

Re Lim Wee Beng Eddie
[2001] SGHC 103

Case Number : OS No 110 of 2000
Decision Date : 23 May 2001
Tribunal/Court : High Court
Coram : Tay Yong Kwang JC
Counsel Name(s) : Robert Yoong (Yoong & Co) for the applicant; Ng Hwee Chong (Rodyk & Davidson), holding a watching brief for Courts Bank (Schweiz) AG
Parties : —

JUDGMENT:

Grounds of Decision

1 This appeal concerns the discharge by the Deputy Registrar of the Supreme Court of an interim order made on 2 October 2000 pursuant to an application filed on 18 September 2000 under Section 45 of the Bankruptcy Act for the following orders:

"1. That Ho Wah Onn, an Advocate & Solicitor be hereby appointed as the Nominee pursuant to Section 45 of the Bankruptcy Act ("the Nominee");

2. That the Nominee within 28 days from the date of the Interim Order to be made hereon submit a report pursuant to Section 49 of the Bankruptcy Act to this Honourable Court stating:-

(a) whether in his opinion, a meeting of the debtors creditors should be summoned to consider the debtors proposal and

(b) if in his opinion such a meeting should be summoned, the date on which and the time and place at which, he proposes the meeting should be held.

(c) That the Applicant within 7 days from the date of the Interim Order to be made hereon submit to the nominee a Statement of Affairs in compliance with Section 49(2)(b) of the Bankruptcy Act;

3. That pending the hearing of the Debtors Application herein, all action/s, execution/s or other legal process against the Applicant or the property of the Applicant be stayed and that no Bankruptcy Petition may be presented or proceeded with against the Applicant or against his property and that no proceedings, execution or other legal process be commenced or continued with against the person or property of the Applicant without the leave of this Honourable Court;

4. Such further or other Order or Orders be made as may be just and equitable in the circumstances and

5. That the costs of and incidentals of this Application be borne by the Applicant."

2 Section 45, which is within Part V of the Bankruptcy Act which relates to Voluntary Arrangements, reads:

"45. (1) Subject to subsection (2), any insolvent debtor who intends to make a proposal to his creditors for a composition in satisfaction of his debts or a scheme of arrangement of his affairs (referred to hereinafter as a voluntary arrangement) may apply to the court for an interim order under this Part.

(2) No partner in an insolvent firm shall apply to the court for an interim order in respect of the firm unless all or a majority of the partners in the firm join or intend to join in the making of the proposal for a voluntary arrangement.

(3) An interim order shall have the effect that, during the period for which it is in force

(a) where the interim order is in respect of an individual debtor

(i) no bankruptcy petition may be presented or proceeded with against the debtor; and

(ii) no other proceedings, execution or other legal process may be commenced or continued against the person or property of the debtor without the leave of the court; and

(b) where the interim order is in respect of a firm

(i) no bankruptcy petition may be presented or proceeded with against the firm or, except with the leave of the court, any partner therein; and

(ii) no other proceedings, execution or other legal process may be commenced or continued against the firm or its property or against the person or property of any partner in the firm, without the leave of the court.

(4) An interim order shall cease to have effect 42 days after the making thereof unless the court otherwise directs."

THE APPLICANTS AFFIDAVIT FILED ON 18 SEPTEMBER 2000

3 In the Applicants affidavit filed on 18 September 2000, he listed five reasons for this application:

(1) the primary reason was to get some form of final settlement to his financial

problems which were taking a toll on his mind, his health and his career;

(2) while he was presently unable to repay all his creditors in full, he believed that he would be able to repay a substantial amount with an initial lump sum payment of \$4.4 million within six months of his proposal being accepted;

(3) if the creditors commenced legal proceedings against him, the costs (which would mostly be on an indemnity basis) would add to his financial misery without helping the creditors in any way;

(4) the general scheme of his proposal was to pay an initial lump sum payment of \$4.4 million within the first six months and to repay at least 50% of his debts over 27 months, with a high probability of full repayment; and

(5) rendering him a bankrupt would not help the creditors in recovering the money owed to them.

4 Various legal proceedings have been commenced against him and one creditor (Courtts Bank) presented a Bankruptcy Petition against him in February 2000 and which was to be heard on 22 September 2000.

5 The Applicant wished to have Mr Ho Wah Onn, a practising Advocate & Solicitor, to be his nominee and trustee for the purposes of this application and to carry into effect the scheme proposed. Mr Ho has been the solicitor for the Applicant and his companies on previous occasions. On 12 September 2000, the Applicant gave written notice of his proposal to Mr Ho which contained a summary of the scheme of voluntary arrangements.

6 The Applicant then set out his personal history. He is 43 years of age, married and has a daughter aged eight and a son aged six. He is a director of Mapor Island Resort Pte Ltd which was set up to market and to manage a resort development project in Bintan, Indonesia.

7 He completed his A level examinations in Singapore in 1978 as a private student while serving National Service. He then worked as flight steward until October 1980 when he became a property agent. He was very successful as a property agent until the 1983 recession. He then decided to enrol as a student in the Faculty of Arts and Social Sciences, National University of Singapore.

8 To support himself through university, the Applicant continued to deal in property and bought into a hairdressing business. He also traded in seafood on a fairly large scale. All this were too much a strain on him and he had to apply for a years leave from his studies.

9 By 1988, his mainstay business was trading in properties. He also ventured with MBf Holdings Bhd into the food business and set up a company. He has since sold all his shares in that company to the other shareholders.

10 In July 1990, he married and then incorporated his family investment company, Elle Holdings Pte Ltd. Elle performed very well from 1990 to 1995 and even made an extraordinary gain of some \$9 million in 1995 from the sale of its investment properties.

11 In 1994, the Applicant ventured into the forestry business and incorporated SINO P.N.G Resources Pte Ltd. He still owns about 35% of the equity of SINO which has a paid up capital of nearly \$6 million.

12 Elle has a convertible loan of about \$2.5 million due from SINO which, when converted into equity, would cause Elle and the Applicant to own a combined and controlling stake of 57% of SINO.

13 In August 1996, the forest assets of SINO (three large concessions in the Republic of Congo) were valued at US\$52 million. In

his proposed scheme of voluntary arrangements, it was stated that these concessions were held through SINO's fully owned subsidiary which owned 80% of them. In 1995, Idris Hydraulics Bhd, a public company listed on the main board of the Kuala Lumpur Stock Exchange, made an offer to purchase 50% of the equity of SINO for US\$40 million. That offer was rejected by the shareholders as the company was then valued at US\$120 million by Rothschild Ventures Asia. In the said proposed scheme of voluntary arrangements, the Applicant stated that the Asian financial crisis had caused SINO to suspend its operations since mid-1997.

14 In 1995, Elle re-entered the property market and purchased 26/A/B/C/D Ewart Park, Singapore for about \$11 million. After spending another \$600,000 on renovations, these properties generated about \$300,000 of annual rental income between 1996 to the middle of 1998.

15 In March 1996, Elle purchased 733 Mountbatten Road, Singapore. The property was refinanced in July 1997 by Coutts Bank (Schweiz) AG, with a total drawdown of \$7.75 million. Elle also borrowed US\$9 million from the Industrial and Commercial Bank of China ("ICBC") to finance the forestry business and to renovate the Ewart Park properties.

16 The Applicants' liabilities arose as a result of his personal guarantees given to various banks for loans granted to Elle. Except for Coutts Bank, none of the other banks had issued any demand for repayment and the Applicant was working cordially with them to resolve his financial matters. The loan from Coutts Bank was used to repay the previous mortgagee bank \$5.8 million, to repay ICBC \$200,000, to repay a loan of \$1 million to Galleries Development Pte Ltd, to extend a friendly loan of \$500,000 to the Grandlink Group Pte Ltd and to set aside \$200,000 to service the loan. The outstanding debt due to Coutts Bank is \$1.45 million.

17 Elle has sued Grandlink for \$450,000 and obtained judgment against Grandlink and its guarantor, Ricky Goh. Ricky Goh's bankruptcy, execution of that judgment was delayed until late June 2000 when the bankruptcy order against Ricky Goh was rescinded.

18 On 18 August 2000, Elle was ordered to be wound up on the petition of Coutts Bank. Elle was appealing against that order and would proceed to reinstate its claim against Coutts Bank for fraud and would seek substantial damages arising from the bank's action.

19 The proposed scheme of voluntary arrangement was necessitated by Coutts Bank's relentless pursuit to bankrupt the Applicant and put an end to any further claims against the bank. Coutts Bank was still holding a parcel of land of about 330,000 square feet in the prime Tanjung Langsat Industrial Estate in Johor worth RM 2 million as security. When subdivision of that piece of land was approved, its value could be easily enhanced to at least RM 8 million. As Coutts Bank could afford to sit and wait for the value of the land to rise over time, it had little to lose in making the Applicant bankrupt to the disadvantage of his other creditors. Coutts Bank would do everything to prevent him from succeeding in the proposed scheme. As the matter was being investigated by the police, the Applicant was unable to disclose further information on it. The Applicant enclosed a letter dated 12 June 2000 from the AG's Chambers informing him that his letter dated 2 June 2000 had been forwarded to the police for investigations. The subject heading of that letter was "Report against false Affidavit used in Court proceedings".

20 The Applicants proposed scheme of voluntary arrangements listed the following as his assets:

- (1) a three-room HDB flat in Holland Close;
- (2) 1.3 million ordinary shares in Elle, said to be worth about \$21.5 million;
- (3) 2.15 million ordinary shares in SINO, said to be worth about \$18.4 million;
- (4) 150,000 ordinary shares of Mapor Island Resort Pte Ltd;
- (5) 330,000 square feet of land in Tanjung Langsat, Johor, worth RM 2 million;
- (6) Villa Puteri condominium worth RM 300,000, pledged to RHB Finance Bhd for

about RM 300,000.

21 His liabilities to creditors amounted to some S\$28 million and RM 300,000. In addition, he owed his family and friends S\$290,000.

22 The proposed scheme of voluntary arrangements dated 12 September 2000, after describing Elle and SINO, continued as follows:

"MAPOR ISLAND RESORT PTE LTD ("MAPOR")

This name of this company was changed in 1994 to reflect the change in the principal activities of the company. The company has been awarded a project management and marketing contract to manage and market a large scale resort development project in Bintan, Indonesia. The principal terms of the contract are as follow:

1. Mapor will procure a project loan of not less than US\$20 million. For her role, Mapor will be paid a fee of 20% of the loan procured subject to a maximum fee of US\$8 million. The loan must be procured within a 12 month period.
2. Mapor will also manage the project. For her role, Mapor will be paid a fee equivalent to 2% of the project cost. At a projected cost of approximately S\$150 million, Mapor will earn a gross fee of approximately S\$3 million. The net fee is expected to be about S\$1.2 million. This fee is expected to be paid over a 36 month period.
3. Mapor will market the entire project and is expected to earn approximately S\$8 million in gross fees. The net fee receivable is expected to be about S\$4 million. The marketing of the project is scheduled to commence by the first quarter of Year 2001.

In total, Mapor will earn a net income of approximately US\$4 million (S\$6.8 million) within 12 months and another S\$5.2 million over another 36 months. This translates to an income of about S\$450,000-00 every quarter.

THE REPAYMENT PROPOSAL

It is anticipated that apart from the proposed sale of the forest concession by a restructured Elle, the bulk of the income will be derived from Mapor, which anticipate a total fee of almost S\$12 million within 36 months.

Setting aside a budgeted sum of S\$20,000-00 per month for business expenses, this will take up S\$72,000-00 over a 36 month period. Personal expenses of S\$5,000-00 or S\$180,000-00 over 36 months will also be provided.

This will leave not more than S\$11.1 million for distribution to the

creditors. A provision of 20% of the anticipated income or about S\$2.2 million should be made, leaving a net sum of S\$8.9 million for final distribution to creditors.

This final sum of S\$8.9 million does not include the following:

1. Additional fee income to be earned from the procurement of a loan exceeding US\$20 million.
2. Additional fee income to be earned from a higher sale value of the project.
3. Repayment of monies due from Grandlink Group Pte Ltd or its guarantor.
4. Sale of all or part of the Congo forest concession.
5. Rental income from the lease of the properties estimated at S\$360,000-00 per annum.

SCHEDULE OF PAYMENT

The following schedule of repayment is proposed:

1. All creditors listed in Annexure B owed less than S\$50,000-00 to be fully repaid within 6 months from the date of acceptance of the scheme of voluntary arrangement by the creditors.
2. All creditors listed in Annexure B owed more than S\$50,000-00 with the exception of the creditors listed under (10) to be repaid 50% of all monies due to them. For the purpose of determining monies owing, the **outstanding debt** shall be the gross amount owing as at 31 August 2000 less the market value of any security pledged to the creditors.
3. Further to Paragraph 2 above, a sum of not less than 25% of the outstanding will be paid to the creditor within 6 months, failing which an extension of 3 months to fulfill the initial lump sum payment is required. ("the initial payment")
4. A further lump sum payment of another 10% of the outstanding debt to be made within 6 months from the last payment date. ("the second payment")
5. A further lump sum payment of another 10% of the outstanding debt to be made within 6 months of the second payment. ("the third payment")

6. A final lump sum payment of 5% of the outstanding debt to be made within 6 months of the third payment.

7. All interest shall cease to be payable from 1 September 2000.

8. Elle be granted the rights to market the properties held by the creditors directly or otherwise to ensure a transparent and orderly disposal of the assets.

9. Secured creditors to maintain the properties for as long as they remain in the possession of the creditors.

10. In the event of any additional income derived under Clauses 1 to 4 of the Repayment Proposal, the proceeds will be divided as follow:

(a) 80% of the net proceeds to be paid to all secured creditors in proportion to their share of the outstanding debt up to the full outstanding as at 1 September 2000.

(b) 20% of the net proceeds to be paid to all unsecured creditors in proportion to their share of the outstanding debt up to the full amount outstanding as at 1 September 2000.

WHY THIS SCHEME WILL SUCCEED

The opportunity for Mapor to raise money using the assets of a third party gives the scheme a greater probability of success. The minimum amount of money to be raised does not exceed 20% of the current valuation of the property to be pledged for the loan. That same loan is also utilized to start the project. This will lead to the management and marketing contract to crystallize.

There is sufficient assets in Sino, if properly managed or disposed off, to repay a substantial portion of the outstanding loan.

The property market is in consolidation and improving at a very stable and steady rate. The approval of a sub-division of the land in Johor held by Coutts will realize at least RM 4 million. Leasehold land sold by the Johor Corporation in the same location is being sold for approximately RM 25 per square foot. The land in question is freehold in tenure and will support a minimum value of RM 8.25 million.

The local and regional economies are growing very rapidly after recovering from the Asian financial crisis in 1999.

A large portion of the outstanding loan was caused by foreign exchange loss and interest and further penalty interest accrued over the last 30 months.

In supporting the scheme, creditors stand to be repaid at least 50% of the outstanding debt and a high probability of being repaid in full.

The past 30 months were very unproductive with too much time spent in litigation and defending various legal actions brought about by both creditors and debtors alike. If the scheme is approved, I will be focused on raising money and looking for opportunities to fulfill my legal responsibilities."

THE INTERIM ORDER DATED 2 OCTOBER 2000

23 On 2 October 2000, the Deputy Registrar of the Supreme Court granted an order in terms of prayers (1) and (2) of the application and made no order on prayer (3). He granted an interim order up to 30 October 2000. The solicitor for Coutts Bank who attended that hearing reported to the Court that the writ action for fraud against the bank was dismissed.

ROBERT YOONGS AFFIDAVIT FILED ON 28 OCTOBER 2000

24 The solicitor for the Applicant, Mr Robert Yoong, filed an affidavit on behalf of the Nominee, Mr Ho Wah Onn, as the latter was away on a business trip. He reported that the Applicant and the Nominee had met several times since the making of the interim order and that the Nominee found the proposed scheme viable and had given instructions that a copy thereof be sent to all creditors and that a meeting of the creditors be held on 15 November 2000. On 24 October 2000, a copy of the proposed scheme and a notice of meeting were sent to the creditors.

THE ORDER OF COURT DATED 30 OCTOBER 2000

25 The Deputy Registrar extended the interim order to 6 November 2000 for the Nominee to file his report.

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THE NOMINEES AFFIDAVIT FILED 4 NOVEMBER 2000

26 The Nominee reported that he was satisfied that the proposed scheme merited consideration subject to verification of the various assumptions that the Applicant had stated. He also suggested that the Creditors nominate one or two members from amongst themselves to consider the proposed scheme and to make recommendations. He also asked that the interim order be extended for another 28 days.

THE ORDERS OF COURT DATED 6 NOVEMBER 2000 AND 20 NOVEMBER 2000

27 The Deputy Registrar extended the interim order by another two weeks to 20 November 2000.

28 On 20 November 2000, the Applicants solicitor applied for a weeks adjournment to file the Nominees report on the meeting held on 15 November 2000. The Deputy Registrar extended the interim order by another week to 27 November 2000.

THE NOMINEES AFFIDAVIT FILED 28 NOVEMBER 2000

29 A copy of this affidavit was used at the hearing on 27 November 2000. The Nominee reported that at the meeting held on 15 November 2000, he raised the issue of a potential conflict of interests as his law firm had acted for the Applicant in a number of matters. He had also informed the creditors that he would file an affidavit setting out such matters and would not act as Nominee should the creditors or he (the Nominee) take the view there might be a potential conflict of interests.

30 The Nominee then went on to say that he was of the view that such a conflict could arise but, in order to facilitate the proceedings, it was decided at the meeting that the documents relating to Elle, SINO and Mapor requested by the creditors would be produced by the Applicant by 27 November 2000 for their perusal before they consider the proposed scheme.

THE ORDER OF COURT DATED 27 NOVEMBER 2000

31 The Deputy Registrar discharged the Nominee and extended the interim order to 4 December 2000 for another Nominee to be appointed.

THE APPLICANTS AFFIDAVIT FILED 2 DECEMBER 2000

32 The Applicant stated that it would be very difficult for him to appoint another Nominee within a week as it took him more than eight weeks to appoint Mr Ho Wah Onn. He had earlier sought the assistance of an accountant whom he had known for more than ten years but who asked him "to place some money into account for the work needed to be done" and he was unable to comply with that request. Mr Ho Wah Onn later agreed to act as Nominee without any fee or charge after studying the proposed scheme for more than two weeks.

33 Only two creditors solicitors had felt uncomfortable with Mr Ho acting as Nominee and they had agreed to seek their clients instructions to retain Mr Ho as Nominee but had not reverted to the Applicant. As Mr Hos expertise was in financial restructuring and as it would be an uphill task for the Applicant to convince a suitable person to be Nominee without some form of assured payment, the Applicant pleaded that Mr Ho be retained as Nominee.

34 Alternatively, he asked for four weeks to search for a substitute and "to search for some funds from family and friends to pay for these services". He would furnish the documents requested by the creditors through his solicitors.

THE ORDERS OF COURT DATED 4 DECEMBER 2000 AND 8 JANUARY 2001

35 On 4 December 2000, the Court granted the Applicants solicitors request for more time and extended the interim order to 8 January 2000.

36 On 8 January 2001, the Applicants solicitor requested another four weeks and if the matter could not be resolved by then, he would leave it to the Court to deal with the matter as it deemed fit, including the possibility of discharging the interim order. The request was again granted and the interim order was extended by another four weeks to 5 February 2001.

THE APPLICANTS AFFIDAVIT FILED ON 3 FEBRUARY 2001

37 Two days before the adjourned hearing, the Applicant filed an affidavit stating that Ms Winifred Gomez, an Advocate and Solicitor, had consented to act as Nominee and that she had undertaken to file an affidavit affirming her consent within two weeks as she was then attending to her mother who had suffered a stroke on 28 January 2001.

THE ORDER OF COURT DATED 5 FEBRUARY 2001

38 At the hearing on 5 February 2001, the solicitor holding a watching brief for Coutts Bank attended and informed the Court that the bank was of the view that the interim order should be discharged as it was more than three months since the order was made on 2 October 2000 (indeed it was more than four months).

39 The Deputy Registrar agreed and discharged the interim order as he felt that the matter had been "outstanding without any positive result for a long time". The Applicant appealed against this decision.

THE APPEAL

40 One day before the hearing of the appeal, the Applicant filed an affidavit stating that Ms Winifred Gomez had agreed to act as Nominee on or about 15 January 2001 and he had intended to ask her to file an affidavit a week before the expiry of the interim order on 5 February 2001. Unfortunately, Ms Winifred Gomez's mother became seriously ill from 29 January 2001 and Ms Gomez was therefore unavailable for the entire week to attend to this matter.

41 He also informed the Court that Coutts Bank had written to the Court to restore its bankruptcy petition against the Applicant and that the hearing was scheduled for 23 February 2001. He then repeated his allegations as to why Coutts Bank was bent on making him a bankrupt despite being a creditor for only 5% of his total debts while ICBC, which was a creditor for about 85% of his total debts, was willing to explore the proposed scheme.

42 Since November 2000, he had prepared the documents requested by the creditors. He stated that the Loan Compensation Agreement and the Project Management and Marketing Agreement in respect of Mapor Island Resort Pte Ltd "were obtained at great cost to me and only concluded after several months of negotiation with the other party".

43 The Applicant also exhibited a list of prices of land published by the Johor State Economic Development Corporation which showed that 60-year leasehold land in the Tanjung Langsat Industrial Estate was offered at between RM 15 to 17 per square foot. His enquiries revealed that 99-year leasehold land was being offered at RM 27 to 30 per square foot. His freehold land in that industrial estate would be worth RM 8.9 million at RM 27 per square foot.

44 Further, he had applied to the Johor Land Office for the full conversion and subdivision of the said land and out of a total of ten departments reporting to the Johor Land Office regarding his application, only two had not replied. His consultants had advised him that the entire process would not take more than six months. Once approved, the land could be readily sold or refinanced for more than the S\$1.45 million owing to Coutts Bank.

45 He had spoken to the Official Receivers office on 14 February 2001 and that office indicated its support and consent to pursue his claim against its judgment debtors. He wished to make it known to his creditors that there were enough assets and sources of income to repay them if the proposed scheme was properly executed.

46 He asked that the interim order be restored and that Thomas Tham Kok Leong, an Advocate and Solicitor, be appointed Nominee. Mr Thomas Tham's consent to so act was enclosed.

47 At the hearing of the appeal on 21 February 2001, the solicitor for Coutts Bank held a watching brief but was given permission to take part in the proceedings. I was informed by the Applicants solicitor that the Applicant was not able to pay the \$10,000 or so requested by people he had approached to be his Nominee. However, by virtue of the Mapor agreement in which he was the broker, he would get 20% of whatever amount was successfully negotiated and the loan he was brokering was US\$50 million. I was also informed that "the police case against Coutts Bank is still outstanding".

48 I was not persuaded that anything useful would come out of the extension of the interim order and therefore dismissed the appeal against the Deputy Registrars discharge of the interim order.

49 I agreed to hear further arguments upon the written request of the Applicants solicitor.

50 On 29 March 2001, the same parties attended before me to present further arguments. As "the bulk of the income will be derived from Mapor" apart from the proposed sale of the forest concessions, (see the proposed scheme) and since the Mapor Commercial Loan Fee/Compensation Agreement signed on 11 October 2000 was to expire after 180 days (i.e. on 10 April 2001), I decided to see what the Applicant could come up with in respect of this agreement and adjourned the hearing to 12 April 2001.

51 On 11 April 2001, the Applicant filed another affidavit to inform the Court of the status of the various aspects of his proposed scheme, highlighting "the key issues in evaluating the feasibility of the scheme". The affidavit stated:

"MAPUR ISLAND RESORT PROJECT

4. The viability for the entire project depends entirely on the ability of the developer and/or the project manager to raise the necessary project financing. This task as elaborated in my scheme filed on 18 September 2001 (sic) has been assigned to Mapor Island Resort Pte Ltd, a company beneficially owned by me.

5. As at 28 October 2000, a Term Sheet outlining a funding proposal was received by Atlas Group Holdings Limited ("Atlas"), a company owned by one Chay Kok Kee, an ex-banker with Overseas Union Bank Limited acting on behalf of Mapor Island Resort Pte Ltd.

6. The funding proposal anticipated a maximum loan of USD\$85 million with a lump sum drawdown of not less than USD\$74 million at closing. Given the difficulties in obtaining credit for Indonesian based projects, I decided that despite the very high cost involved in the loan proposal, it was a proposal that was worth some consideration.

7. The loan was structured as a 5 year non recourse term loan with an annual interest rate of 275 basis points above the average 10 year U.S Treasury rate. This worked to an interest rate of nearly 8.5% per annum. A copy of the Term Sheet is now annexed and exhibited as "ELWB-1".

8. Above the payment of interest, there were an assortment of other one time fees amounting to about 17% of the loan amount. There is also a requirement for the lender to participate in the business of the borrower. Of the 17% fee requested, 6% will be utilised for the payment of credit enhancement of the loan.

9. The proposed loan is essentially monies raised from the sale of bonds guaranteed by an AAA rated financial institution. The syndicate arranging and underwriting the loan comprises the following companies:

- a. The Allianz Group Ag acting as Guarantor whose sole responsibility is the enhancement of the credit rating of the financial papers issued by the Syndicate for a fixed fee
- b. Seattle Northwest Securities Corporation acting as the Investment bank, transfer and placement agent.
- c. MKD Capital Corporation acting as the Syndicator and Correspondent. MKD Capital Corp will also participate as a direct lender in a portion of the loan. Information of these companies are annexed and now exhibited as "ELWB-2".

10. There were various communication between the loan broker and Atlas lasting right up to late January 2001 but the parties could not come to any concrete agreement as the land owner of the Mapur project is still unable at this point in time to accept the level of participation required by the lenders. The lenders have proposed a total equity participation of 30% of the entire project, a percentage that the land owners felt was too high. The lenders have also indicated the willingness to negotiate further.

11. The loan broker wrote to Atlas on 22 March 2001 to enquire whether we are still interested in pursuing the Mapur project financing loan. A copy of their email is now annexed and exhibited as "ELWB-3". We have yet to reply to them as I am still negotiating with and convincing the land owners to come to terms. As the land value was about S\$192 million as at 28 June 2000, the cost of the 30% equity participation amounted to about S\$13 million after deducting the loan to be disbursed. A copy of the valuation of the Mapur land as at 30 June 2000 is annexed and exhibited as "ELWB-4".

12. It is my belief that with an improvement in the political and economic climate of Indonesia, it will become less difficult and cheaper to raise money for projects there, even as Indonesian banks financial instruments become more acceptable to other interested lenders.

13. I have in the meanwhile written to the owners of the Mapur project seeking an extension of the Loan Fee/Compensation Agreement dated 12 October 2000 for a further period of 180 days from the current expiry date of 12 April 2001. The owners have agreed to the extension and I had on 2 April 2001 despatched the necessary documents for their execution. I understand that they have returned the documents duly executed on 6 April 2001 to the mailing address given to them. A copy of my letter seeking the said extension and my receipt of the despatch is now annexed and exhibited as "ELWB-5".

FOREST ASSETS OWNED BY SINO-PNG RESOURCES PTE LTD

14. Following the improvement of timber prices worldwide and the ban on logging of forest in China, I have received several enquiries from forestry companies in Malaysia and China in respect of possible joint ventures in the exploitation of the forest assets in the Congo. I have, in particular, renewed communications with a

major forestry company in America to discuss a previously aborted asset swap to jumpstart the logging operations in Congo. A copy of this communication is now annexed and exhibited as "ELWB-6".

15. The forest assets in Congo remains intact even though logging operations have ceased since late 1996. I intend to renew my effort in pursuing the injection of these assets into any sound company listed in any of the stock exchanges in the region.

LAND IN TANJUNG LANGSAT, JOHOR

16. I had on 29 March 2001 obtained a valuation report from Raine & Horne International Zaki + Partners advising that the open market value of the properties was RM20-00 per sq ft. Given a total land area of approximately 330,000 sq ft, the gross value of the land is approximately RM6.6 million. A copy of the valuation is now annexed and exhibited as "ELWB-7".

26A, B, C & D EWART PARK SINGAPORE

17. The properties were last valued by the mortgagees valuer, Henry Butcher Appraisal Group Pte Ltd on 19 February 2001 at S\$10 million. This valuation may now be inaccurate in view of the recent changes pertaining to the sub-division of land in that area. I now annex and exhibit as "ELWB-8" a Business Times article dated 31 March 2001 in which it was reported that a smaller plot of land in the same location was allowed to be sub-divided into 3 smaller plots. The plots have been put on sale with an expected price of S\$11 million to S\$11.7 million. I intend to apply for the same sub-division from the proper authorities as soon as possible.

18. In view of the information shared, the progress and the recent development surrounding the viability of the Scheme, I urge the Court to assist me in putting the Scheme into effect on a continual basis without disruption of any nature. I can achieve much more if I am left to focus on the matters at hand, instead of wrangling with one or two creditors in and out of Court. Should I be made a bankrupt, my Scheme will fall apart as all these projects requires my personal involvement and efforts. I have to date proven that given the opportunity, I am capable of implementing the Scheme with the desired results. The interest and rights of my creditors have not been compromised at any time and indeed, the value of the securities that they hold have already been enhanced."

THE DECISION OF THE COURT

52 The Law and Practice of Bankruptcy in Singapore and Malaysia (1999) states (at page 22):

"Broadly, a voluntary arrangement is a statutory regime that facilitates and

enables an insolvent debtor to enter into a binding arrangement with his creditors in respect of payment of the debtors debt. The regime was introduced in 1995 as part of Singapore law by the Act, and the governing positions can principally be found in Part V of the Act.

The local regime is based mainly on the provisions contained in sections 252-263 of the UK Insolvency Act 1986, the provisions of which, in turn, were first introduced in the UK in 1985. In the circumstances, the English cases on the construction of the relevant provisions of the UK Insolvency Act 1986 are helpful and persuasive."

53 Sections 46 and 48 of our Bankruptcy Act read:

"46. (1) Every debtor making a proposal for the purpose of this Part shall in such proposal appoint a nominee to act in relation to the voluntary arrangement either as trustee or otherwise for the purpose of supervising its implementation.

(2) No person shall be appointed as a nominee unless he is

(a) registered as a public accountant under the Accountants Act (Cap. 2A);

(b) an advocate and solicitor; or

(c) such other person as the Minister may, by order published in the *Gazette*, prescribe.

(3) The Minister may make rules prescribing the scale of fees to be charged by nominees assisting debtors in respect of voluntary arrangements.

48. (1) The court shall not make an interim order on an application under section 45 unless it is satisfied that

(a) the debtor intends to make a proposal for a voluntary arrangement;

(b) no previous application for an interim order has been made by or in respect of the debtor during the period of 12 months immediately preceding the date of the application; and

(c) the nominee appointed by the debtors proposal is qualified and willing to act in relation to the proposal.

(2) The court may make an interim order if it thinks that it would be appropriate to do so for the purpose of facilitating the consideration and implementation of the debtors proposal."

54 Rule 71 (1) of the Bankruptcy Rules provides:

"71. (1) An application to the court for an interim order under Part V of the Act shall be by way of originating summons entitled "*In the Matter of Part V of the Bankruptcy Act (Cap. 20)*" and shall be accompanied by an affidavit stating

- (a) the reasons for the making of the application;
- (b) particulars of any execution or other legal process which, to the debtors knowledge, has been commenced against him;
- (c) that the debtor is able to petition for his own bankruptcy;
- (d) that no previous application for an interim order has been made by or in respect of the debtor in the period of 12 months ending with the date of the affidavit; and
- (e) the name of the person to be appointed as the nominee under the proposal and that he is a person who is qualified and willing to act as a nominee in relation to the proposal."

55 It can be seen from the above statutory provisions that the nominee appointed must be "qualified and willing to act". It is incumbent on the Applicant to procure such a Nominee. Willingness to act must of course be coupled with the ability to do so. Nothing useful will be accomplished by appointing a Nominee who is willing to act but will only be able to do so say two months later for whatever reasons. It is just too bad if the Applicant is not able to have a Nominee because no one wants to be one. It is certainly not his creditors fault.

56 Secondly, the Court will make, and consequently should extend, an interim order if it would be appropriate to do so for the purpose of facilitating the consideration and implementation of the Applicants proposal. *Muir Hunter on Personal Insolvency* (1987), commenting on the English equivalent of our Section 48, states (at pages 3018 and 3019):

"The court must be satisfied of the seriousness and bona fides of the application, because of the far-reaching effect which its consequent order under section 254 may have, in staying proceedings by the debtors creditors.

The terms "appropriate" and "inappropriate" occur several times in this Part, and also in Part IX, *post*. Little guidance is given as to the criteria of appropriateness which are to be applicable to the context. It may imply here that the proposal is more complicated than can be digested at the first hearing of the application, or that its terms are necessarily incomplete, and that time is needed to perfect them.

In determining the "appropriateness" or otherwise of making an interim order, the court will consider whether the debtors proposal for voluntary arrangement to be put to his creditors is serious and viable. "If, in a particular case, the judge before whom the application for an interim order comes concludes that the proposal is not one which can be described as serious and viable, it would be expected that as a matter of discretion the judge would refuse to make an

interim order. Judges must, I think, be careful not to allow applications for interim orders simply to become a means of postponing the making of bankruptcy orders, in circumstances where there is no apparent likelihood of benefit to the creditors from such a postponement": see *Hook v. Jewson Ltd* [1997] 1 B.C.L.C. 664, Scott, V.-C, following *Re A Debtor (Cooper v. Fearnley) (1 of 1994)* [1997] B.P.I.R. 20, Aldous J.

Thus, in *Hook v. Jewson* itself, the Vice-Chancellor upheld the district judges refusal to make an interim order to enable a proposal to be put to a meeting under section 257, which failed adequately to comply with the requirements of Rule 5.3, and which seemed unlikely (if approved) to generate any return for unsecured creditors.

It is however not a good ground for refusing to make an interim order that the return to creditors will be small (though not derisory); it is for the creditors themselves to decide on its adequacy: see *Knowles v. Coutts & Co.* [1998] B.P.I.R. 96."

57 It was surprising that the Applicant, at the meeting with the creditors on 15 November 2000, did not have the necessary documents available to back up his assertions in the proposed scheme. This fact alone would cast doubt on the Applicants sincerity in his proposal.

58 When documents were exhibited in his subsequent affidavits, they appeared on the face to be unsigned or spent documents. For instance, the "Loan Proposal/Term Sheet" referred to in his last affidavit was unsigned, dated 27 October 2000 and was stated explicitly to expire on 1 November 2000. It should also be noted that this document was not alluded to nor produced until the eleventh hour. Further, third parties were introduced for the first time without any concrete evidence of their involvement or participation in the purported elaborate financial arrangement.

59 The "Commercial Loan Fee/Compensation Agreement" exhibited in the Applicants affidavit filed on 20 February 2001 was apparently signed on 11 October 2000. On the face of that document, it expired after 180 days (or by 10 April 2001). At page 4 of the document, the "Broker understands and appreciates that time is of the essence to the Borrower". All we have on record was another bare assertion by the Applicant that the other party to the agreement had agreed to extend the agreement by another 180 days and had signified such consent on 6 April 2001 by endorsing on the Applicants letter dated 30 March 2001. If that was true, surely the one-page signed document could have been easily faxed over or even sent by courier from Riau, Indonesia to Singapore.

60 Even if there was such an extension, the agreement was with Mapor Island Resort Pte Ltd in which the Applicant was Managing Director. If his involvement was so crucial and would be likely to produce results, he could easily seek the Official Assignees permission (assuming he was made a bankrupt) to carry on with his work in that respect. However, I was informed by the Applicants solicitor at the final hearing that a third party (the Atlas Group) was negotiating on the Applicants behalf "because the Applicant on his own does not carry any weight".

61 In any event, the proposed resort project, which the developers intended to commence in the second quarter of 2001 (see "Letter of Appointment" dated 15 December 2000 in the Applicants affidavit filed on 20 February 2001), did not even appear to be at the starting line. This Letter of Appointment, which the Applicant described as a Project Management and Marketing Agreement in his affidavit, stated that it was "subject to final agreement to be executed between us" and even the terms of payment for the Applicants companys services "shall be negotiated at the agreement stage".

62 The documents in respect of the purported forestry concessions were old ones going back to 1998, 1996 and 1995. Again, the Applicant has shown no concrete evidence that he had a serious and viable venture in respect of these purported concessions.

63 Similarly, for the property in Tanjung Langsat Industrial Estate, Johor, the application to subdivide was taken out as long ago as January 1997, more than four years back. No active step appeared to have been seriously taken over the past several years. Even if the subdivision would enhance the value of the land, there was no reason why the Official Assignee (again assuming the Applicant was made a bankrupt) could not carry on the process.

64 The Ewart Park properties were owned by Elle and that company has been wound up. These properties were mortgaged to ICBC to which the Applicant owed some \$23 million. It was not clear why the Applicant was including these properties in his affidavit in this application for an interim order.

65 Looking at the proposed scheme in the light of all that has transpired, I was of the view that it would not be appropriate to continue the interim order. The proposed scheme appeared to be nothing more than the Applicants earnest hopes that somehow, someday, something would happen to relieve him of his financial woes. I was not persuaded that it was a serious and viable one meriting the further extension of the interim order. I therefore affirmed the Deputy Registrars decision discharging that order.

Tay Yong Kwang

Judicial Commissioner

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