Deutsche Bank AG and Another v Asia Pulp & Paper Company Ltd
[2002] SGHC 257

Case Number : OP 2/2002/D

Decision Date : 31 October 2002

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Alvin Yeo SC, Nishith K Shetty & N Ponniya (Wong Partnership) for the petitioners; Davinder Singh SC, Sushil Nair, Julian Kwek, Blossom Hing, Raymond Lam & Tan Boon Khai (Drew & Napier LLC) for the respondents

Parties : Deutsche Bank AG; BNP Paribas (formerly known as Banque Nationale De Paris) — Asia Pulp & Paper Company Ltd

Judgment

GROUNDS OF DECISION

1. At the conclusion of the hearing, I dismissed the above Petition (the Petition) filed jointly by Deutsche Bank AG [DB] and BNP Paribas [BNP] (hereinafter referred to collectively as the Petitioners) for the making of a judicial management order against Asia Pulp & Paper Ltd (APP), pursuant to s 227B of the Companies Act Cap 50. As the Petitioners have appealed against my decision (in Civil Appeal No. 95 of 2002), I shall expand upon my oral judgment delivered on 22 August 2002, and set out in full the reasons for my decision.

The background

2. APP is a public company incorporated in Singapore on 12 October 1994 and has its registered office in Jurong at No. 118, Pioneer Road, Singapore 639598. The company has an authorised capital in excess of US$3 billion with issued and paid-up shares of 1,151,653,612 comprising of preference ($1.00 each) and ordinary shares (US$0.50 each). APP's objects inter alia are as follows:-

> a. to carry on the business of investment holding and to transact all kinds of investment business;
>
> b. to invest the monies of the company in or otherwise to acquire and hold shares, stock, debentures, debenture stock, scrip, loans, bonds, obligations, notes, securities and investments issued or guaranteed by any company or trust constituted or carrying on business in any part of the world.

APP is essentially an investment holding company which in itself does not own any significant tangible assets or have any operations in Singapore. Its principal business is in the pulp and paper industry located elsewhere. APP serves as the holding company for the pulp, paper and packaging business of the Widjaja family of Indonesia, who are its majority shareholders through another company known as APP Global Limited. Through its subsidiaries which operate mills (in Indonesia and China) which manufacture the group's products, APP as a group is one of the largest producers of paper in the world and the largest in Asia, outside Japan; it claims to be one of the lowest cost producers of pulp and paper in the world. APP has under its umbrella, more than 150 companies incorporated in Indonesia, China, Malaysia, Mauritius, the Unites States and Singapore. The company derives its income (in part) from the management fees it charges its operating subsidiaries. I should point out that APP does not have direct interest as shareholders, in the operating subsidiaries. The company's

interest in these subsidiaries is through its equity in intermediate holding companies. In Indonesia, APP has a holding company called PT Purinusa Ekapesada (Purinusa) which has four (4) major Indonesian subsidiaries: PT Indah Kiat, PT Pabrik Kertas Tjiwi Kimia Tbk (Tjiwi Kimia), PT Pindo Deli Pulp & Paper Mills (Pindo Deli) and PT Lontar Papyrus Pulp & Paper Industry. Indah Kiat and Tjiwi Kimia are quoted on the stock exchanges of Surabaya and Jakarta respectively. Purinusa however does not own any timber concessions or subsidiaries that supply the wood to the foregoing four (4) subsidiaries. The timber concessions in Sumatra and Riau Island instead belong essentially to two (2) companies PT Arara Abadi (Abadi) and PT Wirakarya Sakti (Sakti).

3. APP and its subsidiaries are part of a larger group of companies known as the Sinar Mas group, which is one of Indonesia's largest conglomerates, controlled by the Widjaja family. The Sinar Mas group of companies has diversified interests in palm oil, financial services and, timber and pulp/paper. The group even owned a bank PT Bank Internasional Indonesia Tbk, until it was placed under the control of Indonesian authorities in 1999. Abadi and Sakti (hereinafter referred to collectively as the wood companies) belong to the Sinar Mas group.

4. DB is a foreign bank incorporated in the Federal Republic of Germany with branches worldwide, including a Singapore branch located at No. 6 Shenton Way #15-08, DBS Building Tower 2, Singapore 068809.

5. Similarly, BNP is a foreign bank but incorporated in France, with branches worldwide including a Singapore branch located at No 20 Collyer Quay, Tung Centre, Singapore 049319.

6. Although it is a public company, APP is not listed on Singapore's stock exchange (the SGX). However, it does have one subsidiary Nippecraft Limited which is listed on the SGX; it has 15 other Singapore incorporated subsidiaries. APP was granted OHQ (operational headquarters) status by Singapore's Economic Development Board in 1995 for five (5) years which upon expiry, was extended for one (1) year up to 31 December 2000; the company did not apply for further extensions thereafter. APP's American Depository shares (ADS) were listed on the New York Stock Exchange until about 10 August 2001, when the shares were delisted after the price fell for 30 consecutive days below the minimum of US$1.00 required by the exchange; trading in the ADS had been suspended since 4 April 2001.

7. DB is and became, a creditor of APP in the following circumstances: APP's subsidiary APP International Finance (BVI) Ltd (APP-IF) had entered into a Master Agreement dated 19 March 1997 (the Master Agreement) with Bankers Trust International PLC (Bankers Trust) for currency 'swap' transactions. The Master Agreement was guaranteed by APP by a separate agreement of the same date (the Guarantee). The Master Agreement and the Guarantee are governed by New York law. Bankers Trust was taken over by DB and, by a Transfer Agreement dated 28 July 2000 made between DB's London branch and Bankers Trust (with the consent of APP-IF), the Master Agreement was novated to DB. By a separate letter also dated 28 July 2000 from Bankers Trust to DB's London branch, the rights of the former under the Guarantee were also assigned to DB, with APP's consent. As a result of APP-IF's failure to pay DB a sum of US$1,877,204.98 when it fell due on 13 October 2000, DB terminated the two (2) swap transactions dated 19 March and 8 August, 1997 under the Master Agreement. This resulted in APP-IF and thereby APP owing DB a total of US$216,814,659.09 as at 7 November 2000.

8. Negotiations took place between APP-IF, APP and DB which resulted in the signing of a Deed of Forbearance dated 22 November 2000 whereby APP-IF agreed to pay the sum owed to DB by instalments in the years 2000-2002, with such payments being guaranteed by APP. The Deed of Forbearance is governed by English Law. APP-IF failed to comply with the instalment payment plan

apart from a sum of US$21,727,237.89 paid by a subsidiary of APP-IF (Hillside Trading Limited) on or about 22 November 2000. As at the date of filing this Petition, the sum owed to DB by APP-IF and or APP (excluding interest) approximated US$193m.

9. On 7 February 2001, DB served (through their solicitors) a statutory notice of demand on APP for the sum of US$28,780,253.32. Apparently no payment or satisfactory payment was made by APP pursuant to the demand.

10. BNP on its part is owed US$20m. BNP had participated in a syndicated loan facility of US$264m which was lent in two (2) tranches, tranche A was released to Indah Kiat International Finance Co. BV (the finance company) and tranche B to PT Indah Kiat Pulp & Paper (Indah Kiat); BNP had lent US$20m to the finance company. This loan was guaranteed by Indah Kiat. The term facility of US$264m was in turn guaranteed by APP, pursuant to a Deed of Guarantee dated 30 March 2000. The loan instruments and APP's guarantee are governed by English law.

11. The participating banks in the syndicate had appointed the Singapore branch of Fuji Bank Limited as their Agent to exercise their rights and powers etc under the facility. An event of default having arisen under the facility, Fuji Bank Ltd by its letter dated 27 March 2001 made on behalf of the participating banks, a demand for payment from Indah Kiat of all monies owing under the loans made in tranches A and B. This demand was followed by a second demand from Fuji Bank to APP (as the guarantor) on 2 April 2001, for repayment of all sums due and payable by Indah Kiat and the finance company (including the US$20m owed to BNP).

12. On 12 March 2001, APP issued a press release through its Chief Financial Officer Hendrik Tee (the press release) announcing a debt repayment standstill (the debt standstill); the announcement inter alia stated:

> On the advice of our financial advisors, Credit Suisse First Boston (CSFS), we intend to immediately cease payment of interest and principal on all holding company debt and on debt issued by our subsidiaries and affiliates, the obligations of which are funded by such subsidiaries. In order to allow our operating subsidiaries to continue normal operations, we will be giving priority to servicing our suppliers and trade creditors.
>
> ……..we believe it is in the best long-term interest of the Company and its creditors and we plan to seek a consensual arrangement with our creditors. We understand that a number of our creditors have initiated efforts to organize themselves globally and also separately for the China operations. We welcome these efforts. We intend to discuss the standstill and the way forward separately with each of our China operating entities and non-China creditor groups. Appropriate approaches will need to be developed for the various creditor groups based upon the particulars of their respective situations. The Company and its financial advisor will be meeting with creditor representatives to discuss the restructuring process and means for conveying information to creditors.

Creditors of APP (including the Petitioners) cried foul on the company's unilateral declaration of a debt standstill. Indeed, the press release was one of the reasons given for the presentation of this Petition. I should add that APP now has the dubious honour of being the largest debtor (of about US$13.9 billion) in the emerging market as well as being the biggest debt defaulter in Asia. In Singapore, it has been sued by numerous creditors for sums approximating US$210m while two (2) creditors (Cellmark AB and Union De Banques Arabes Et Francaises UBAF) filed Winding-Up Petitions (which were subsequently stayed by order of court). The Sinar Mas group has not fared much better; it is equally financial troubled and owes about US$1.3 billion alone to Indonesia's Bank Restructuring Agency (IBRA) not to mention larger amounts to other creditors.

The Petition

13. Next, I turn to the Petitioners' grouses and the Petition. Although the press release indicated that APP would draw up a debt restructuring proposal within one (1) month of the announcement, the deadline was not met. Indeed, the Petitioners complained that as at the date of this Petition (23 June 2003), APP had failed to come up with a proposal which merited serious consideration by the company's creditors (themselves included) – the company's debt restructuring plan dated 1 February 2002 had been rejected outright. Creditors' counter-proposals dated 2 May 2002 were not accepted by APP save for four (4) items. There was no agreement between APP and its creditors on even the basic principles of restructuring. This allegation was however hotly contested by Ferry Siswojo Djongianto (Djongianto), a member of APP's restructuring committee. In his first affidavit filed on 10 July 2002 (which I shall refer to later), Djongianto painstakingly detailed all the meetings which had taken place with creditors, after the debt standstill and, the progress that had been achieved since then.

14. APP did appoint a host of professional and legal advisers after the debt standstill; these included:

> (i) Credit Suisse First Boston (CSFB) to advise on a debt restructuring plan;
>
> (ii) JP Morgan to implement the disposal of assets under plan (i);
>
> (iii) Arthur Anderson (AA) to conduct an audit and review the financial position of the company/group; (AA has since been replaced by Nicky Tan's company nTan Corporate Advisory Pte Ltd after he left AA where he was in charge of APP's brief);
>
> (v) White & Case LLP to act as the company's international counsel;
>
> (vi) Drew & Napier LLC to advise on Singapore law elements in the restructuring;
>
> (vii) Tumbuan Pane to advise on Indonesian law elements in the restructuring;
>
> (viii) Bank of China International as financial advisors to the Chinese operating subsidiaries vis a vis Chinese creditors.

The Chinese creditors' legal advisors are Johnson Stokes & Masters whilst their financial advisors are PriceWaterhouseCoopers (PWC);

(vix) King & Wood to advise on Chinese law elements in the restructuring.

15. The company/group's creditors were put into committees which represented their interests, these were:-

(i) a Bondholders Steering Committee made up of public bondholders whose legal advisors were Bingham Dana LLP (now Bingham-McCutchen LLP) with Allen & Gledhill as their Singapore counsel, Mochtar, Kauwin & Komar as their Indonesian law advisors and Denton Wilde Sapte as their legal advisors on Chinese law;

(ii) a Combined Steering Committee (CSC) made up of banks, trading companies and export credit agencies whose legal advisors were Shearman & Sterling (now Sherman & Sterling Stamford) with Soewito, Suhardiman Eddy Kardono as Indonesian legal advisors;

(iii) the Umbrella Steering Committee (USC) which comprised of members of both the BSC and CSC and whose financial advisors are KPMG (Australia) and PT Siddharta Consulting. DB is a member of the USC;

(iv) the People's Republic of China Banks Steering Committee (the PRC SC) for the restructuring in China.

16. Notwithstanding the appointments set out in paras 14 and 15 above, the Petitioners accused APP/its management of the following misdeeds:

(i) seriously delaying the restructuring process;

(ii) failing to co-operate with professional advisors and thereby hindering the review of the group's financial position;

(iii) engaging in transactions that suggested that substantial sums of money were being siphoned out of APP into companies/organisations which are related to the Widjaja family;

(iv) giving preference to certain creditors, despite the debt repayment standstill;

(v) failing to establish any satisfactory mechanism to control/monitor the operating cashflow of the group.

17. It would be well nigh impossible to elaborate on each and every one of the above complaints. Voluminous documents were produced in court to which counsel for both parties made copious reference, in the course of their arguments spanning seven (7) days. Heavy reliance especially, was placed by the Petitioners inter alia on various press releases and or reports published by, the International Financial Review (IFR), Morgan Stanley, the Asian Wall Street Journal, Reuters, the Jakarta Post, The Business Times, Wall Street Journal, The Far Eastern Economic Review, Bloomberg, The Financial Times and The South China Morning Post. Consequently, I shall only focus on the more serious allegations raised by the Petitioners in the course of this judgement.

18. The Petitioners alleged that APP had failed:

> (i) to disclose swap contracts of the value of US$220m with DB in their 1997 to 2000 audited accounts;
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> (ii) to satisfactorily explain why Indah Kiat did not disclose the existence of US$199.3m deposited with BII Cook Islands, a bank owned by the Widjaja family, in its audited accounts for year 2000;
>
> (iii) to explain the qualifications put by AA on the audited accounts for year 2000 of Indah Kiat and Tjiwi Kimia on the following transactions:
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> > (a) US$261m advance made by Indah Kiat to Sinar Mas' subsidiary Abadi;
> >
> > (b) provision of US$500m for doubtful debts;
> >
> > (c) receivables of US$1 billion from five (5) trading companies incorporated in the British Virgin Islands (the 5 BVI companies);
>
> (iv) to explain why AA resigned as the company's auditors in November 2001.

19. There were allegations (not denied) that class actions were commenced in August 2001 against the company (and AA) in New York, in relation to failure to disclose the losses resulting from the swap contracts with DB. Further, no reasons were given for the resignation in September 2001 of Deloitte, Touche & Tohmatsu, who had been appointed to investigate the company's failure to disclose those losses.

20. The Petitioners' concern that funds from the company had been or were being siphoned out or wrongfully utilised arose from several events; some of these were:

> (i) on 25 May 2001, the Widjaja family disclosed the existence of US$247m belonging to Golden-Agri Resources Ltd (a Singapore listed company belonging to the Sinar Mas group) being placed with BII, Cook Islands. On 17 July 2001, BII Cook Islands announced that it would be unable to pay

the deposits of Golden Agri-Resources Ltd as well as those of APP amounting to US$80.3m but would do so within a five (5) year period;

(ii) the 5 BVI companies appeared to be related to APP and or the Widjaja family as, their officers were former or current employees of the company. The debts owed by the 5 BVI companies appeared to be based on fictitious trades. Further, in October 2001, APP inexplicably discontinued five (5) of the many suits it had filed against the 5 BVI companies in Jakarta in August 2001;

(iii) US$504m was lent to the wood companies.

21. The Petitioners alleged that the creditors had appointed KPMG to conduct an independent audit of the company. However, KPMG's progress had been hampered by APP's unwillingness to give the accountants access to: information relating to the company's operations in China, inter-company debt analysis, inter-related company transactions and accounts receivable. Consequently, KPMG missed the completion deadline of July 2001 as well as the revised deadlines of January and April 2002. Without the report of KPMG, the creditors/Petitioners would not be able to assess the viability of the debt restructuring proposals put forward by the company. It was further alleged that APP had deliberately used the ploy of disputing KPMG's fees to prevent/delay the release of the firm's report. Relying on a report published in the 16 June issue of IFR Asia, the Petitioners alleged that Teguh Widjaja, a member of the Widjaja family, had demanded that KPMG's draft report should be revised to delete inaccuracies which included an allegation that funds had been siphoned out of APP by its shareholders.

22. The Petitioners alleged that interest payments were made to rupiah-denominated bondholders for many months after the debt standstill; they were suspended only after pressure from international creditors. The company had also reportedly paid interest to certain Chinese creditors after March 2001. APP had also paid IBRA some US$90m to settle debts owed by the Sinar Mas group. There was even speculation in the press that the Widjaja family was buying up its own rupiah-denominated bonds through third parties, as a means of extracting cash from APP and to influence creditors' votes on any proposed restructuring plan.

23. The Petitioners concluded their Petition with the belief that there was a reasonable possibility of rehabilitating the company and the APP group as a whole, of preserving its business as a going concern, by placing the company under judicial management instead of winding it up. Reasons for their preference over compulsory liquidation and a scheme of arrangement under s 210, were set out in paras 93 to 106 of the Petition; essentially it was because the Petitioners believed the group could be rehabilitated.

24. I must point out that the Petitioners' appointees for the position of Judicial Managers were not without controversy. The proposed judicial managers Messrs Kon Yuen Kong, Wong Kian Kok and William Caven Hutchinson are from the accounting firm of Foo, Kon, Tan, Grant Thornton Singapore (the firm). The firm through its ties with Grant Thornton International, are associated with the Indonesian firm of PT Grant Thornton who are the auditors of Indah Kiat and Tjiwi Kimia. There was some concern that there would be a conflict of interest should the three (3) appointees of the firm be made judicial managers.

25. The possible conflict between PT Grant Thornton and the firm also resulted in conflict

between the associated firms themselves. The managing-director of DB's Asia Pacific head office, Wolfgang Helmut Topp (Topp) had, in his first affidavit stated that he had been informed by Gabriel Azedo (the Divisional Director of Grant Thornton International) who met with James Kallman (the President-Director of PT Grant Thornton), that it had been agreed that PT Grant Thornton (with suitable compensation) would, at the request of Grant Thornton International's Chief Executive Officer (David McDonnell) relinquish its role as auditor of Indah Kiat and Tjiwi Kimia should the firm's three (3) appointees be appointed judicial managers. This was however hotly denied by James Kallman, (according to Djongianto in his first affidavt). In his exchange of letters with Grant Thornton International, James Kallman gave the distinct impression that PT Grant Thornton would not resign as auditors of the two (2) listed subsidiaries of APP. It did not help matters that Kon Yuen Kong and Gabriel Azedo joined in the fray by affirming affidavits supporting Topp's position.

26. In the light of my refusal to put APP under judicial management, it is academic and unnecessary for me to determine who is speaking the truth and whose version of the conversations which took place between James Kallman, David McDonnell and Gabrial Azedo, I should accept. However, it does show the extent of disagreement between the parties, even on the people to be appointed as judicial managers. I should add however, that in view of the controversy generated on this subject, it may be unwise to choose Grant Thornton International or its associated firms in the event some petitioner, other than DB and or PNB, decide to file a fresh petition for judicial management against APP in the future.

27. The Petition concluded by pointing out (in para 107) that the company had benefited from the well respected regulatory and business environment provided by Singapore (including its OHQ status) which contributed in no small measure to its ability to raise massive funds in the global capital markets. Consequently, the Petitioners felt it was appropriate that creditors should turn to the self-same regime for resolution of the present situation and they asked the court to adopt a robust approach to address the concerns of financial institutions with international repute. I will return to this argument later, referred to and criticised by counsel for APP (Davinder Singh) as the 'Singapore card'.

APP's case

28. In his first affidavit, Djongianto stated that not only APP, but IBRA and other creditors particularly those in China, opposed the appointment of judicial managers. He contended that putting APP under judicial management would not only not achieve the objectives set out under s 227A of the Companies Act but, would also cause irreparable harm to the company for the following reasons:-

> (i) judicial managers will not facilitate the approval of an acceptable compromise or agreement between the company and its creditors nor provide for a better realisation of its assets;
>
> (ii) appointing judicial managers at the holding company level would cause operating subsidiaries (where actual value of the group lies) to stop paying APP management fees, ring-fence their own assets and enter into separate restructuring arrangements with their own creditors;
>
> (iii) because of the organisational structure of the group, judicial managers if appointed, will not be able to discharge their duties to take control of the company's assets, as

they are mainly located outside Singapore.

Indeed, it was Djongianto's contention that appointing judicial managers would sound the death knell for the company. He asserted it would jeopardise the on-going restructuring process, lead to the disintegration of the company as, without the up-flow of funds from its operating subsidiaries, APP's creditors would not be repaid and, the company would ultimately be forced to wind up.

29. As earlier stated (para 13 *supra*), Djongianto disagreed with the Petitioners' claim that no agreement (let alone progress), had been achieved on the debt restructuring proposal between APP and its creditors. He explained that the Widjaja family was pursuing a consensual restructuring plan because it would allow monies from the company's operating subsidiaries to be up-streamed to the company for the benefit of APP's creditors, even though this was not in the interests of the creditors at the level of the operating subsidiaries. Such up-streaming would immediately cease upon the appointment of judicial managers as, the creditors of each operating subsidiary would scramble to ring-fence the assets of individual debtor companies to protect their own claims.

30. Although it is the duty of court-appointed judicial managers to take control/custody and management of the property to which the company is entitled, Djongianto said this exercise would either be meaningless or impossible/impractical in this case for several reasons:-

> (i) APP's main asset is its equity in the operating subsidiaries held through Purinusa. Purinusa's main creditor is IBRA (to the tune of US$346m out of total debts of US$361m). IBRA is separately owed US$602m by the operating subsidiaries. IBRA holds as security a pledge over Purinusa's shares in the operating subsidiaries as well as mortgages over the properties owned by the subsidiaries. IBRA was unlikely to do nothing if the judicial managers attempted to take control of the Indonesian operating subsidiaries through APP's shareholdings. Instead, IBRA will move to enforce its security over the assets of the operating subsidiaries and, given the level of the latter's indebtedness to IBRA, it is unlikely that such realisation will yield any surplus for up-streaming to the parent company's creditors;
>
> (ii) the judicial managers would encounter legal and practical issues in taking control of the boards and management of the operating subsidiaries in both Indonesia and China. Their attempts to do so may aggravate existing delays not to mention incurring additional costs at the company's expense, which could have been better utilised for the benefit of creditors;
>
> (iii) operation of the mills owned and run by the operating subsidiaries require specialised technical knowledge as well as sensitivity to and knowledge of local conditions/circumstances – judicial managers would not have any such knowledge.

31. Djongianto cast doubt on the efficacy of the powers of Singapore-appointed judicial

managers in Indonesia and China. He produced legal opinions (see his exhibits **F8** and **F9**) from M/s King & Wood and Tumbuan Pane respectively, to support his contention that court appointed judicial managers would encounter great difficulties in exercising control over the company's Chinese and Indonesian subsidiaries; the judicial managers' appointment/authority would not be automatically recognised. There is considerable uncertainty under PRC laws as to what rights if any, APP's judicial managers would have, over the company's China-based operating subsidiaries (numbering 13). Indonesia law would not recognise Singapore court-appointed judicial managers of APP as having the right to exercise control over its subsidiaries incorporated in Indonesia. The judicial managers would have to go through the arduous and probably lengthy process of applying separately to the Chinese and Indonesian courts for recognition of their status.

32. Not surprisingly, the Petitioners produced contrary opinions (see exhibits **JLME-6** and **JMLE-7** in Joyce Lim's affidavit) from their own legal advisers in Indonesia (Remy & Darus) and China (Global Law Office). Both law firms opined that the judicial managers would be able to exercise APP's rights as majority shareholder, in the operating subsidiaries; they would replace the function and authority of APP's board of directors.

33. Djongianto claimed that judicial management of APP would jeopardise the company's receipt of cheap wood supplies (at no less than 35% discount below market prices) for its Indonesian subsidiaries from the two wood companies. He went so far as to say (in his third affidavit) that *the lifeblood of the group is the continuous (and guaranteed) supply of low cost wood from the wood companies*. This 'discount' however was refuted by the Petitioners who referred to press and other reports which suggested that not only were no discounts given but, the wood companies were in fact supplying timber to APP's subsidiaries at inflated prices and on unfavourable terms under onerous and long term contracts; I shall revert to this subject later.

The restructuring process

34. Djongianto asserted that the company had acted in accordance with the debt restructuring plan of its financial advisers CSFB (whose managing-director Raymond Davis filed a supporting affidavit to oppose the Petition). He detailed the steps the company had taken since the debt standstill, over and above the appointments of professional/legal advisers set out in para 14 above. Djongianto deposed that 24 or more meetings had taken place with creditors up to 8 May 2002, starting with one on 6 March 2001, which was even before the press release. The group had spent considerable time working with KPMG in reviewing the group's financial positions for its Indonesian operations. Contrary to the Petitioners' claims, the company had not been uncooperative with KPMG. In fact, it had given easy access to all documentation, made staff/accounting staff available to answer queries and, assigned in excess of 100 staff to work with the accountants. White & Case had even created a data room for the benefit of KPMG and creditors. Djongianto rejected as unfounded the Petitioners' claim that the company deliberately wanted to delay the release of KPMG's report. Indeed, the USC was at fault in not monitoring the activities of KPMG and, because KPMG had to respond to a variety of creditor demands from within the USC, the scope of the accountants' audit had expanded beyond that of a due diligence report, resulting in considerable delay. Further, there was a genuine dispute on the fees chargeable by KPMG (which was however resolved subsequently) which delayed the issuance of their report. I should point out that phase 1 of KPMG's report was finally released on or 26 July 2002 (after the first part hearing).

35. Djongianto criticised the creditors (including DB) for rejecting the company's restructuring proposal dated 1 February 2002 (containing 75 pages) within hours of its presentation, without giving the same due consideration. He held the creditors responsible for the subsequent delay as, instead of negotiating with the company on its proposal, the USC chose to revert only three (3) months later

(on 2 May 2002) with mere fundamental principles (18 pages) for the restructuring process. Criticism was also levelled at the USC which Djongianto alleged was being driven by 29 creditors with divergent interests. Indeed, the company's expert witness Andrew Riebe (Riebe) asserted that the company's creditors bore the lion's share of the blame for the lack of progress in restructuring. Riebe criticised the creditors for demanding excessive inter-creditor secrecy, for overstaffing committees with people scattered all over the globe and opined that the USC lacked leadership. Riebe also commented that the creditors' proposed negotiating structure appeared flawed.

36. In contrast, the consensual restructuring of the group's Chinese debts was progressing well; Chinese domestic banks had agreed to roll-over loans on condition that the assets in China are shielded from creditors. Such roll-over had allowed the company to complete construction of its pulp and paper plant in Hainan Island. In mid-June 2002, the company presented a restructuring proposal to the Chinese banks which plan is under active negotiation. Chinese creditors who are in the PRC SC (para 15[iv] *supra*) strongly opposed the appointment of judicial managers, as reflected in a letter dated 18 July 2002 (see exhibit **FD-4** in Djongianto's third affidavit) addressed care of Rabobank Hong Kong to, the China Foreign Creditors Committee from Johnson Stokes & Master, solicitors for the PRC SC.

APP's other creditors

37. Creditors who filed affidavits supporting the Petition are as follows:-

	Name	Owed in US$
(i)	Oaktree Capital Management LLC	164,016,000.00
(ii)	Salomon Smith Barney Inc	7,011,000.00
(iii)	Citibank NA Indonesia branch	25,000,000.00
(iv)	Salomon Brothers International Ltd	10,500,000.00
(v)	Emergent Alternative Fund Ltd	8,000,000.00
(vi)	Centre Solutions (Bermuda) Ltd (Centre Solutions)	220,002,463.86
	Total sums owed:	434,529,463.86

Three (3) other creditors namely, Gramecry Advisors LLC, Credit Lyonnais and Swiss Capital Alternative Investments AG, gave letters of support to the Petitioners (see exhibit **JLME-5** in Joyce Lim's affidavit).

38. Something more has to be said about creditor (vi) above. Unlike the other creditors who filed brief affidavits supporting the Petition and set out the sums owed to them by APP (either as principal debtor or as guarantor), Centre Solutions (an insurance company) filed (by its Vice-President Sukhdeep Singh Sandhu [Sandhu]) a 778 page affidavit (inclusive of exhibits) alleging the massive fraud APP had perpetrated on them, arising out of a securitization programme established pursuant to a Master Trust Agreement dated 23 October 1998 made between The Bank of New York and APP International Trading (VI) Ltd, whose obligations were essentially guaranteed by APP. There was an additional allegation that sales in the APP group were inflated by US$1 billion. Sandhu's affidavit (para 30) also alleged that APP had receivables from seven (7) Hong Kong companies which had non-existent or fictitious addresses whilst 14 other customers had the same business address. The common address itself belonged to a company (Lucky Rock Limited) which is ultimately owned by a subsidiary of or otherwise related to, APP.

39. APP filed an affidavit by one Ferry Kusien (Kusien) a member of the company's legal department, to rebut Sandhu's allegations. In addition to disputing Sandhu's allegations on their merits, APP also took issue with Centre Solution's *locus standi*, challenging Centre Solution's right to file affidavits to support the Petition and to make submissions, arguing that Regulations 35 to 37 made under the Companies Act Cap 50 do not provide for creditors who support Petitions for judicial management orders to file affidavits. Such creditors are only entitled to appear at the hearing of the Petition to indicate their support or opposition to judicial management orders being made (emphasis added). It was further submitted that the Petitioners could not rely on Centre Solutions's allegations to support their pleaded case; otherwise APP would be severely prejudiced. By supporting the Petition, APP alleged that Centre Solutions was making good its previous threat to publicly damage APP if the company (which had refused) did not give in to its threats/pressure to pay more receivables into the securitization programme.

40. Ultimately, there was no need to make a ruling on Centre Solution's *locus standi* as in the midst of the hearing, on 16 August 2002 (see N/E198-201), their counsel (Andre Yeap) informed the court that his clients had decided to withdraw their support for the Petition. He indicated that Centre Solutions' change of heart was prompted by the fact that the group appeared to have made considerable efforts to move ahead with the restructuring exercise since the filing of the Petition. The court was further informed that APP had given fresh assurances to Centre Solutions to honour its commitments relating to the securitization programme.

41. I would add that Centre Solutions' perception of APP's more vigorous approach to restructuring since the filing of the Petition, was corroborated by none other than one of the Petitioners. In his third affidavit filed for DB, Topp stated (in paras 4 and 5):-

> In the six weeks since the Petition was filed, the following events have taken place:
>
> (i) the long-awaited KPMG Phase 1 due diligence report (the KPMG report) on the company and its subsidiaries has been released (a copy of which is annexed hereto and marked as **WHT-9);**
>
> (ii) the company had apparently 'committed' to 'finalising' a restructuring plan (of the Indonesian operations) by September 30, 2002 and that IBRA has agreed to take leading role in the process;
>
> (iii) the company has apparently agreed to opening an escrow account(s) to set aside cash for the benefit of the creditors and to make regular contributions to the account(s), but the 'details are being worked out' and the company is still haggling about the amount; and
>
> (iv) the company has apparently agreed to augmentation of management but again the details are being worked out.
>
> The Petitioners are gratified at these developments, but suspect that the company's newly stated willingness to accede (partially) to creditors' requests is due, the Petitioners' believe to some extent at least to their attempt

to resist the appointment of judicial managers.

I myself entertain no doubts that the filing of the Petition was the impetus which prompted the company to hasten the pace of restructuring, in order to stave off judicial management.

42. Conflicting charts were produced by the parties showing the extent of support or opposition as the case may be, for the Petition. What is clear however is, that neither sides' computation showed overwhelming support for or against, the making of a judicial management order, at the APP level. The Petitioners produced pie charts which showed 25.3% were for and 24.2% were against, the granting of the Petition. APP's revised chart no. 6 indicated that 27% were for and 22% were against, the Petition. At the subsidiaries' level, a more conclusive picture emerged. The Chinese creditors were overwhelmingly against the granting of a judicial management order while for the Indonesian creditors, the vote depended on whose figures one accepted – APP claimed that 24% of creditors were against the Petition being granted as opposed to 14% being in favour, while the Petitioners asserted that 30.4% were for and 20.7% against, the Petition. Most creditors at all three (3) levels of debt were essentially 'fence-sitters' or neutral although counsel for the Petitioners (Alvin Yeo) took the position (V/N 149) that the silence of the majority was indicative of implied support for the Petition and, further indicative of APP's failings in its restructuring process.

43. What I did find remarkable was, that holders of the same bond issue could be in opposite camps. In this regard I refer to the bonds listed in items 5,6 and 7 of the attachment to the letter of Bingham-McCutchen dated 10 July 2002 (see exhibit **JLME-3** in Joyce Lim's affidavit) addressed to White & Case LLP; Bingham-McCutchen stated their clients supported the Petition. However, holders of the same bonds in the letters dated 16 and 20 August 2002 of Nomura Singapore Limited addressed to APP, opposed the Petition. Nomura were/are the custodians/nominees of those bond holders whose identity they declined to reveal, when requested by the Petitioners' solicitors. Another interesting factor is that CSFB, while acting as APP's debt restructuring adviser, is also a creditor of the company/group to the tune of US$405-650m, depending on whose figure one accepts; CSFB too opposed the Petition as a creditor.

44. Accusations and cross accusations were traded by the parties against one another, each alleging pressure was being applied on it by the other party. On the first day of the hearing, the Petitioners had produced another letter dated 10 July 2002 from Bingham-McCutchen to the Petitioners (see exhibit **JLME-2** of Joyce Lim's affidavit) expressing support for the Petition; the firm stated that their clients were owed in excess of US$1.53 billion by APP while the company's subsidiaries owed another US$1.217 billion. Exhibit A was attached to the said letter listing seven (7) demands the bondholders required APP to comply with before the bondholders would withdraw their support for the Petition. Mr Davinder Singh considered the demands (see V/N215) *as another weapon from the negotiating armoury of the bondholders.* He described the Petitioners' allegations of fraud as a red herring which had been dredged up for a collateral purpose. He referred to the bondholders' following demands:-

> 6. No later than 19 July 2002, the APP group shall establish a debt restructuring task force, which shall include Mr Indra Widjaja, Mr Frankie Widjaja and senior officers of APP, which task force shall be responsible for providing information required by the USC and IBRA and for negotiating the Restructuring Plan.
>
> 7. No later than 30 September 2002, the APP group and its controlling shareholders shall have signed and delivered the

Restructuring Plan.

pointing out that notwithstanding their allegations of fraud, the bondholders had no qualms dealing with and having the Widjaja family run the show, provided the family complied with the bondholders' demands. These included a deposit of not less than US$100m from APP's four (4) Indonesian subsidiaries into four (4) separate escrow accounts established with internationally reputable banks designated by the bondholders; the monies were to be assigned absolutely for the benefit of creditors, pursuant to the restructuring plan to be agreed by USC and IBRA.

45. On their part, the Petitioners accused APP of using veiled threats to garner support from creditors to oppose the Petition. Their counsel Alvin Yeo referred to a memorandum from White & Case dated 26 June 2002 to the CSC's legal advisors Shearman & Sterling Stamford (and also to Bingham Dana), which contained the following paragraphs:-

> Attached to this memorandum is a form of support letter which APP expects to receive from each entity or person participating in the Umbrella Steering Committee. APP asks that you send this memorandum and the form of support letter to those committee members whom you represent and ask that a support letter, in the suggested format, be delivered as soon as possible and, in any event, by no later than July 5, 2002. APP asks for your assistance in ensuring that committee members whom you represent be made aware of the contents of this memorandum, and the request that support letters be issued, as a matter of urgency.
>
> Please note that APP is of the view that the judicial management Petition is not consistent with the consensual restructuring, out-of-court restructuring concept which has been under discussion between APP and the Umbrella Steering Committee for more than one year. The fact that one of the Petitioners is an Umbrella Steering Committee member is also a cause of concern. In the circumstances, APP expects those committee members which support the consensual restructuring concept to issue the requested letter, thereby providing tangible evidence of its support for the consensual process. The refusal or other failure by an Umbrella Steering Committee member to issue a support letter will be viewed by APP as indicating that such member does not support the consensual out-of-court restructuring process. Should it transpire that a material number of committee members fail to issue a support letter, APP is of the view that may be material adverse consequences for the consensual debt restructuring process.

I agree that the above paragraphs constituted a threat by APP and not a subtle one at that. Alvin Yeo had repeatedly informed the court that the company's creditors should not have to negotiate with a gun at their heads nor should the restructuring process be held to ransom by what the creditors contended were threats to withhold co-operation.

IBRA's position

46. Next I turn to the not unimportant role played by IBRA. I would not disagree with Alvin Yeo's statement that IBRA is a state agency which has different interests from those of APP's creditors despite which, it had been foisted with the unenviable task of leading the restructuring process. IBRA's position was initially unclear. On the one hand, the Petitioners claimed that IBRA did not oppose the Petition, relying on a report from Bloomberg dated 25 June 2002, which quoted IBRA's chairman Syafruddin Temenggung as saying that it was willing to endorse legal action against APP, when asked for his comments on the Petition. The company on the other hand produced a letter dated 28 June 2002 from IBRA addressed to the company's board of directors, opposing the Petition; the letter contained the following paragraph which was in the support letter drafted by White & Case:-

> It has come to our attention that certain creditors have chosen to file a Petition in High Court of Singapore for judicial managers to be appointed over APP. In our view, this action should have been taken in conjunction with the consent of other creditors. Indeed, we are working towards the consensual restructuring agreement and will not agree with any action that may well be jeopardising the process.

It cannot be a coincidence that on 29 June 2002, APP issued a press release stating that a day earlier, the company had paid IBRA a sum of US$90m through its Indonesian operations, pursuant to payment arrangements reached with IBRA on the debts owed by Sinar Mas; no doubt the payment prompted IBRA's change of heart.

The same report went on to state:

> IBRA has agreed to take a leading and proactive role in the consensual debt restructuring discussions currently under way between the Indonesian operations of APP and its creditors. IBRA's agreement to play a leading role in the restructuring is intended to facilitate accelerated discussions with the objective of agreeing the basic commercial terms of the consensual debt restructuring.

47. In arguing that consensual restructuring under IBRA's leadership should be given a chance, APP also referred to a Memorandum of Understanding (MOU) dated 15 June 2002 made between IBRA and the export credit agencies (ECAs) of Germany, Japan and the United States; it provided for resolution of IBRA's claims against the APP group and controlling shareholders of the Sinar Mas group. Two significant principles set out in the MOU state as follows:-

> 7. The restructuring plan shall further provide that IBRA shall share the benefits of all fiduciary transfers, security rights, pledges and guarantees that IBRA may have or may have the right to have, under the Settlement Agreement (collectively called 'the Security') with the other unaffiliated creditors of the APP group. In sharing such benefits, IBRA may retain the Security, but may enforce such security only for the benefit of creditors generally as shall be provided under the restructuring plan. The Creditors' Restructuring Outline dated 2 May 2002, as

> may be modified from time to time by agreement of IBRA and the USC, shall serve as the basis of the restructuring plan.
>
> 9. IBRA agrees to the principles set forth in the Creditors' Restructuring Outline and shall use its capacity to cause the APP group and the controlling shareholders of the Sinar Mas group to accept such principles and a restructuring plan based on those principles. More specifically, IBRA shall…cause the APP group…. to agree to ..
>
> > (i) augmentation of the management of the APP group, including creditor representation on the boards of the relevant members of the APP group;
> >
> > (ii) control of the cash of the APP group by creditors;… .

I should caution that the undertakings in the MOU were clearly stated (in paras 11 and 12) to be not binding on the parties until:-

> (i) the Indonesian) Financial Sector Policy Committee had issued a decree, endorsed by the approval of the Minister of State-Owned Enterprises;
>
> (ii) the respective supervisory governmental authorities of each of the ECAs had similarly endorsed the MOU.

Reference was also made to reports (from Reuters News Service on 5 July 2002) stating that IBRA would be putting five (5) chief financial officers into each Indonesian subsidiary, to avoid diversion of funds.

The KPMG report

48. Some reference must be made to the KPMG report before I explain why I gave APP an opportunity to continue with the consensual restructuring process. In this regard, I should also point out that due to objections raised by the company's counsel (principally on the ground that the KPMG report was rendered to USC members on a confidential basis), the hearing was in camera when the parties' arguments centred on the findings in the report. With this constraint in mind, I will only refer to extracts from the KPMG report where they have already found their way into the press or other publications and are in the public domain.

49. It would be fair to say that some findings in the KPMG report were a cause for concern. I will highlight those which have been disclosed to the public in one way or another, by Reuters News Service and or other agencies. The KPMG report was referred to (and exhibited) *in extenso* in Topp's third affidavit for which reason I ordered all the court documents to be sealed to pre-empt access by third parties not involved in these proceedings.

50. According to reports from the Wall Street Journal (dated 27 Jan 2002) and from the Far Eastern Economic Review issue dated 14 February 2002, questions had arisen surrounding a purchase of a huge tract of land (1,759 hectares) for US$170m by APP's subsidiary Pindo Deli from a Sinar Mas

company. In actual fact, the KPMG report stated that Pindo Deli as well as PT Lontar Papyrus had paid US$181.6m (of which US$110.5m was in cash) to the controlling shareholders to purchase additional land (between January and September 2001), at a time when both subsidiaries were facing a cash crunch. Further, Pindo Deli already owned approximately 495 hectares of land of which only about 30% had been developed. There was therefore no reason to, nor had APP provided any plan which necessitated, acquiring such a large piece of land. Further, APP did not disclose the purchase until August 2001, after the debt standstill.

51. Yet another transaction which caused disquiet were the advances totalling US$504/- to the wood companies, made mainly in the fourth quarter of 2000; Indah Kiat advanced US$276m to Abadi, PT Lontar Papyrus advanced US$75m to Sakti while Purinusa advanced US$153m to both companies. References to these loans were made in the special report of Morgan Stanley dated 21 March 2002 (at p 13) although the loan amounts were incorrectly stated. When the creditors demanded to look at the accounts of the wood companies, their request was denied on the basis that the two (2) companies were outside the APP group. I note that such a legal nicety did not stop the Widjaja family from lending out the monies in the first place.

52. Other transactions which made no commercial sense and which were clearly disadvantageous to APP's subsidiaries were, fresh pulpwood purchase agreements entered into in January 2001 by Indah Kiat with Abadi and by PT Lontar Papyrus with Sakti, even though the original agreements made on 23 May 1994 and 27 January 1995 respectively between the parties, were valid for 15 years. The onerous terms in Indah Kiat's agreement included being charged for wood at agreed prices, instead of the pricing being pegged to the actual cost of production. Further, Indah Kiat could not offset the advances it had made to Abadi, against the price of wood supplied by the latter. Far worse, both agreements provided for a penalty of US$1 billion and waiver of all outstanding balances, if either Indah Kiat or PT Lontar Papyrus obtained wood from sources other than Abadi and Sakit respectively. A brief report of Indah Kiat's agreement appeared in The Business Times of 21 February 2002. I should mention that one of the demands stipulated by the bondholders (represented by Bingham-McCutchen) for withdrawal of their support for the Petition was, that the original wood supply contracts dated 23 May 1994 and 27 January 1995 be restored and, further amendments to those original agreements would have to be made on terms and conditions acceptable to USC and IBRA.

53. One other questionable transaction (which received wide coverage in the Asian Wall Street Journal report of 28 August 2001) were the debts of US$1 billion owed to the company's Indonesian subsidiaries by the five (5) BVI companies (see paras 18(iii)(c) and 20(ii) *supra*). Bloomberg had also carried a report (on 27 December 2001) on the receivables. KPMG and the media reported that the 5 BVI companies (Yale Han Trading Ltd, Red Chips International Ltd, City Success Ltd, Lucky Clover Ltd and Shinning Armour Ltd) shared the same address in the BVI (at P. O. Box 957, Road Town, Tortola), were registered in Singapore with four (4) being registered on the same day (19 February 1998) and, all five (5) subsequently closed down their businesses in Singapore on 9 February 2001. Although the company told the Asian Wall Street Journal that the 5 BVI companies were not related to APP, officers and agents of those companies which the journal spoke to, turned out to be APP employees.

54. The Indonesian subsidiaries (Indah Kiat, Tjiwi Kimia and Pindo Deli) filed 10 suits against the 5 BVI companies in the Jakarta Central Courts for claims in excess of US$1 billion. In April 2002, Indah Kiat obtained judgments against a number of debtors for about US$242m. However, five (5) of the suits were discontinued subsequently. What was even more disturbing was the company's response (through Djongianto) to these events, as can be seen from the following paragraphs in his first affidavit:-

> 315. The Indonesian Operating Subsidiaries chose to discontinue claims against five of the BVI companies because it was decided that, given the drain on the management and manpower resources of the subsidiaries, it was better to focus our efforts on the more substantial claims.
>
> 316. There is simply no basis for the Petitioners to allege that these claims are not genuine transactions.

Both explanations were highly unsatisfactory and were no answer to the creditors/Petitioners' concerns which were well founded; the questionable nature of the 5 BVI companies and their apparent connection with the Widjaja family cried out for explanations which were not at all forthcoming. I found it hard to believe that the cost of manpower and other resources to be expended by APP were not commensurate with the huge sums to be recovered from the 5 BVI companies. What was even more puzzling was, why the company's subsidiaries chose to commence proceedings in the Jakarta courts instead of in the companies' place of incorporation. What is the use if the judgments obtained cannot be enforced in the British Virgin Islands and the monies thereunder recovered? Obtaining paper judgments without more, is not enough.

55. Other questionable transactions included APP's selective payments to creditors in Indonesia and China after the debt standstill. Counsel had explained that payment to rupiah-denominated bondholders were necessary as a matter of political survival because otherwise, relatively small Indonesian banks and Indonesian pension funds which had invested heavily in those bonds and who depended on the fund payments for their livelihood would have been adversely affected. In turn, APP would have felt the impact because some of these bondholders are associated/connected with provincial governments which are important to the business prospects of the APP group. Consequently (according to Djongianto's first affidavit), the company had no option but to make relevant payments to rupiah-denominated investors. As for the Petitioners' allegation that the reason for the payment was that the Widjaja family was buying up the rupiah-denominated bonds, Djongianto's explanation (in his second affidavit para 7) was that he had made inquiries of the family members and was told that was not the case. I am not at all satisfied with either explanation.

The decision

56. It would be useful to start by looking at the provisions of ss 227A and 227B of the Companies Act Cap 50 (the Act); the relevant portions of the sections state:

> **227A**
>
> Where a company or where a creditor or creditors of a company consider that —
>
> (a) the company is or will be unable to pay its debts; and
>
> (b) there is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern or that otherwise the interests of creditors would be better served than by resorting to a winding up,
>
> an application may be made to the Court under section

227B for an order that the company should be placed under the judicial management of a judicial manager.

227B

(1) Where a company or its directors (pursuant to a resolution of its members or the board of directors) or a creditor or creditors (including any contingent or prospective creditor or creditors or all or any of those parties, together or separately), pursuant to section 227A, make an application by way of Petition, for an order that the company should be placed under the judicial management of a judicial manager, the Court may make a judicial management order in relation to the company if, and only if, —

(a) it is satisfied that the company is or will be unable to pay its debts; and

(b) it considers that the making of the order would be likely to achieve one or more of the following purposes, namely:

(i) the survival of the company, or the whole or part of its undertaking as a going concern;

(ii) the approval under s 210 of a compromise or arrangement between the company and any such persons as are mentioned in that section;

(iii) a more advantageous realisation of the company's assets would be effected than on a winding up.

It is common ground that APP is unable to pay its debts. What is in dispute between the parties is whether the objectives under s 227B(b) of the Act would be achieved by placing the company under judicial management; I was of the view that it would not. Whilst I did not entirely agree with the doomsday scenario painted by the company should judicial managers be appointed, I was also not convinced that the picture would be as rosy as that presented by the Petitioners, should judicial managers be appointed.

57. Counsel for the Petitioners had repeatedly stressed that, the judicial managers to be appointed fully intended to work in tandem with IBRA and with the Chinese creditors to rehabilitate APP and to better realise its assets, that the appointees would not adopt a confrontational attitude. That may well be the noble intention but the more pertinent question to ask is, would IBRA and the Chinese creditors want to work/co-operate with the judicial managers? I think not, judging from the indications given so far by both IBRA and by the Chinese creditor banks, through the PRS SC, as seen in the letter of Johnson, Stokes & Master dated 18 July 2002 (para 36 *supra*). Without the co-operation of IBRA and the clients of Johnson, Stokes & Master, the judicial managers would not be able to make any headway in the discharge of their duties outside Singapore. It bears remembering that apart from being headquartered in Singapore, APP has no or valuable assets here; its subsidiary Nippecraft Limited cannot be considered as it is a public listed company while no information was forthcoming from either party on the company's other Singapore subsidiaries. I noted further that the

Petitioners' claims (and the debt instruments of other creditors whether supporting or opposing) did not provide for Singapore as the *forum conveniens*. The transgressions complained of by the Petitioners took place outside Singapore.

58. Counsel had indicated that the Petitioners intended to assume control of the APP's Indonesian and Chinese subsidiaries by exercising the company's rights as shareholder in the subsidiaries. With respect, I am not at all optimistic that the task can be so easily achieved by such a route. That may well be the case under our system of law but may not be so under Chinese and Indonesian law, given the anticipated opposition from creditors of those subsidiaries to the judicial management order in the first place, as well as the conflict in opinions from the parties' Indonesian and Chinese legal advisers.

59. Before I proceed further, I wish to address the issue of what counsel for the company described as the 'Singapore card' argument (para 27 *supra*). In response to the Petitioners' argument that Singapore courts should grant redress to its creditors as APP is a Singapore company, Djongianto had produced (see exhibit **FD-10**) a reply from the Monetary Authority of Singapore to an article which appeared in Asian Business on 13 August 2001 headed "Asia's worst deal"; MAS had stated:

> Asia's worst deal (Asian Business, Aug 13) states that securities of Asia Pulp and Paper Co (APP) passed muster with regulators in Singapore and Washington, and that lax regulators contributed to the disaster. Although APP was incorporated in Singapore with limited liability, it was listed on the New York Stock Exchange. It was not listed on the Singapore Exchange and is therefore not subject to Singapore listing rules.
>
> Neither APP nor its subsidiaries registered prospectuses for its securities issues with Singapore's authorities, because the securities were either not offered in Singapore or were not targeted at retail investors. This is the practice internationally e g in the US, Britain and Australia.

Djongianto had pointed out that the creditors of APP (including the Petitioners) knew the risks involved in lending to APP and its subsidiaries; he exhibited (**FD-13**) samples of the kind of prospectuses that were issued for bonds previously offered by the group's subsidiaries; these included APP China's (in the sum of US$403m), APP International Finance Company BV's (in the sum of US$350m), and APP Finance (VI) Mauritius Ltd's (in the sum of US$1.25 billion) all of which were guaranteed by APP and managed by Morgan Stanley Dean Witter and or Merrill Lynch, leading American bankers. The APP group had detailed in those prospectuses the high risks involved. Yet, the hard-nosed bankers had no qualms about lending to the company's various subsidiaries. Consequently Djongianto had asserted, the Petitioners and their supporting creditors should not now be heard to complain to a Singapore court suggesting otherwise; I agree.

60. The Petitioners had inter alia relied on *Re Genesis Technologies International (S) Pte Ltd* [1994] 3 SLR 390 to support their contention that their interests as creditors are paramount where a debtor company is insolvent, because a company whose debts far exceeds its assets in effect belongs to its creditors. I do not dispute that proposition of law for one moment. With respect however, Selvam J in that case only had to deal with a local company which had a paid-up capital (of $12,766) which was 10% of its authorised capital. In contrast, APP is a huge conglomerate. Even if I were to apply the principles enunciated in that case, the Petitioners' wishes do not reflect those of

the majority of the creditors (see para 42 *supra*); it is clear that the Chinese creditors overwhelmingly oppose judicial management. The position is less clear-cut where the Indonesian creditors are concerned. However, IBRA whose wishes cannot be ignored, has also voiced its opposition. Indeed, at APP's level, there is no conclusive preference either way. I noted that CSFB, although a substantial creditor of the group, opposed the Petition. So did Nicky Tan, who was reviewing the group's financial position. Both Raymond Davis of CSFB and Nicky Tan are experts in the field of corporate restructuring and some credence must be given to their views.

61. In the week that I dismissed the Petition, the court was informed that IBRA's representatives had come to Singapore for the purpose of holding talks with members of the USC (which would include DB). I thought it would be a pity to scuttle IBRA's efforts (albeit made at the last minute) to restructure the group's debts by consensus. I noted that IBRA had stated in the MOU it signed with ECAs that it was willing to share the group's assets with other creditors. In any case, 22 August 2002 (when I dismissed the Petition) was only five (5) weeks away from the deadline of 30 September 2002 imposed by the USC/the CSC, for the Widjaja family/APP to sign and deliver up a restructuring plan (one of the demands made by Bingham-McCutchen for withdrawing support for the Petition). What possible harm could there be in allowing the company/the Widjaja family one last opportunity to show their sincerity to restructure the group's debts? Members of the USC should use the opportunity to put forward their proposals for restructuring in the event they disagree with IBRA's. They would also do well to consider the criticisms made by Riebe, the company's expert, on the committee's lack of leadership.

62. Whatever misdeeds the Widjaja family had committed in the past were not going to be unravelled retrospectively by an order for judicial management. Would such acts persist if no judicial managers were appointed, as the Petitioners alleged would be the case? As I had indicated in my oral judgment, that would depend very much on how the Widjaja family want the world to view their future creditworthiness. If the family decides to let the APP group collapse under its mountain of debts, would appointing judicial managers prevent the group's creditors from ending up with bad debts? I think not. Would judicial managers be able to salvage any part of the group's assets for the benefit of APP's creditors in that event? I think it would be highly unlikely, given the extent of indebtedness at both parent and subsidiary levels. However, if the Widjajas intend to raise funds ever again from global capital markets (be it for themselves, APP or Sinar Mas or new conglomerates they intend to form), then the family members would have to cease treating and spending, funds belonging to their companies as if from their own personal piggy banks. Serious consideration must be given to repaying creditors what the group owes. Misuse of companies' funds under any system of law is unacceptable behaviour, even where corporate governance is less rigorous than under Singapore law.

63. Appointing judicial managers at this stage would only add another layer to the costs to be borne by APP and its subsidiaries, on top of the costs they are paying for the numerous committees established in para 14 above. Such an expense can be better saved for payment to creditors.

64. Finally, I had made it clear that dismissing the Petition may well be a temporary reprieve for APP and the Widjajas. If in six (6) months' time, the creditors see no visible improvement in the consensual restructuring process, any creditor who presents a fresh petition to our courts under s 227B of the Act, would very likely find a sympathetic judge who would be more than willing to appoint judicial managers, notwithstanding the legal and other obstacles I anticipate they would encounter, in the discharge of their duties overseas. A new petitioner would not exclude Centre Solutions, who would have no difficulties in turning their supporting affidavit into a basis for a fresh petition for judicial management.

Sgd:

LAI SIU CHIU

JUDGE

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