mr Aathar filed an application for an interim order, which precluded any further step in proceedings against him, and a proposal for a voluntary arrangement ("the first voluntary arrangement proposal").[2] Under this proposal, he would pay his creditors in several tranches over 26 months after receiving an interest free loan of $1.5 million from an unnamed business

1 See the originating summons in HC/B 276/2016.

2 See the originating summons in HC/OSB 30/2016, and Mr Aathar's affidavit in HC/OSB 30/2016 dated 27 April 2016.

associate.[3] His nominee, appointed under s 46 of the Bankruptcy Act, was an accountant.

5 A creditors' meeting was held on 29 July 2016 and, after affording Mr Aathar an opportunity to answer queries, again on 10 August 2016, when the voluntary arrangement proposed by Mr Aathar was approved by a requisite majority of his creditors. Several dissenting creditors applied for the approval to be set aside, and their applications were granted by an Assistant Registrar ("the AR") on 8 March 2017, whose grounds of decision are reported in *Re Aathar Ah Kong Andrew* [2017] SGHCR 4. The AR found that Mr Aathar had not been completely forthright, and that the nominee had failed to scrutinise Mr Aathar's proposal adequately. An appeal was filed against the AR's decision and scheduled for hearing on 7 June 2017. Citibank's bankruptcy petition was adjourned to 22 June 2017 as a result.

6 The appeal against the AR's decision was withdrawn on the date of the scheduled appeal, 7 June 2017. On 21 June 2017, a day before Citibank's scheduled bankruptcy hearing, Mr Aathar applied for another interim order on the basis of a fresh proposal ("the second voluntary arrangement proposal").[4] He was able to do so despite the previous application because s 48(1)(*b*) of the Bankruptcy Act allows a subsequent application for an interim order if more than twelve months have elapsed since a first application for an interim under. Under this new proposal, Mr Aathar would, after receiving an interest-free loan of some $3 million from a contributor, make payment to his creditors in several tranches over 48 months.[5] Mr Aathar appointed a senior legal practitioner as his

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3 Mr Aathar's affidavit in HC/OSB 30/2016 dated 27 April 2016 at pp 18–19.

4 See originating summons in HC/OSB 59/2017.

5 Mr Aathar's affidavit dated 21 June 2017 at pp 20–21; CIMB's Bundle of Documents at Tab E.

nominee. On 11 July 2017, Mr Aathar obtained an interim order in relation to his new proposal.[6] The nominee notified the creditors of Mr Aathar's proposal between 21–26 September 2017,[7] after which notices of claims were filed.

7 The first creditors' meeting, chaired by the nominee, was held on 5 October 2017.[8] Creditors raised concern over the veracity of substantial debts owed to Mr Aathar's Indonesian creditors, which had increased since the first voluntary arrangement proposal. A fresh debt of $29,375,000, owed to a company named Golden Cliff International Ltd ("Golden Cliff"), appeared similar to a loan of $25 million claimed by one Fan Kow Hin ("Mr Fan") in Mr Aathar's first voluntary arrangement proposal.[9] OUELH also clarified that its claim against Mr Aathar, listed by Mr Aathar as a contingent liability for $1.5m, was, as highlighted by OUELH in its notice of claim, estimated it to be around $35m as at 15 June 2017.[10] The nominee informed the creditors present that he needed more time to review the submitted documents, and adjourned the meeting to 19 October 2017.[11]

8 On 19 October 2017, the nominee provided the creditors present with his adjudication of the debts. In particular, Mr Aathar's liability to Golden Cliff was adjudicated to be $3 million. The nominee explained this was because only that amount of debt was supported by documents; there were no supporting documents for the remaining claim which originally stood over $29m.[12] Another

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6 See Minute Sheet dated 11 July 2017.

7 Creditors' Meeting Report at paras 3–5.

8 Creditors' Meeting Report at para 6.

9 Wong Weng Hong's affidavit dated 21 November 2017 at paras 23–24.

10 Wong Weng Hong's affidavit dated 21 November 2017 at para 26.

11 Wong Weng Hong's affidavit dated 21 November 2017 at para 27.

12 Wong Weng Hong's affidavit dated 21 November 2017 at paras 28–31.

point raised at the adjourned meeting pertained to separate ongoing legal proceedings brought against Mr Aathar by OUELH, one Low See Ching ("Mr Low") and a group of companies I refer to in these grounds of decision as "the Crest Entities". After discussion, these claims (referred to here collectively as "the Litigation Claims") were marked "objected to" and the creditors allowed to vote, subject to the vote being declared invalid in the event that the objection was sustained.[13] The creditors then proceeded to vote on Mr Aathar's proposal.[14]

9 Mr Aathar, despite being the debtor proposing the arrangement, and notwithstanding the many queries posed by creditors, was not present at either of the creditors' meetings.[15]

10 By way of an email dated 20 October 2017, the nominee set out the results of the creditors' vote. Two sets of results were provided. The first was calculated on the basis that the Litigation Claims were allocated "nil" value for voting purposes, while the second was calculated on the basis that the claims by the Crest Entities and Mr Low were admitted in full while OUELH's claims were wholly disregarded. On these calculations, the threshold for approval of the voluntary arrangement procedure would be met in the first calculation at 80.13% approval, but not the second, where there would be 60% approval only.[16]

11 The nominee subsequently wrote to creditors on 25 October 2017, stating that Mr Aathar's proposal had met the threshold for approval.[17] At

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13 Wong Weng Hong's affidavit dated 21 November 2017 at paras 32–35; Creditors' Meeting Report at p 58.

14 Creditors' Meeting Report at p 59.

15 Creditors' Meeting Report at pp 41 and 52.

16 Wong Weng Hong's affidavit dated 21 November 2017 at paras 38–39.

paragraph 3 of the same letter, he explained that the Litigation Claims had been marked "objected to" and the representatives of the creditors under those claims had been allowed to vote, subject to their votes being subsequently declared invalid if the objection to the claim was sustained.[18] In his creditors' meeting report of the same date, it appeared the nominee marked the Litigation Claims as "unable to determine" and set the value of their votes at zero.[19] In these latest calculations, he included a further claim of more than $20 million by Golden Cliff for the purposes of voting.[20]

12 This formed the context for the applications for revocation of the approval obtained for Mr Aathar's voluntary arrangement. The four creditors were of the view that multiple material irregularities justified revoking the approval. That approval, in summary, was for repayment of a total debt adjudicated as $202m,[21] over 48 months, through an interest-free $3m loan.[22] The meeting was said to have approved this arrangement with an 80% majority.[23]

Legal context and issues arising

13 Section 54 of the Bankruptcy Act, the applicable provision allowing a court to revoke any approval given at a creditors' meeting on the ground of material irregularity at or in relation to the meeting, reads:

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17 Wong Weng Hong's affidavit dated 21 November 2017 at para 40.

18 Wong Weng Hong's affidavit dated 21 November 2017 at WWH-10, p 420.

19 Creditors' Meeting Report at pp 20–21.

20 Creditors' Meeting Report at p 21.

21 Creditors' Meeting Report at p 21.

22 Mr Aathar's affidavit dated 21 June 2017 at pp 20–21; CIMB's Bundle of Documents at Tab E.

23 Creditors' Meeting Report at p 21.

> **Review of meeting's decision**
>
> **54.**—(1) Any debtor, nominee or person entitled to vote at a creditors' meeting summoned under section 50 may apply to the court for a review of the decision of the meeting on the ground that —
>
> (a) the voluntary arrangement approved by the meeting unfairly prejudices the interests of the debtor or any of the debtor's creditors; or
>
> *(b) there has been some* ***material irregularity*** *at or in relation to the meeting.*
>
> (2) Upon hearing an application under subsection (1), the court may, if it thinks fit, do one or both of the following:
>
> (a) revoke or suspend any approval given by the meeting;
>
> …
>
> [emphasis in bold italics and italics added]

14 The provisions in the Bankruptcy Act on voluntary arrangements are based on the provisions of the (English) Insolvency Act 1986 (c 45): Kala Anandarajah *et al*, *Law and Practice of Bankruptcy in Singapore and Malaysia* (Butterworths Asia, 1999) at p 22. In *Andrew Fender v The Commissioners of Inland Revenue* [2003] EWHC 3543 (Ch) ("*Fender*"), the (English) High Court summarised the guiding principles at [11] as follows:

> (a) A debtor who puts forward a proposed voluntary arrangement must be not only honest, but should take care to put all relevant facts before creditors. An individual voluntary arrangement must be characterised by complete transparency and good faith by the debtor.
>
> (b) The nominee, when discharging any of his functions, has a duty to exercise a professional independent judgment, informed by his qualifications and skills. In assessing the performance of that obligation, account must be taken of the context in which it is to be performed. A nominee is initially heavily reliant upon the debtor. But where doubts

reasonably arise as to the reliability or sufficiency of that information, the nominee must satisfy himself that he has received enough information of adequate quality to arrive at a fair provisional view as to whether a claim should be admitted, and a fair view as to the minimum value to be attributed to any unascertained debt. This will not require him personally to verify every figure: he is involved in a process which is designed to be speedy and robust, and is only required to take reasonable steps.

(c) A material irregularity may occur in relation to the debtor's proposal, or his statement of affairs, or the preparation of the nominee's report to the court, or in relation to the nominee's chairmanship of the creditors' meeting. The court is concerned to look at the whole process. Not every mistake or omission will found the jurisdiction to set aside the result of the meeting. An irregularity is "material" if, objectively assessed, it would be likely to have made a material difference to the way in which the creditors would have considered and assessed the terms of the proposed voluntary arrangement.

(d) While the chairman of the creditors' meeting would ordinarily be the nominee (and hence someone experienced in insolvency procedure), he cannot be expected to resolve difficult disputes about debts. If the chairman's decision is challenged, the court must at the resultant hearing decide the merits based on the evidence adduced in the application.

15 Two points highlighted in *Fender* are of particular relevance in this case. The first is that the debtor's full disclosure is fundamental. In *Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd* [2003] 3 SLR(R) 629 held at [24], the Court of Appeal, in the context of a

scheme of arrangement, the corporate equivalent of a voluntary arrangement in bankruptcy, stated that it is an "independent principle of law that the creditors [of a company] should be put in possession of such information as is necessary to make a meaningful choice"; therefore, it is of "extreme importance that the [debtor] company furnishes full information as is necessary to make a meaningful choice". .

16 The second relates to the importance placed upon the role and conduct of the nominee, who facilitates the meeting and later administers the arrangement. In *Re a Debtor (No 140 of 1995)* [1996] 2 BCLC 429, Lindsay J elaborated at 434–436 on the duties of the nominee. He held that where the fullness or candour of the debtor's information has come into question, it "cannot be right for the nominee unquestioningly to accept whatever is put in front of him", and that it is "fundamental to the intended operation of [voluntary arrangements]" that the proposal which creditors vote on has "survived scrutiny" by an "independent professional insolvency practitioner". In *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd and another appeal* [2012] 2 SLR 213 ("*TT International*"), the Court of Appeal held, again in the context of a scheme of arrangement, that a scheme manager (the equivalent of a nominee) chairing a creditors' meeting cannot act "capriciously or arbitrarily, and must determine issues objectively" and transparently (at [67] and [73]).

17 These two expectations are crucial to the efficacy of any voluntary arrangement. A debtor, in putting forward a proposal in order to avoid bankruptcy, bears the onus of showing his *bona fides* with proper disclosure to his creditors. His nominee, charged with facilitating and implementing the arrangement, must discharge his duties in keeping with his role as a professional, independent, expert. In the case at hand, neither of these two

expectations were met. In particular, I found multiple material irregularities, as follows:

(a) material irregularity on the part of the nominee in dealing with the Litigation Claims under Rule 84 of the Bankruptcy Rules (Cap 20, R 1, 2006 Rev Ed) ("Bankruptcy Rules");

(b) the doubtful veracity of the claims of the Indonesian creditors, which gave rise to material irregularity in their inclusion in the arrangement;

(c) a material error in admitting another $20m in relation to Golden Cliff in the Creditors' Meeting Report, where the nominee had previously decided at the meeting on a sum of some $3m; and

(d) Mr Aathar's failure to disclose his source of funds for the proposal as required by Rule 68 of the Bankruptcy Rules.

I deal with each of these in turn below.

The Litigation Claims

18 The nominee, in his final adjudication, did not assign any value to the Litigation Claims for the purposes of voting, even though he had, during the second creditors' meeting on 19 October 2017, agreed to allow the plaintiffs in the Litigation Claims to vote on an "objected to" basis. In the creditors' meeting report prepared by the nominee, the column "Liabilities as per NOC [*ie*, notice of claim]" stated a figure above $35m for OUELH, while the column "Adjudicated liabilities" stated "Unable to determine".[24]

[24] Creditors' meeting report at p 66.

19 The starting point to analyse OUELH's contention that this was a material irregularity must be Rule 84(1) of the Bankruptcy Rules, which states that: "*Every* creditor who has been given notice of the creditors' meeting *shall* be entitled to vote at the meeting or any adjournment of it" [emphasis added]. It was not disputed that OUELH had been given notice and was entitled to vote.

20 Mr Aathar attempted to rely upon Rule 84(2) of the Bankruptcy Rules, which states: "Votes shall be calculated according to the amount of the debt as at the date of the meeting". It was submitted that Mr Aathar was not indebted to OUELH at the date of the creditors' meetings, because OUELH's claim against Mr Aathar had not been determined by a court. Hence, there was no judgment debt to speak of, and the nominee was correct to assign a "nil" value to OUE's claim.[25]

21 There was no merit in this submission, because voluntary arrangements may include and bind creditors of unliquidated debts. This is apparent from Rule 84(3) of the Bankruptcy Rules, which deals with such debts. Thus, the fact that OUE's claim had not crystallised at the date of the creditors' meeting did not preclude its vote from being counted. This was also the position adopted in *Re Cancol Ltd* [1996] 1 All ER 37, by the (English) High Court, ruling that the identical r 5.17(3) of the Insolvency Rules 1986 (SI 1986 No 1925) clearly contemplated contingent creditors. Indeed, OUELH had been summoned by Mr Aathar's nominee as one of Mr Aathar's many contingent creditors, and Rule 84(1) of the Bankruptcy Rules plainly provides that every creditor thus notified shall vote.

22 The nominee's reason for the nil value he used was explained, in his letter dated 25 October 2017[26] and by him at the hearing, as arising from the fact

[25] Mr Aathar's written submissions at para 37.

that the votes under the Litigation Claims had been admitted to on an "objected to" basis. The "objected to" basis is governed by Rule 84(6) of the Bankruptcy Rules, which reads:

> If the chairman is in doubt whether a claim should be admitted or rejected, he shall mark it as objected to and allow the creditor to vote, subject to his vote being subsequently declared invalid if the objection to the claim is sustained.

23 Arising from this the nominee made two arguments: first, that no agreement was reached at the meeting, and second, that he could then subsequently invalidate the votes in his report.

24 I deal first with his statement on affidavit "that there was no agreed estimated minimum value of [OUE's] claims at the meeting".[27] Rule 84(3) of the Bankruptcy Rules, in envisaging a chairman who "agrees to put upon the debt an estimated minimum value", does not require creditors and nominee to agree *with each other* to a minimum. Rather, it requires *the chairman* to agree to set an estimated minimum value.

25 In *Re a debtor (No 222 of 1990), ex parte the Bank of Ireland and others* [1992] BCLC 137 ("*Re a debtor*"), the chairman in question decided that five creditors were not entitled to vote because their claims were for unliquidated amounts. Harman J's view was that for unliquidated claims, a chairman was not expected to make protracted investigation. If there was any doubt a chairman should simply "mark the debt as 'Doubted', *and otherwise admit it*" (at p147h). OUELH's contention was essentially that the nominee had proceeded precisely as suggested by Harman J. He had agreed to admit OUELH's claim in full at

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26 Wong Weng Hong's affidavit dated 21 November 2017 at WWH-10, p 420.

27 Prem Gurbani's affidavit dated 8 January 2018 at para 8; OUE's Bundle of Cause Papers at Tab 3, p 12.

the meeting, on an "objected to" basis. It followed, then, that the $35m claim was admitted as such for the purposes of voting. The nominee, on the other hand, appeared to backtrack from his actions at the meeting, in effect indicating a nil value because of his inability to determine the issue. I thus consider both alternatives. If, on the one hand, the nominee had so agreed to set the minimum sum at $35m as suggested by OUELH, his actions later in ignoring this in his report would result in a miscalculation of the final vote, and a material irregularity. If, on the other hand, as suggested by the nominee's report, he failed to set a minimum value altogether despite allowing OUELH to vote at the meeting, that too, would be a material irregularity in contravention of Rule 84(6) of the Bankruptcy Rules, which pertains to the second issue I now turn to.

26 The second issue relates to how an "objected to" vote could be invalidated. The nominee supposed that he could invalidate the vote on his own objection. OUELH's contention that any declaration of invalidity could only be made by a court[28] is supported by the schema and natural reading of Rule 84(4)-(7) of the Bankruptcy Rules. Looking at the construction of these rules, after Rule 84(1)-(3) sets out how votes are to be valued, Rule 84(4) gives the chairman the power to admit or reject in whole or in part any creditor's claim. Appeal therefrom is first mentioned in Rule 84(5) in the context of the admission or rejection of claims in Rule 84(4). Rule 84(6) follows on to describe the "objected to" basis where a chairman is in doubt, and Rule 84(7) then discusses the role of the court on an appeal from the chairman's decision. It is clear from this that any decision as to invalidity is that of the court. As made clear by *Fender* (see above, at [14(b) and (d)]) and *Re a debtor* (see above, at [25]), the chairman's role in facilitating the voting process is intended as a pragmatic one, to ascertain if an arrangement may fairly be brokered amongst

[28] OUELH's written submissions at para 74.

creditors holding the value of three-quarters of a debtor's debts, with any disputes arising to be decided by the court as part of its curial oversight.

27 Weatherup J, sitting in the High Court of Northern Ireland, held similarly as follows in *Official Receiver v Thompson* [2002] NICh 10:

> 12 … If the chairman is in doubt about the creditor he should allow the creditor to vote and mark the vote as objected to [r 5.20(6) of the Insolvency Rules (Northern Ireland) 1991, which exactly mirrors 84(6) of the Bankruptcy Rules]. *If on appeal the creditor's vote is declared invalid* ***the court*** may order another meeting if there has been unfair prejudice or a material irregularity…
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> [emphasis in italics and bold italics added]

28 It follows, then, that Rule 84 of the Bankruptcy Rules contemplates that any appeal against the chairman's decision to admit a vote on an "objected to" basis will be heard by a court. And moreover, on these particular facts, it would have been for Mr Aathar to apply to court to object to the Litigation Claims at the minimum sum at which they were set and ask that they be declared invalid. The nominee ought not to have, instead, subsequently unilaterally ignored the votes for which he had previously settled a sum.

29 Finally, the nominee also stated in his report that if OUELH's claims were admitted in full, there would be an overlap with the claims brought by the Crest Entities.[29] There is, however, no overlap. OUELH is suing both Mr Aathar and the Crest Entities. While the nominee relied on "cross-claims" between OUELH and the Crest Entities and between the Crest Entities and OUELH,[30] these relate to the two-mentioned entities. Their cross-claims did not make irrelevant the need to set a value to each individual claim against Mr Aathar.

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[29] Prem Gurbani's affidavit dated 8 January 2018 at para 8; OUE's Bundle of Cause Papers at Tab 3, p 12.

[30] Creditors' Meeting Report at paras 44–52.

Regarding Mr Low's claim against Mr Aathar, the nominee stated that he did not put a value to Mr Low's claim because the matter was "pending before the High Court".[31] This makes matters rather circuitous, as Mr Low's summary judgment application against Mr Aathar has been stayed as a result of Mr Aathar's interim order,[32] for the specific purpose its consideration within the context of the proposal for a voluntary arrangement.

30 In the light of this finding that the nominee's subsequent setting of the value at nil in his report was a material irregularity, OUELH's alternative prayer for a declaration that if it had not been entitled to vote, it would not be bound by the voluntary arrangement, was no longer necessary.[33] OUELH confirmed that they were no longer pursuing that alternative part of their application. In any event, there was no dispute that OUELH did vote, as envisaged by Rule 84(1). Harman J, in *Re a debtor*, where, it will be recalled, the chairman held that certain creditors were not entitled to vote, also explained at p.147d of his judgment the rationale of so interpreting the Bankruptcy Rules: if creditors were not entitled to vote, they would not then be bound by the decision, and there would arise therefrom a situation where they would then be able to proceed with statutory demands and have bankruptcy petitions presented in respect of a debtor when there was apparently a binding voluntary arrangement in force. Harman J concluded that "the matter can never be in that state at all. The answer is that these creditors should have been admitted to vote and had they been admitted the voluntary arrangement would never have got off the ground at all."

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31 Creditors' Meeting Report at para 23.

32 Creditors' Meeting Report at para 21.

33 OUE's written submissions at paras 93–102.

Indonesian Creditors

31 The bulk of the claims against Mr Aathar comprised claims by 24 Indonesian creditors amounting to $235.9 million, or 74.2% of his total declared debt.[34] These 24 creditors are: PT Fajar Perkasa Trading; Golden Cliff; PT Berkah Tujuh Saudara; Asrul Kariaa; Sarman Harlen; Meutia Ningsih; Sugandi SE; Ngajiman; Antonius Santoso; Baya Darsono; Gatot Sudjoko; Supangat; Herman; A Mulyadi; Sulistanto; Tjandra Swari; Munasifa; Darmansjah Widjaja; PT Fajar Perkasa Trading; PT Entete Mining; PT Berkah Tujuh Saudara; Liem Augustinus; Komala; and Haryati. These claims were adjudicated down to over $130m[35] in the creditor's report, but this still formed some 64% of the overall adjudicated amount of over $202m.[36]

32 These creditors are not new, they initially surfaced in the context of Mr Aathar's first voluntary arrangement proposal. In his first voluntary arrangement proposal, Mr Aathar had listed 24 Indonesian creditors with claims amounting to $204.9 million. At the time, it was stated that these creditors were "not participating in the distribution but participating in the voting" for approval of the first voluntary arrangement.[37] In other words, the Indonesian creditors waived their rights to be repaid by Mr Aathar, but not their right to vote in support of Mr Aathar's proposal.

33 In the present proposed voluntary arrangement, the same Indonesian creditors are listed again, save that Golden Cliff appeared in place of Mr Fan,

34 Tey Khar Lang's affidavit dated 16 November 2017 at paras 50–51.

35 CIMB's written submissions at para 66; Creditors' Meeting Report at para 56, S/No. 12–14, 17–21, 23–24, 28–34, 40–42, and the last entry of $20,767,193.21 in the name of Golden Cliff.

36 Creditors' Meeting Report at p 21.

37 Tey Khar Leng's affidavit dated 16 November 2017 at paras 47–49 and p 39; CIMB's Bundle of Documents at Tab A.

and the total claims have increased by about $35m. Furthermore, these creditors have had an apparent change of heart, and intend to participate in the distribution of funds in this second proposal. The only explanation for their change of mind was provided by Mr Aathar as follows:[38]

> 18 First, I wish to give a background of my relationship with my Indonesian creditors. Many years ago, I was posted to Indonesia by DBS Land, my employers. I made many friends and earned their trust because, as I was told by some of them, I showed them that I had integrity.
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> 19 Unlike Singapore, where business dealings are based on contract, business dealings in Indonesia are based on relationships.
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> …
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> 20 In my first [voluntary arrangement], my Indonesian creditors thought they will help to make my [voluntary arrangement] more attractive for my Singapore creditors by forgoing their shares of the payout and thus increasing the amounts to be paid to the other creditors. Instead, their good intentions were misconstrued. So, they decided, in this current [voluntary arrangement], not to forgo their entitlements. There is nothing insidious about this change.

34 None of the 24 Indonesian creditors filed an affidavit to corroborate Mr Aathar's explanation, even though this would have been the simplest way to rebut the creditors' allegations.

35 I now turn to the nominee's explanation as to why he admitted the claims of the Indonesian creditors:[39]

> 15 Insofar as the genuineness of the claims of the Indonesian Creditors are concerned, I have been given copies of the supporting documents (in 3 arch files) by all the Creditors. The Indonesian Creditors' claims which I have allowed are prima facie supported by documents.

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38 Mr Aathar's affidavit dated 8 January 2018 at paras 18– 20; CIMB's Bundle of Documents at Tab B.

39 Prem Gurbani's affidavit dated 8 January 2018.

> 16 I have invited the Creditors to inspect and take copies of all the supporting documents. However, no creditor asked for copies of the supporting documents. Accordingly, I have adjudicated based on the documents that have been furnished to me.

36 In my view, this explanation left much to be desired. The nature of the supporting documents was not explained; neither were these documents exhibited in his affidavit, or any other affidavit for that matter. It also appears from the nominee's affidavit that he had reviewed the supporting documents on a cursory basis, taking each document at face value. In the light of the large sums claimed by the Indonesian creditors and the circumstances surrounding the previous proposal for voluntary arrangement, he ought to have scrutinised these claims more closely in his independent and quasi-judicial role.

37 I should mention that the creditors also queried the high interest rates charged by these Indonesian creditors. There was no evidence as to the correct range of interest rates and I therefore make no finding on this issue. But the nominee's explanation of his treatment of the interest components in his affidavit is curious in the light of his quasi-judicial role.[40] He explained at paragraph 17 of his affidavit that he was not in a position to rewrite the interest figure that parties had agreed to as part of their contracts. Nevertheless, as chairman, it was his duty to adjudicate the debt: he could easily have trimmed the interest component if he thought it oppressive.

Golden Cliff's claim

38 Golden Cliff's claim, it will be recalled, initially stood at over $29m. The nominee initially admitted only $3 million of the $29 million claim by Golden Cliff, as he was of the view that only debts amounting to that sum could

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40 Prem Gurbani's affidavit dated 8 January 2018.

be supported by documents. It was only in the final adjudication that the nominee decided to include a further $20.7 million on a contingent basis.

39 I was not persuaded that the nominee's decision was correct. The loan agreement between Golden Cliff and Mr Aathar exhibited in the nominee's affidavit only stated that Golden Cliff agreed to lend $30m to Mr Aathar;[41] The affidavit did not contain any documents showing the disbursement of funds. No bank statements or cheques were exhibited.

40 Indeed, at the hearing, the nominee submitted that the inclusion of Golden Cliff as a contingent creditor for the sum of over $20 million was "obviously an error", and that if "Golden Cliff could not substantiate its claim for over $20m, then its vote, as far as $20m is concerned, should not count".[42] He further clarified that Golden Cliff's claim was assessed as at 19 October 2017 to be $3 million, and that he had decided not to consider further supporting documents which Mr Aathar's solicitors sent to him after that because of the need for finality.[43] In other words, the nominee conceded that he had wrongly admitted Golden Cliff as a contingent creditor and their claim ought to have remained at $3m. His point, rather, was that it did not bring the majority to under 75%.[44]

41 Even more troubling was the creditors' submission that the debt purportedly owed to Golden Cliff appeared to be the same debt which was, in the first voluntary arrangement proposal, claimed to be owed to Mr Fan. Mr Aathar claimed that he had mistakenly named Mr Fan as his creditor in the

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41 Prem Gurbani's affidavit dated 8 January 2018 at pp 26–31.

42 Notes of Argument for 4 March 2018 ("NOA"), p 2 lines 17-18.

43 NOA, p 22 lines 22 to 25.

44 NOA, p 2 lines 25 to 26.

earlier proceedings, and had realised this error only after checking the supporting documents in preparation for the present proceedings.[45] This was rather surprising, when he unequivocally stated on affidavit filed in support of his first attempted voluntary arrangement that "[t]here are records of cheques which show the loan monies [Mr Fan] had extended to me and an arrangement between us in relation to the loans he extended to me".[46] He also claimed that he had spent over two months checking and verifying his debts for his Statement of Affairs, which "was a substantial undertaking that involved a significant investment of effort and time".[47] If that is correct, it is difficult to believe that Mr Aathar would have made such an obvious error, which he described in his affidavit rather quaintly as a "simple mistake". Furthermore, I note that Mr Fan was made a bankrupt in March 2017, after Mr Aathar's first attempted voluntary arrangement. As a result, any voting rights that Mr Fan may have had in respect of his alleged debts could only be exercised by his private trustees.[48] In this context, the creditors' contention that Golden Cliff was substituted as a creditor so that the voting rights in respect of Mr Fan's claim could still be exercised in Mr Aathar's favour was an extremely plausible one. The fact that the address of Golden Cliff was the address used for Mr Fan in Mr Aathar's first voluntary arrangement proposal[49] lent further credence to the suggestion.

42 It was clear that Mr Aathar had not discharged his duty to be candid in relation to the claim by Golden Cliff. While the nominee's view was that $20m was not a significant proportion of the final percentage, his mistake in adding

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45 Mr Aathar's affidavit dated 8 January 2018 at paras 14–16; CIMB's Bundle of Documents at Tab B.

46 OUE's Bundle of Cause Papers, Tab 6, p 27, para 72.

47 OUE's Bundle of Cause Papers Tab 6, p 11, para 32.

48 OUE's written submissions at para 51.

49 OUE's written submissions at para 52.

this $20m must be considered in its full context. The purpose of the statutory mechanism of a three-fourths majority is to ensure that a minority of creditors holding only a quarter of the debt may not railroad an otherwise beneficial scheme. Where, however, the three-fourths has not been correctly calculated, there is a fundamental irregularity. Queries about this $20m, taken together with the erroneous deduction of the Litigation Claims and the wrongful addition of the Indonesian debts, lead to an irresistible conclusion that if the meeting had been appropriately conducted and votes properly counted, the second voluntary arrangement proposal would have been overwhelmingly rejected.

Funding of the voluntary arrangement

43 In any arrangement, the source from which the arrangement is to be funded is important information for creditors. For this reason, Rule 68(2)(b) of the Bankruptcy Rules mandates that the debtor state the source of funds.This rule was not satisfied in this case.

44 In his proposal dated 18 June 2017,[50] Mr Aathar stated vaguely:

> 5.1.6 Over the last one year, there are ultra-high networth persons who are prepared to help me in return for working and building a business for them. I have obtained a letter of commitment from a financial contributor contribute a total sum of S$3,000,000 subject to terms and conditions which would include [creditors'] approval and court sanction of the scheme of arrangement.

Mr Aathar did not identify these "ultra-high networth persons" or the "financial contributor" in the proposal. Furthermore, by using the word "include", Mr Aathar appeared to be suggesting that the terms and conditions stated in the quotation above for obtaining the letter of commitment were not exhaustive.

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50 Mr Aathar's affidavit dated 21 June 2017 at p 10; CIMB's Bundle of Documents at Tab E.

45 A letter from the "financial contributor" dated 20 June 2017[51] was included in the nominee's report dated 7 September 2017. The letter was signed by one "Herman", and sent on behalf of PT Cahaya Bangun Sarana ("PT Cahaya"). It states that PT Cahaya had decided to extend a $3 million loan to Mr Aathar, subject to approval of the proposed voluntary arrangement, and an additional condition that Mr Aathar "continue to remain to assist [it] to explore and advise business and operational opportunities in Indonesia in the healthcare and commodity business".

46 This letter was suspect for the following reasons. First, it was produced only *after* the nominee requested that he identify the "financial contributor" in an email dated 25 August 2017.[52] It is difficult to see why Mr Aathar did not include this letter or simply identify PT Cahaya when he first filed his proposal, as it would have been easy for him to do so. Having read the AR's decision in relation to his first voluntary arrangement, he must have been aware of his duty of candour. It therefore appears that for reasons best known to himself, Mr Aathar was determined to be as economical as he could with information, revealing details only when probed. Second, the letter is dated 20 June 2017, two days *after* the date on which he signed his proposal. This suggests that the letter was prepared only as an afterthought. Third, the letter was signed off by one Herman, who was also allegedly owed $2 million by Mr Aathar.[53] It is therefore peculiar that Herman would so readily agree to lend Mr Aathar a further $3 million, albeit via a corporate vehicle. Furthermore, this alleged $3 million loan has to be seen in light of Mr Aathar's total declared debt of more than $300 million,[54] and the fact that Mr Aathar has declared no other substantial

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51 Nominee's report at p 25; CIMB's Bundle of Documents at Tab D.

52 Nominee's report at p 18; CIMB's Bundle of Documents at Tab D.

53 Mr Aathar's affidavit dated 21 June 2017 at p 28; CIMB's Bundle of Documents at Tab E.

sources of funds. Creditors, including Herman, are likely to recover only 1% of their claims. It therefore made absolutely no sense for Herman to agree to the $3 million loan, and he did not file an affidavit to explain his reasons for doing so.

47 Mr Aathar's submissions did not assist his case. First, he argued that he would repay his sponsor from his "bonuses and profit sharing" if he were to succeed in his "posting", and that the loan was made "on the basis of [his] relationship with [his] sponsor".[55] These vague assertions do not address the underlying concerns highlighted. In fact, they raise even more queries as to the sources of his "bonuses" and "profit sharing", which were not specified in the affidavit. Second, Mr Aathar submitted that s 56 of the Bankruptcy Act provides for the steps to be taken if the offer fails.[56] Section 56 merely states that where a debtor fails to comply with any of his obligations under a voluntary arrangement, a bankruptcy application can be made against him. I fail to see how this provision could be useful to rebut the creditors' allegations in relation to the funding of the voluntary arrangement. Third, Mr Aathar highlighted that the creditors had failed to adduce evidence to show that PT Cahaya was not the source of the loan.[57] This submission is disingenuous. Mr Aathar arranged for the loan. It was a fact especially within his knowledge, and the burden of proving this fact fell squarely on his shoulders under s 108 of the Evidence Act (Cap 97, 1997 Rev Ed). The onus was on Mr Aathar to be completely honest and transparent in order to persuade his creditors to agree to the voluntary arrangement.

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54 Creditors' Meeting Report at p 67.

55 Mr Aathar's affidavit dated 8 January 2018 at paras 32–33; CIMB's Bundle of Documents at Tab B.

56 Mr Aathar's written submissions at para 69.

57 Mr Aathar's written submissions at para 70.

48 While no monetary value could be put on this irregularity, it was fundamental. It went to the credibility of the entire arrangement proposed by Mr Aathar. The fact that the source of funds was opaque, and the rescue fund was only a minute proportion of the total debt, created a severe risk of a nil return for creditors.

Other irregularities

49 The above was sufficient to grant the revocation of approval requested. I deal with two more objections below for completeness.

Dallacy International's claim

50 KGI submitted that there were irregularities in relation to the claim made by Dallacy. In particular, the nominee had stated at the meeting that Dallacy's vote would be subject to a discount. He was therefore incorrect to later admit this claim in full for the purpose of voting in his report.[58] The nominee conceded at hearing that some aspect was secured by shares and a discount would have been correct. Although he made the point that Dallacy's claim of approximately $4.2 million was only a small fraction of the total adjudicated liabilities of around $202.4 million and a discount would not have made a material difference to the outcome of the creditors' meetings,[59] this was a point of inconsistency which reinforced my concerns as to the nominee's degree of care in the adjudication of the various claims and subsequent preparation of the report.

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58 KGI's written submissions at paras 52–56.

59 NOA at p 2 lines 19-26.

The nominee's remuneration

51 A final complaint by the creditors pertained to the disclosure of information relating to the nominee's remuneration. Rules 68(2)(*g*) and (*h*) of the Bankruptcy Rules require that the amount proposed as and the manner of remuneration should be clearly stated within the proposal. In like vein with the rest of his proposal, Mr Aathar referred vaguely to charges for "work undertaken and time spent in reporting on this proposal and in supervising its implementation as required by s 55(1) of the [Bankruptcy Act]".[60] This fell rather short of the standard of proper disclosure required on the part of a debtor who seeks a voluntary arrangement with his creditors. The nominee subsequently clarified his rates. In view of my earlier findings, I did not have to consider whether the initial irregularity was material.

Conclusion

52 In my judgment, there were material irregularities in the conduct of the creditors' meeting, arising from the nominee's decisions and Mr Aathar's lack of disclosure. Section 54(1) (*b*) of the Bankruptcy Act was clearly satisfied. I accordingly set aside the approval for the voluntary arrangement at the hearing, and directed that no further creditors' meeting be held. I awarded costs of $12,000 each to CIMB and OUE, and $5,000 each to Citibank and KGI. The various sums included disbursements in each case.

53 On a wider note, an application for an interim order may only be filed by an "insolvent debtor" intending to propose a voluntary arrangement: see s 45(1) of the Bankruptcy Act. The object of a voluntary arrangement is to enable a debtor to stave off multiple lawsuits by offering creditors the assurance of

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60 Mr Aathar's affidavit dated 21 June 2017 at p 18; CIMB's Bundle of Documents at Tab E.

earlier satisfaction. Where a good arrangement is struck, all involved benefit as debts may be repaid to the satisfaction of a majority of creditors holding three-quarters of the value of the debtor's liabilities, obviating the longer process and higher costs of bankruptcy administration. Thus Prof S Jayakumar, Minister for Law, stated at the Second Reading of the Bill that the scheme "hopefully will encourage debtors to settle their debts early so as to avoid bankruptcy": *Singapore Parliamentary Debates, Official Report* (25 August 1994) vol 63 at col 401.

54 By filing an application under s 45(1) of the Bankruptcy Act, Mr Aathar, on his own admission, has been insolvent since 5 May 2016. Bankruptcy proceedings were first brought against him on 2 February 2016. More than two years on, he appears no closer to paying his debts; indeed, these debts appear to have grown. Mr Aathar's actions - and in this context, his second voluntary arrangement proposal - sit ill with the rationale and premise of voluntary arrangements.

Valerie Thean
Judge

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Phyllis Lim Sock Ngee (Fabian & Khoo) for
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Lim Ke Xiu (Eversheds Harry Elias LLP) for KGI Securities
(Singapore) Pte Ltd in HC/SUM 5367/2017;
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