IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 207

Originating Summons No 824 of 2016

Between

nTan Corporate Advisory Pte Ltd

… *Plaintiff*

And

TT International Limited

… *Defendant*

JUDGMENT

[Companies] — [Schemes of arrangement]

[Companies] — [Receiver and manager] — [Remuneration of]

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nTan Corporate Advisory Pte Ltd
v
TT International Limited

[2017] SGHC 207

High Court — Originating Summons No 824 of 2016
Aedit Abdullah JC
21, 22 February 2017; 20 March 2017

22 August 2017

Aedit Abdullah JC:

Introduction

1 In this case, the plaintiff, a corporate advisory firm, seeks assessment of its professional fees in respect of work done for the defendant company. This assessment is sought pursuant to the orders made by the Court of Appeal in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd and another appeal* [2012] 4 SLR 1182 ("*TTI 2012*").

Background

2 The plaintiff, nTan Corporate Advisory Pte Ltd ("the Plaintiff"), is a boutique corporate advisory firm. The Chief Executive Officer of the Plaintiff is Mr Nicky Tan Ng Kuang ("Mr Nicky").[1]

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[1] Nicky Tan Ng Kuang's affidavit dated 10 August 2016 at para 1.

3 The defendant company, TT International Limited ("the Defendant"), was locally incorporated in 1984 as a private limited company and was subsequently listed on the Main Board of the Singapore Exchange Securities Trading Limited ("the SGX Main Board") in 2000. At the material time, the Defendant was primarily involved in the business of consumer electronics, being the main distributor and licensee of the AKIRA brand of electronic products worldwide. It was founded by a couple, Mr Sng Sze Hiang and Ms Tong Jia Pi Julia (collectively, "the Sngs"). While its business appeared to do well, it incurred losses from foreign exchange derivatives, and had large loans, entailing personal guarantees from the majority shareholders of the company, the Sngs. Following the global financial crisis in 2008, the company's position worsened, as credit dried up while it had outstanding claims from creditors amounting to some $607.03m.[2]

4 In the midst of this, the Defendant had embarked on the construction of the Big Box, a development of a retail complex in Jurong East ("the Big Box Project"). Unsurprisingly, the Defendant ran into difficulties financing the project; an adjudication award was even made against it. In this connection, personal guarantees and loans had to be provided by its founders and majority shareholders, *ie*, the Sngs.[3]

5 It was against this backdrop that the Plaintiff was appointed by the Defendant as its independent financial advisor[4] by an appointment letter dated 28 October 2008. That letter, read together with another letter dated 15 May 2009, constituted the terms of the engagement for the Plaintiff's work as the Defendant's independent financial advisor ("the Contract").[5]

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2 Nicky Tan Ng Kuang's affidavit dated 10 August 2016 at paras 13–20.

3 Nicky Tan Ng Kuang's affidavit dated 10 August 2016 at paras 15 and 19.

4 Tong Jia Pi Julia's affidavit dated 11 November 2016 at para 24.

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6 Under the terms of the Contract, the Plaintiff was to be paid time costs based on hourly rates set out in the letters of engagement, disbursements, and a "Value-Added Fee" ("the VAF"). The parties had keenly negotiated the Contract, with particular focus on the VAF component.[6] The VAF was to be paid on the occurrence of various events, including the obtaining of new funds or the approval of a scheme of arrangement. The VAF comprised of "7.5% of the Net Value of Debt Resolved" and "5.0% of Total Gross Transaction Value" ("the VAF Formula").[7] In simple terms, the VAF was a percentage of the amount of debt owed by the Defendant to its creditors which was "waived, written off, extinguished, forgiven or avoided" or converted into equity in the Defendant pursuant to the anticipated scheme of arrangement. Separately, it also included a percentage of an increase in value of the Defendant through the raising of new funds, loans or assets arising from the Plaintiff's efforts.[8] Hence, the greater the value of the debt rendered not payable as well as the higher the increase in the Defendant's value, the greater the amount of the VAF the Plaintiff stood to receive. For this reason, the VAF is also described as "a success fee".

7 Following its appointment, the Plaintiff embarked on work,[9] the value and effect of which is disputed between the parties. As it was, a scheme of arrangement was approved by the High Court in March 2010. However, a revote was subsequently ordered by the Court of Appeal in August 2010. At the revote, the scheme was approved again. This scheme was approved by the Court of Appeal on 13 October 2010 ("the Scheme"),[10] resulting in three personnel from

5 Nicky Tan Ng Kuang's affidavit dated 10 August 2016 at para 26.

6 Nicky Tan Ng Kuang's affidavit dated 10 August 2016 at paras 29–30.

7 Nicky Tan Ng Kuang's affidavit dated 10 August 2016 at NT-2, pp 154–155.

8 Nicky Tan Ng Kuang's affidavit dated 10 August 2016 at NT-2, pp 154–155.

9 Nicky Tan Ng Kuang's affidavit dated 10 August 2016 at para 33.

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the Plaintiff being named as the scheme managers[11] ("the SM") and the Plaintiff becoming entitled to the VAF under the Contract.

8 The Scheme included the following aspects:[12]

(a) a reverse Dutch auction to allow retirement of debts at a discount – retirement was in order of decreasing rate of discount, with payment coming out of a fund established for that purpose ("Reverse Dutch Action");

(b) restructuring of the balance debt that was considered sustainable;

(c) other debts not falling into the earlier categories were converted into redeemable convertible bonds;

(d) a fixed and floating charge was granted by the Defendant over all the assets of the company in favour of the Scheme creditors;

(e) a moratorium applied to all the Scheme creditors preventing the commencement or continuation of any proceedings against the Defendant and/or its subsidiaries; and

(f) the Scheme would last for 11 years, assuming performance of the obligations under the Scheme.

9 The Plaintiff was an "excluded creditor" under the terms of the Scheme, which meant that the VAF was not subject to the Scheme. Materially, the VAF was not disclosed to the Scheme's Management Committee of creditors ("the

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10 Nicky Tan Ng Kuang's affidavit dated 10 August 2016 at paras 61, 65 and 73.

11 Tong Jia Pi Julia's affidavit dated 11 November 2016 at para 29.

12 Tong Jia Pi Julia's affidavit dated 11 November 2016 at para 30; Nicky Tan Ng Kuang's affidavit dated 10 August 2016 at para 50.

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MC") or the court prior to the Court of Appeal's sanction of the Scheme. It was only almost a year after the Scheme was sanctioned that details of the VAF were disclosed to the MC. Thereafter, in 2012, the MC sought directions from the Court of Appeal on the payment of the VAF to the Plaintiff. The matter was of some controversy between the parties.[13] Eventually, the Court of Appeal in *TTI 2012* made orders with respect to the fees payable to the Plaintiff ("the VAF Orders"):

> 34 … [W]e direct that the relevant parties to this dispute (*ie*, the SM/[the Plaintiff], the [Defendant] and the MC) are to endeavour to reach an agreement as to what ought to be the proper amount of professional fees awarded for [the Plaintiff]'s efforts in reviving the [Defendant] to date. *In the event the parties are unable to reach an agreement, we order that [the Plaintiff]'s global fees (before and after the SM's appointment) will be assessed by a High Court judge.* …
>
> [emphasis added]

Since no agreement on the fees was forthcoming, it is out of the above directions that the present application by the Plaintiff arises.

10 It bears mention that the Plaintiff sought to set aside the decision in *TTI 2012* and/or the VAF Orders. The Court of Appeal in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104 ("*TTI 2015*") declined to do so, though it noted the possibility of setting aside the Scheme. However, both the MC and the Defendant resisted the setting aside of the Scheme.

11 Up till the present proceedings, in addition to an initial $500,000 non-refundable deposit ("the Deposit"), the Defendant has already paid $10,266,164 to the Plaintiff. This $10,266,164 corresponds to all of the Plaintiff's billed time

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[13] Nicky Tan Ng Kuang's affidavit dated 10 August 2016 at paras 79–82.

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costs for the period from 28 October 2008 to 31 May 2011 ("the Billed Time Costs"), save for a sum of $401,150 for April 2009, for which the Plaintiff had initially issued a credit note ("the Credit Note").

12 The MC was not part of the present proceedings. However, a number of creditors, *ie*, bondholders, were present at the hearing.

The Plaintiff's Case

13 The Plaintiff's claim for its global fees is set out as follows:[14]

	Description	Quantum of fees claimed (excluding GST)
1.	Billed Time Costs for the period of 28 October 2008 to 31 May 2011 which have already been paid by the Defendant	$10,266,164[15]
2.	Unpaid time costs for the month of April 2009	$401,150[16]
3.	Fixed monthly fee from August 2011 to July 2012	$830,000[17]
4.	Time costs for August 2012 to November 2012	$42,300[18]
5.	VAF	$27,602,925 – computed based on the formula set out at [38] below[19]

14 Plaintiff's Written Submissions dated 14 February 2017 at para 7.

15 Nicky Tan Ng Kuang's affidavit dated 10 August 2016 at para 137.

16 Nicky Tan Ng Kuang's affidavit dated 10 August 2016 at para 141.

17 Nicky Tan Ng Kuang's affidavit dated 10 August 2016 at para 141.

18 Nicky Tan Ng Kuang's affidavit dated 10 August 2016 at para 141.

19 Plaintiff's Written Submissions dated 14 February 2017, Annex B.

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		+ 5% of the amount adjudicated in respect of certain disputed claims ("the Disputed Claims")[20]
6.	Deposit	$500,000
7.	Outstanding disbursements	$3,285.40
	Total	$39,645,824.40 + 5% of the Disputed Claims

14 The Plaintiff argues that the agreement between the parties, *ie*, the Contract, should be the starting point to determine its fees. The Contract should not be ignored. Both the decisions in *TTI 2012* and *Re Econ Corp Ltd* [2004] 2 SLR(R) 264 ("*Re Econ (No 2)*") did not entail the discarding of an agreement for fees. The fact that the fee is to be assessed does not mean that the Contract should be disregarded – the Court of Appeal in *TTI 2012* was careful to indicate that it was not interfering with the contractual arrangements. In any event, in *TTI 2015*, the Court of Appeal noted that *TTI 2012* was wrong and it did not have the power to unilaterally subject the VAF to taxation or assessment. The Contract remained binding. Similarly, *Re Econ (No 2)* did not require that the fee arrangement be disregarded. The Defendant itself has acknowledged that the court should have reference to the Contract in terms of an "all-in" amount of $10m.[21]

15 The Contract was neither set aside nor challenged. This contractual arrangement arose out of extensive negotiations and indicated what was fair, reasonable and adequate remuneration, as mandated in *TTI 2012*. The

[20] Plaintiff's Written Submissions dated 14 February 2017 at paras 134–137.

[21] Plaintiff's Written Submissions dated 14 February 2017 at paras 97–107.

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Defendant has also not disputed these arrangements until the present proceedings. The Defendant could not now be allowed to rewrite the VAF Formula and disregard a valid contract. Sanctity of contract requires the parties to be bound: *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 at [24] and *MAE Engineering Ltd v Fire-Stop Marketing Services Pte Ltd* [2005] 1 SLR(R) 379 at [27].[22]

16 The VAF Formula reflects the direct and tangible benefit derived by the Defendant from the Plaintiff's work. It provided full certainty. In the negotiations between the parties, the Defendant only took issue with the specific items to be included as part of the components in the VAF Formula but had otherwise agreed to the VAF Formula.[23]

17 The Plaintiff argues that the Defendant wrongly excludes several actual and contingent liabilities from the computation of the VAF quantum. Although various claims were excluded or transferred to a separate voting class by the Court of Appeal during the sanction of the Scheme, these claims are still part of the total debts owed by the Defendant and fall within the definition of "Total Debt" in the VAF Formula. Taking these into account, the Plaintiff had prepared a detailed computation applying the VAF Formula, leading to a VAF quantum of $27.6m.[24]

18 The Plaintiff also contends that *Re Econ (No 2)* was a case decided in the context of an insolvent liquidation scenario, and thus entailed different considerations. In a situation of insolvency, the assets are essentially for the

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22 Plaintiff's Written Submissions dated 14 February 2017 at paras 110–115 and 124–127.

23 Plaintiff's Written Submissions dated 14 February 2017 at paras 130–133.

24 Plaintiff's Written Submissions dated 14 February 2017 at paras 134–136.

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benefit of the creditors. The materiality of the state of solvency was recognised in *Re Econ (No 2)* because the primacy of the contractual arrangement was impliedly acknowledged in a solvent situation. Here however, a "diametrically different context" operates because the Defendant was never placed under liquidation and had been successfully restructured. Independent financial advisors such as the Plaintiff work to create value for companies in financial trouble. The Defendant had also obtained benefits from the Plaintiff's efforts.[25]

19 The Plaintiff also submits that fee arrangements for independent financial advisors should not be rewritten by the court. Independent financial advisors should be distinguished from court-appointed insolvency practitioners such as liquidators or receivers. A VAF arrangement (or other types of success fees) provides incentives for independent financial advisors. Such an incentive benefits the company in motivating financial advisors to strive for successful outcomes. Risk is shared between the company and the financial advisors. The treatment accorded by the court in this case will have an impact on Singapore's aspirations as an international centre for debt restructuring. Singapore needs to attract top insolvency specialists and independent financial advisors. If such fee arrangements are readily rewritten, the "wrong signal" would be sent, disincentivising these professionals.[26]

20 The Plaintiff points to various exhibits to show that value was added for the Defendant. It is emphasised that, despite the range of possible indications of value, as well as the uncertainty, the parties decided that the VAF Formula would be an appropriate mechanism. To discard the formula would leave the court with no principled basis to carry out the assessment. The share price and

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25 Plaintiff's Written Submissions dated 14 February 2017 at paras 139–146.

26 Plaintiff's Written Submissions dated 14 February 2017 at paras 221–236.

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the benchmarks exhibited give the court a proper basis to conclude that the Defendant benefited from the Plaintiff's services.[27]

21 Following *Re Econ (No 2)*, in determining the fees payable to the Plaintiff, the court should take into account the value contributed, time spent, rates charged, assistance provided by the Plaintiff's employees, the scope of work performed and the amount of disbursements claimed by the Plaintiff. On the point of value, the Plaintiff submits the following:[28]

(a) The value is to be assessed on a holistic basis: *TTI 2012* at [35]. Aside from the direct benefits, the court should also consider the renewed level of business and investors' confidence achieved by the Defendant with the Plaintiff's assistance as well as preservation of the Defendant's goodwill. This approach was recognised and followed in *Liquidators of Dovechem Holdings Pte Ltd v Dovechem Holdings Pte Ltd (in compulsory liquidation)* [2015] 4 SLR 955 ("*Dovechem*") and *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2016] 1 SLR 21 ("*Linda Kao*"). In this connection, a successful outcome entitles the insolvency practitioner to remuneration beyond incurred time costs. This is the approach taken in the UK through practice directions: see also *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] 1 BCLC 638. The VAF remunerates the insolvency practitioner for the difference made.[29]

(b) Value was created for the Defendant. It remains a going concern some six years after the Scheme was sanctioned. The Plaintiff worked

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27 Plaintiff's Written Submissions dated 14 February 2017, Annex A and B

28 Plaintiff's Written Submissions dated 14 February 2017 at para 148.

29 Plaintiff's Written Submissions dated 14 February 2017 at paras 152–157.

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with creditors and expended effort on obtaining support for the Scheme. The Plaintiff also assisted in the preparation for court proceedings, creditors' meetings as well as the implementation of the Scheme.[30]

(c) The value contributed need not be direct. This is implicit in *TTI 2012*'s principle of requiring that the value be assessed holistically. In relation to the Big Box Project, the Plaintiff is not seeking to include the value of the Big Box in the computation of the VAF, but the Plaintiff should be credited with its efforts for allowing the Defendant to proceed with the project.[31]

(d) The Plaintiff created value for the creditors through the Scheme. The Scheme creditors stood to gain a much higher payment ranging from 71% to 100% of their debts as compared to the scenario of liquidation, which would have only returned between 9 to 12%. Value was also created by the early retirement of debt through the Reverse Dutch Auction. Interest as well as security was obtained by some creditors.[32]

(e) Value was created for the Defendant's shareholders as the share price regained value over time. Value was also created for the Sngs, allowing them to avoid personal bankruptcy, for the Defendant's employees by preserving their jobs as well as the Defendant's consumers whose product warranties remained valid and enforceable due to the continued survival of the Defendant.[33]

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30 Plaintiff's Written Submissions dated 14 February 2017 at paras 163–167.

31 Plaintiff's Written Submissions dated 14 February 2017 at paras 170–174.

32 Plaintiff's Written Submissions dated 14 February 2017 at paras 178–179.

33 Plaintiff's Written Submissions dated 14 February 2017 at paras 180–181.

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(f) The total value created by the Plaintiff's work ranged from $1.4 to $1.5bn in terms of tangible benefits. The actual value created (including intangible benefits such as preservation of goodwill) was likely to be even higher.[34]

22 The bulk of the time costs claimed by the Plaintiff has already been paid by the Defendant. These were not previously disputed by the Defendant. While some allegations were made, the Defendant ultimately conceded that the time costs already paid was "not unfair". The amount that remains unpaid relates to fixed fees for the months of August 2011 to July 2012. These time costs should be paid as they were reasonably incurred and the Defendant had agreed to pay (which payment was also approved by the MC).[35] Some leeway should be given for work done in the thick of things: *Re Econ (No 2)* at [58]; *Linda Kao* at [35] and *Dovechem* at [55]–[57].[36]

23 The Plaintiff also claims that its rates charged are reasonable as they are comparable to rates imposed by other "Big Four" accounting firms such as PricewaterhouseCoopers LLP and Ernst & Young for the relevant period, *ie*, 2008. Several members of the Plaintiff's team were from leading accounting firms, with similar experience and qualifications as those in the "Big Four" firms. The Plaintiff itself is a well-established boutique firm specialising in high-value corporate restructuring work. There is nothing unfair or unreasonable in the Plaintiff's rates.[37] In the present case, the circumstances necessitated the staff deployed. The manpower used was not previously disputed by the Defendant. The Plaintiff has substantiated why the numbers

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34 Plaintiff's Written Submissions dated 14 February 2017 at paras 182–183.

35 Plaintiff's Written Submissions dated 14 February 2017 at paras 184–187.

36 Plaintiff's Written Submissions dated 14 February 2017 at para 190.

37 Plaintiff's Written Submissions dated 14 February 2017 at paras 194–195.

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deployed were necessary. The different categories of work done are also substantiated. As noted in *Re Econ (No 2)* at [58], the Plaintiff should not be penalised for decisions made in the heat of the moment. The disbursements incurred are also reasonable.[38]

24 Overall, the conduct of the Defendant showed its lack of good faith. Various allegations were belatedly raised, including that the time costs appeared to be excessive; that the Plaintiff had been sufficiently compensated by time costs; and that an all-in basis of about $10m had been conveyed to the Sngs. None of these are made out.[39]

The Defendant's Case

25 The Defendant argues that the terms of *TTI 2012* are clear. The Court of Appeal required this court to have regard to the *Re Econ (No 2)* principles in determining the appropriate amount of remuneration. Of importance is the value that the Plaintiff has brought to the Defendant. The burden lies on the Plaintiff to satisfy the court that the remuneration claims are justifiable; the Plaintiff must provide full particulars and details. Any agreement between the parties would not be conclusive.[40]

26 Given the value contributed by the Plaintiff, and the factors identified in *Re Econ (No 2)*, the Billed Time Costs, *ie*, $10,266,164, as well as the Deposit, would represent a fair, reasonable and adequate remuneration for the Plaintiff.[41]

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38 Plaintiff's Written Submissions dated 14 February 2017 at paras 197–204.

39 Plaintiff's Written Submissions dated 14 February 2017 at paras 212–220.

40 Defendant's Written Submissions dated 14 February 2017 at paras 13–19.

41 Defendant's Written Submissions dated 14 February 2017 at para 27; Defendant's Response to the Plaintiff's Exhibits dated 10 March 2017 at para 16.

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27 The Defendant also contends that the Plaintiff is wrong to state that the Defendant's position is that $10,266,164 is a "fair and reasonable compensation for work done" by the Plaintiff and that the Defendant only disputes "the quantum of VAF payable to [the Plaintiff] (*cf*. [the Plaintiff's] time costs)".[42] The Court of Appeal in *TTI 2012* ordered that the Plaintiff's *global fees* (and not just the VAF) are to be assessed. Thus, the correct approach is whether, having already been paid $10,266,164 for work done under the Scheme, the Plaintiff can prove that it has contributed any additional value justifying entitlement to further fees and on this the Defendant submits that the Plaintiff has not.[43]

28 In respect of the Plaintiff's claim to the VAF, *TTI 2012* made it clear that a holistic approach is to be taken (at [35]), and the value should be measured in terms of "the tangible results for the creditors and the company, as opposed to the mere quantum of debt involved" (at [31]). As the VAF claimed is solely pegged to the quantum of debt involved, this goes against *TTI 2012* and the court should thus not adopt the VAF Formula.[44]

29 Lastly, the Defendant submits that the Plaintiff's claims of value creation do not hold up. The Plaintiff did not play any role in obtaining loans, facilities or other investment for the Big Box Project. Even if credit can be claimed in respect of the latter, these would be work done in discharge of its responsibilities as an independent financial adviser to the Defendant, for which it has already been duly paid. The successful management of the Scheme put in place was dependent on the Defendant's management and staff. The Defendant's ability to fulfil its obligations under the Scheme depended on it

42 Nicky Tan Ng Kuang's affidavit dated 2 December 2016 at para 28.

43 Defendant's Written Submissions dated 14 February 2017 at paras 48–51.

44 Defendant's Written Submissions dated 14 February 2017 at paras 45–47.

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obtaining the necessary funding required for the Big Box Project. Such funding was obtained by the Defendant's own efforts and not the Plaintiff's. The Plaintiff cannot claim that it has contributed value solely on the basis that certain events (such as new investments and loans) would not have materialised if not for the Scheme that saved the Defendant from being wound up. The Plaintiff's claim of improving the Defendant's balance sheet and restoring investor confidence, leading to the securing of credit facilities, particularly through the Reverse Dutch Action, is misconceived. The Defendant had negative equity as at 31 March 2011. That position continued to the end of the 2013 financial year. The improved equity position of the Defendant thereafter was largely due to the revaluation of property, plant and equipment rather than any improved financial performance of the Defendant. Furthermore, the Defendant remained liable to repay any non-sustainable debt which remained unconverted after the Scheme was terminated. The Defendant also continues to be in financial difficulties and has suffered losses during the financial years 2009 to 2016.[45]

30 The Defendant also argues that the share price increase, which the Plaintiff relies upon, cannot be used to show value. The date of 16 January 2013 chosen by the Plaintiff to claim credit for significant increase in the equity value of the Defendant is arbitrary[46] and appears to be selected only because it reflected the peak closing share price of the Defendant post-sanction of the Scheme. The Defendant exhibits evidence to show that the share prices and traded volume remained low after the Scheme was sanctioned on 13 October 2010; it subsequently increased around April 2012 because of the announcement of investment framework agreements relating to the Big Box

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45 Defendant's Written Submissions dated 14 February 2017 at paras 52–68 and 70–76.

46 Defendant's Written Submissions dated 14 February 2017 at para 70(c).

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Project. It also adduces evidence that the current share price of the Defendant is substantially lower than that highlighted by the Plaintiff.[47]

31 Finally, the Defendant argues that the Plaintiff's comparison of their fees with other insolvency professionals and independent financial advisors cannot be meaningful as those cases involved complex cross jurisdictional insolvencies. Where the matters are less complex, the appropriate fees are closer to the $10,266,164 that the Defendant argues should be taken as the appropriate global fees. As for the Singapore cases cited by the Plaintiff, aside from MF Global Singapore Pte Ltd ("MF Global"), the rest are all the Plaintiff's own matters, for which there is no clarity as to how the valuation was obtained. It is also unclear whether the fees charged in these examples included success fees.[48]

My Decision

32 Applying the guidance laid down by the Court of Appeal in *TTI 2012*, I am not satisfied that the full amount claimed by the Plaintiff should be granted. In particular, the contracted VAF Formula is not shown to be fair and reasonable. Neither has sufficient evidence been adduced to support the full claim for the time costs incurred. As only a broad brush approach could be adopted here, the amount that is fair, adequate and reasonable, taking into account the value contributed by the Plaintiff in the exercise of judgment and expertise, would be the time costs claimed for the periods of 28 October 2008 to 31 May 2011 (including the value reflected in the Credit Note) and August 2011 to November 2012 (both these time costs would already carry a premium over the probable actual time costs that were reasonably incurred for the work),

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47 Defendant's Response to the Plaintiff's Exhibits dated 10 March 2017 at paras 5 and 8 –10.

48 Defendant's Response to the Plaintiff's Exhibits dated 10 March 2017 at para 13.

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the outstanding disbursements as well as the Deposit of $500,000. All in all, these sums add up to a total professional fee of $12,042,899.40.

The Analysis

The requirements in past case law

TTI 2012

33 In *TTI 2012*, which was incidentally the second case involving the Defendant decided in 2012, the Court of Appeal, after encouraging the present Plaintiff, the Defendant and the MC to try to resolve the issue of the Plaintiff's remuneration by negotiation, laid down the following:

> 35 However, should this matter proceed for assessment, the court shall have regard to the principles stated in *Re Econ Corp Ltd (No 2)* ([20] *supra*) which are also applicable to scheme managers (see *Re Econ Corp Ltd (No 2)* at [48]) in arriving at the quantum of fees reasonably due to nTan in successfully reviving the Company. In *Re Econ Corp Ltd (No 2)*, the High Court laid down certain principles to be taken into account in determining the remuneration of insolvency practitioners. Bearing these in mind, the court shall first and foremost *consider the value (in this case the benefits, from a holistic and not mathematical standpoint, accruing to the Company and the creditors) contributed by nTan.* Other factors to be taken into consideration would include, *inter alia*, *the nature of the work involved, the time spent, the assistance provided by the employees working in nTan, the scope of work and reasonable disbursements incurred.* It will be the duty of the court, should the parties fail to reach an agreement, to ensure that nTan will be "***fairly, reasonably and adequately remunerated***" (*Re Econ Corp Ltd (No 2)* at [74]).
>
> [emphasis added in italics and bold italics]

The objective of the assessment exercise is thus the determination of fees that are fair, reasonable and adequate.

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TTI 2015

34 The above requirements were not disturbed in *TTI 2015*, where the Plaintiff sought to set aside *TTI 2012* and/or the VAF Orders on the basis of *res judicata*, breach of natural justice, lack of jurisdiction and powers to order that the VAF be assessed or taxed. The Court of Appeal observed, in so far as is pertinent to the present application, that *TTI 2012* considered the effect of the non-disclosure of the VAF agreement in the Contract, and that *TTI 2012* considered that the court had the power to order assessment or taxation. Nothing in respect of such assessment or taxation as ordered in *TTI 2012* was disturbed by *TTI 2015.*

35 The Plaintiff argues that doubt was cast on *TTI 2012* in *TT1 2015*. It is correct that in *TTI 2015*, the Court of Appeal noted that there was "some force" in the argument that *TTI 2012* had no power to unilaterally order that the VAF be taxed if not agreed by the SM/the Plaintiff, the MC and the Defendant (at [194]–[195]). However, it expressly declined to reconsider the VAF Orders made in *TT1 2012* (see *TTI 2015* at [195]):

> 195 …[I]n our judgment, the fact that the CA may have been wrong in deciding that it had the power to make the VAF Orders does not afford us a basis for reopening [*TTI 2012*] ([3] *supra*), of which the VAF Orders form a part. In the final analysis, the public interest in the finality of litigation must prevail.

Thus, the VAF Orders made in *TTI 2012* remain applicable, and were not in any way modified by *TTI 2015*.

Re Econ (No 2)

36 Given the endorsement of *Re Econ (No 2)* by the Court of Appeal (see [33] above), the principles enunciated in *Re Econ (No 2)* are instructive in assessing what would be a fair, reasonable and adequate level of remuneration.

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These principles apply equally to court-appointed as well as privately-appointed insolvency practitioners (*Re Econ (No 2)* at [44]). In each case, the inquiry would be to "assess the value that the insolvency practitioner has brought to bear" (at [47]). In particular, the court in *Re Econ (No 2)* specified a number of considerations in making this assessment:

(a) There was a right to fair and reasonable remuneration, but being remunerated on a time costs basis is not "a matter of right". The time spent is "only one of several factors" to be taken into account – the precise importance of this factor is case-sensitive (at [45] and [51]).

(b) The burden of proof is on the insolvency practitioner that the remuneration is justifiable. The appropriate benchmark is fairness and reasonableness and the court "will carefully scrutinise the facts placed before it" (at [49]).

(c) The difference or value brought by the insolvency practitioner is one of the most important aspects affecting his remuneration. The views of the major creditors would be significant, unless they are related entities (at [50]).

(d) Rates cannot be taken at face value. The court determines what would be adequate remuneration for "a similarly experienced and qualified" insolvency practitioner. The fact that insolvency practitioners may exercise commercial judgment should not attract special treatment. Major insolvencies may attract different considerations but these are in the "realm of exceptional cases". Comparative rates by other insolvency practitioners may not serve much use. In the absence of any industry practice, the court should consider a solicitor's rate (one with similar

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experience) on an indemnity basis as a possible yardstick in determining the applicable hourly rate of an insolvency practitioner (at [52]–[56]).

(e) Claims for assistance of employees in the insolvency practitioners' firms must be scrutinised to determine if this has been "reasonably incurred" (at [57]).

(f) The functions and the responsibilities assumed by the insolvency practitioner should be considered, while considering the demands of the process of insolvency (at [58]).

(g) Sufficient particulars of the disbursements claimed must be provided to determine whether they were "reasonably incurred" and if the quantum claimed is "reasonable" (at [59]).

37 The objective of the exercise, prescribed in *Re Econ (No 2)* and endorsed by the Court of Appeal in *TTI 2012* as applicable to scheme managers, is for sufficient scrutiny to be given to the claim for fees made by the practitioner, to ensure that a fair, adequate and reasonable amount is charged.

The Contract

38 The Contract stipulates:[49]

> 1. Our fees for the engagement comprises:-
>
> (a) Our ***time costs*** which shall be determined in accordance with Schedule A attached thereto; and
>
> (b) A ***Value-Added Fee*** ("Value-Added Fee") which shall be computed in accordance with paragraphs 3, 4 and 5 below.
>
> 2. In addition to the fees set out in paragraph 1 above, you will also be required to pay for our ***out-of-pocket expenses***

[49] Nicky Tan Ng Kuang's affidavit dated 10 August 2016 at NT-2, pp 154–155.

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(including fees of any experts or professionals). Our time costs and out-of-pocket expenses shall be paid promptly and on a monthly basis.

3. ***The Value-Added Fee shall comprise****:* -

(a) 7.5% of the ***Net Value of Debt Resolved*** (as defined in paragraph 4 below); and

(b) 5.0% of ***Total Gross Transaction Value*** (as defined in paragraph 5 below).

4. "Net Value of Debt Resolved" means the total value of the Group's ***actual and contingent liabilities***, inclusive of contractual accrued interest and other charges thereon ("Total Debt") which, upon Successful Completion… are ***waived, written off, extinguished, forgiven or avoided*** ("Extinguished"), such liabilities to be valued as at the date that each such liability is Extinguished. …

5. "Total Gross Transaction Value" means the aggregate of

(i) the aggregate value of those parts of the ***Total Debt***, other than those that have been taken into account as Net Value of Debt Resolved, which, upon Successful Completion are: -

a) converted to equity in the Company, including inter alia issuance of warrants or options by the Company that are exercisable into equity in the Company ("Converted to Equity"); and

b) restructured, including but not limited to, inter alia restructuring by payment of a liability either partially or in full except for amounts paid under paragraph 4 above, conversion into term loans or by rescheduling of payments (in which case the entire amount of those parts of the Total Debt that are rescheduled) shall be calculated as part of the Total Gross Transaction Value …

…

(ii) new funds raised by us for the Group by the issuance of any equity or debt instruments ("New Investors"); and

(iii) the sum of new loans or other new financing from banks and/or non-financial institutions successfully obtained by us for the Group ("New Loans"); and

(iv) the fair value of any assets and/or businesses acquired or to be acquired by the Group which have

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> been advised by us following a written confirmation between us that we would provide such advice. …
>
> …
>
> [emphasis in original omitted; emphasis added in bold italics]

39 The Plaintiff argues that contractual freedom should not be impinged on, and the Contract, which was negotiated and voluntarily entered into, should not be ignored. I agree that *TTI 2012* did not find that the Contract should be discarded or ignored. There is nothing in the language of *TTI 2012* that suggests such a conclusion.

40 However, the fact that the Contract remains relevant is not the end of the matter. *TTI 2012* requires the assessing court to assess what is fair, *reasonable* and adequate. Given that one of the aims is the determination of reasonable fees, the Contract cannot be the start and end points. Otherwise, the court would not need to be involved – the parties could just be held to their contractual agreement and that would be conclusive of the matter. Indeed, *TTI 2015* at [57] noted that the "upshot of [*TTI 2012*] was that [the Plaintiff] was not entitled to the full amount of the VAF under [the Contract]". This consequence flowed from the fact that the Court of Appeal found that there had been non-disclosure of the VAF to the MC. The Plaintiff argues that the non-disclosure was caused by the Defendant. Whatever the cause of the non-disclosure – whether, as the Plaintiff says, the non-disclosure was the Defendant's own doing or otherwise – the Court of Appeal had to decide between unravelling the Scheme and allowing it to proceed. The Court of Appeal in *TTI 2012* decided *not* to unravel the Scheme because it was not "practical to set it aside without causing more harm to the [Defendant] and the creditors", given that the Scheme had been implemented for more than two years at the time of the decision (at [33]).

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41 Given the decision to allow the Scheme to continue, the Court of Appeal could not have allowed the Plaintiff to be remunerated on the basis of the Contract – if it had done so, then there would have been absolutely no consequences to the fact that there was non-disclosure of the VAF to the MC. That was precisely the outcome the Court of Appeal wanted to avoid. Seen in this context, the Contract, which was the very thing that was not disclosed, could not be the controlling or determinative factor.

42 The Plaintiff argues that weakening the force of the contractual bargain in this way may affect the position of insolvency practitioners and have a chilling effect on the field. However, the precedential effect of this decision is likely to be limited, given that it arose out of the non-disclosure of the Contract to the MC, *ie*, the creditors. Where a restructuring is undertaken with appropriate disclosure of the scheme manager's remuneration, the contract for fee agreement will, in the absence of anything else untoward, be given effect. Thus in most restructurings, insolvency practitioners acting as scheme managers can expect to get what they bargained for. There would thus be little by way of a *genuine* chilling effect if the Contract is not given primacy effect in the present case. It bears emphasis that the approach adopted here is different *only* because of the material non-disclosure to the MC.

43 The fact that the Defendant, but not the MC, has objected to the Plaintiff's fees in the Contract, despite agreeing to it from the very beginning, does not change anything. The VAF Orders require the fee to be negotiated between the involved parties, which includes the Defendant. The passivity of the MC does not mean that the fees sought by the Plaintiff should be granted. The weighing of reasonableness, adequacy and fairness still has to be made considering all the relevant factors.

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44 I have concluded that the Contract is neither a starting point nor a default basis to ascertain the Plaintiff's fees. What then is the role of the Contract? At best, the Contract represents the outcome of negotiations only as between the Defendant and the Plaintiff – it cannot be taken to have been agreed by the MC who did not participate in the negotiations leading up to the Contract. Depriving the contract of that controlling role means that the bargain struck between the Plaintiff and the Defendant is given at most secondary weight. Having said that, the Contract is not however irrelevant or immaterial. The Contract is part of the factual matrix that an assessing court considers alongside the factors stated in *Re Econ (No 2)*. In principle, it can be considered in the court's determination, as an indication of the value that is to be ascribed to the work rendered by the Plaintiff. But it is *only* one of many factors.

45 Crucially, the contractual fee must be shown to have been derived on a reasonable basis. Merely being the product of arm's length negotiations that was freely entered into does not show that the agreed fee is reasonable. Such a fee might well be reflective of market value, but that is a different inquiry. Market value is often a product of a multitude of factors, particularly demand and supply. Additionally, the relative bargaining power of the parties, the presence/absence of competitors, and the adequacy of information available, will all have an impact. In comparison, the analysis of reasonableness, fairness and adequacy import other considerations such as equity, good faith, and the need to stymie profiteering and windfalls.

46 On the point of the Contract, the Defendant alluded in one of its affidavits to the Sngs' understanding that "the likely restructuring costs, on a [*sic*] 'all in' basis, would be around $10 million".[50] However, the Plaintiff argues

[50] Tong Jia Pi Julia's affidavit dated 11 November 2016 at para 40.

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that this understanding is not in any way substantiated and is in fact inconsistent with the terms of the Contract.[51] Having considered the evidence, on a balance of probabilities, I find that there was no such understanding. The Contract is unequivocally *silent* on this alleged $10m "all-in" understanding. Even though it was entirely open to the Defendant to include an express provision in the Contract to record this alleged understanding, there is nothing in the negotiations and/or correspondence which evidences this. It is important to bear in mind that the Defendant is a sophisticated commercial entity, listed on the SGX Main Board, and was at all times legally advised. There is simply no excuse for the Defendant not to have included such a material term in the Contract if indeed there was any such understanding. In this vein, the Court of Appeal's observations in *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 are apposite:

> 57 …[N]o explanation was offered for the parties' failure to put the alleged tripartite contractual agreement to set off in writing. … [O]ne would have expected that *sophisticated commercial parties … would not have agreed to deal with each other without ensuring that their contractual arrangements have been comprehensively evidenced by proper legal documentation* … Here we are not dealing with two individuals, or small entities, which have carried on their business relationship in an informal manner. We are instead talking about *large, commercial-savvy parties who have been dealing with one another at arm's length on the basis of written contracts*, and who would, had that been their intention, have *surely taken care to enshrine the purported tripartite set-off agreement in writing*. …
>
> [emphasis added]

47 Even if I am wrong on the above and there was in fact such an understanding, it serves the same limited value as the terms of the Contract and

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[51] Plaintiff's Written Submissions at paras 214–216.

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does not obviate the necessity for the court to assess the fees based on what is fair, adequate and reasonable.

Synthesis

48 Based on the analysis above, in the present case, the Plaintiff has to show that:

(a) value was added by its contribution to the Scheme;

(b) the VAF was fair, reasonable as well as adequate; and

(c) the time costs were properly substantiated and incurred.

49 There is a significant difference between scheme managers as compared to judicial managers and receivers. As the professionals in the latter category are appointed by the court, it would be expected that their conduct and remuneration would be subject to some scrutiny by the court. Scheme managers, on the other hand, are appointed essentially by either the company or the creditors on a *private* basis. In general, they would not be subject to the court's control, especially with regard to remuneration. However, here, the court has become involved because of the non-disclosure of the remuneration agreement. Thus, this particular scheme manager's, *ie*, the Plaintiff's, remuneration is subject to control and scrutiny.

Application to the facts

Value added on the facts

50 In the present case, the key question to be determined is the value created by the Plaintiff's work for the Defendant. Contrary to the Plaintiff's attempts to characterise the value it contributed through the mathematical calculation in the

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VAF Formula, the exercise to be undertaken is not a mathematical, *ie*, solely quantitative, assessment (see [33] above). It is insufficient for the Plaintiff to merely allege that the VAF Formula reflects the direct and tangible benefit derived by the Defendant from the Plaintiff's work. The Court of Appeal in *TTI 2012* emphasised that the value should be measured in terms of "the tangible results for the creditors and the company, as opposed to the *mere quantum of debt* involved" (at [31]) [emphasis added]. However, the Plaintiff's reliance on the VAF Formula is primarily predicated on the quantum of debt previously owed by the Defendant,[52] which clearly goes against the Court of Appeal's decision in *TTI 2012*.

51 Instead, a holistic assessment is to be undertaken, which requires a predominantly qualitative component, weighing, among many factors, the complexity of the task, the difficulties that may be faced and the resources at hand. Additionally, causation needs to be established between the value created and the practitioner's efforts – this is not easy to show. Given these likely difficulties, a contractual agreement would probably be the best mechanism to identify and assess the benefit of any value added. However, in the absence of the controlling effect of the Contract, the Plaintiff must adduce sufficient evidence that shows a link between its efforts and the value added to the Defendant.

52 To recapitulate, the Plaintiff highlights various matters as indicating the value brought by it through the Scheme, pointing to (see [21] above):

(a) the Defendant remaining a going concern, which was a result of the Plaintiff's efforts and the implementation of the Scheme;[53]

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[52] See the Plaintiff's detailed calculation in the Plaintiff's Written Submissions dated 14 February 2017, Annex B.

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(b) the Plaintiff's efforts in allowing the Defendant to proceed with the Big Box Project;[54]

(c) the Scheme yielded a higher possible payment returns range for the creditors *vis-à-vis* a liquidation scenario, and the early retirement of debt for some creditors through the Reverse Dutch Action;[55]

(d) value was created for the Defendant's shareholders because the Defendant's share price regained value over time;[56] and

(e) value was also created for the Sngs, allowing them to avoid personal bankruptcy, for the Defendant's employees who retained their jobs as well as for the Defendant's consumers whose product warranties remained enforceable.[57]

53 In my judgment, I do not find that any of these claims justify an award of any fee on the basis of fair, reasonable and adequate compensation that is significantly much higher than the actual time costs incurred.

54 The Big Box Project could not be said to have been so substantively materialised through the Plaintiff's efforts that it would be fair to include the Plaintiff's contribution as part of the basis for the value-added claim. It was the Defendant and not the Plaintiff that had secured the necessary loan facilities and other investments to continue with the Big Box Project. In a related vein, the Plaintiff also argues that it should be credited with its efforts in preventing the

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53 Plaintiff's Written Submissions dated 14 February 2017 at paras 163–167.

54 Plaintiff's Written Submissions dated 14 February 2017 at paras 170–174.

55 Plaintiff's Written Submissions dated 14 February 2017 at paras 178–179.

56 Plaintiff's Written Submissions dated 14 February 2017 at para 180.

57 Plaintiff's Written Submissions dated 14 February 2017 at para 181.

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Defendant from being liquidated, which was the reason why the Defendant could proceed with the Big Box Project in the first place. If such an argument is accepted, for any company under a scheme of arrangement, it would mean that the value of every successful project or investment (post-scheme) can be attributed to the scheme manager's efforts since these projects would not have been possible if the company had went under. That logically cannot be right. What needs to be assessed is who had primarily contributed to the project's success. Here, there is insufficient evidence to show that the Plaintiff (as opposed to the Defendant) played the pivotal role in the successful execution of the Big Box Project.

55 As for the share price, it is true that any recovery in share price could be relevant. However, this cannot be conclusive indication of value – share prices fluctuate for various reasons, some of which would only be tenuously linked to the performance or position of the company. Presumably, long term share price trends may be indicative of the intrinsic value of the company, but that would require more data accumulated over several years, and would also necessarily involve the effort of other persons aside from the scheme managers (who often drops out of the picture once the scheme is completed). In any event, in the present case, the share prices are not of a conclusive indication because, as the Defendant highlights,[58] the increase in share price was not immediate and had only briefly increased in 2012 because of the announcement of investment framework agreements relating to the Big Box Project. The Plaintiff conveniently chose to represent the Defendant's share price as of 16 January 2013 (which coincidentally reflected the highest ever closing share price of the Defendant post-sanction of the Scheme) but omitted to mention that the current

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[58] Defendant's Response to the Plaintiff's Exhibits dated 10 March 2017 at paras 5 and 8 –10.

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share price of the Defendant is substantially lower and that the Defendant has been in the red during the financial years 2009 to 2016.

56 The Plaintiff also invokes the Sngs escaping bankruptcy as an indication that valuable work was rendered. The Defendant disputes this, contending that the Sngs continue to face further personal liabilities.[59] Even if the Plaintiff's efforts enabled the Sngs to avoid bankruptcy, that is not relevant *vis-à-vis* the Defendant. It is not enough that value has accrued to someone other than the Defendant from the Plaintiff's work. The benefit must be one accruing directly to the company. The focus of the *TTI 2012* and the *Re Econ (No 2)* analysis is on the direct benefit to the company being restructured or liquidated. The object of the analysis of value is accrual of value in terms of the assets of the company, *ie*, how much better it is in terms of financial value, because of the efforts of the scheme manager. While it is possible that the Defendant may benefit in a sense from the continued solvency of the Sngs, its founders and perhaps driving spirit, their relationship is too remote for the purposes of determining the value of work done for the Defendant. For the same reasons, any value derived by the Defendant's creditors from the Scheme is also immaterial.

57 In relation to the points made about the Defendant remaining a going concern, the Defendant's employees not losing their jobs and the Defendant's consumers being protected, these are aspects that will naturally feature in any reasonably successful schemes of arrangement. I fail to see how these factors can be said to have *particularly* increased the value brought to the Defendant as a result of the Plaintiff's efforts in orchestrating the Scheme.

58 Weighing all of the above, I find that the value added by the Plaintiff is not shown to be of the scale contemplated by the VAF Formula. The amount

[59] Defendant's Written Submissions dated 14 February 2017 at para 70(d).

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that can be ascribed to the value created by the Plaintiff for the Defendant is uncertain, but it is certainly not of the level stated in the Contract – the VAF claimed by the Plaintiff under the Contract is in excess of $27.6m (see [13] above). In view of the above, the value claimed by the Plaintiff, which is grossly more than adequate compensation for the effort and work it expended.

Other relevant factors in Re Econ (No 2)

59 The Defendant submits that the time costs claimed by the Plaintiff from 28 October 2008 to 31 May 2011, *ie*, the Billed Time Costs of $10,266,164, as well as the Deposit of $500,000, are sufficient compensation for the Plaintiff's work done and no additional fees should be awarded to the Plaintiff. The Defendant draws a comparison with the time costs paid to the receivers in *Linda Kao*, who were awarded $3.45m for about one year's work.[60] Here, the Plaintiff's Billed Time Costs came up to a total of $10,266,164, with $6.3m accruing in just the first year. Further, in respect of the additional unbilled time costs of $872,300 for the period of August 2011 to November 2012 ("the Unbilled Time Costs"), the Defendant submits that no proper breakdown has been given in the present case as was required by *Re Econ (No 2)*. In any event, any work done during this period would not have been substantial.[61]

60 For the Billed Time Costs, what the Plaintiff does to argue for its claimed hourly fees is to refer to the hourly rates charged by some of the "Big Four" accounting firms.[62] The Plaintiff argues as well that the fees were "reasonably incurred" because the Defendant had agreed on and the MC had

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60 Defendant's Written Submissions dated 14 February 2017 at para 30.

61 Defendant's Written Submissions dated 14 February 2017 at paras 34–38.

62 Plaintiff's Written Submissions dated 14 February 2017 at para 194.

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approved the payment of these fees.[63] In my judgment, these are insufficient. The fact that there are similar hourly rates only helps to show that the rates themselves are not disproportionate. It does not substantiate or support the conclusion that the rates are reasonable for the work done. As for the prior agreement or consent of the Defendant and/or the MC, that is not conclusive in light of the directions in *TTI 2012* for an assessment of a *reasonable* fee. If anything, the fact that a whopping $6.3m was charged for time costs in the first year alone strongly suggests that the Billed Time Costs are unlikely to be reasonable. In these circumstances, allowing full recovery for the Billed Time Costs will mean that a premium over and above the actual time costs incurred would be awarded to the Plaintiff.

61 In respect of the Unbilled Time Costs, I agree with the Defendant that *Re Econ (No 2)* requires cogent evidence to be given, so that there is at least *prima facie* substantiation of the amounts claimed. In fact, showing that a set number of hours has been spent on a matter would not even be sufficient. Time spent needs to be linked to specific categories of work done, which in turn must be related to the scope of the engagement (see the Appendix to *Re Econ (No 2)*). It is only with this information that an assessment can be properly done. In the present case, the Plaintiff has not adduced sufficient evidence to justify the Unbilled Time Costs. The Plaintiff only makes reference to an agreed fixed monthly fee from August 2011 to July 2012, which again has limited relevance in assessing a *reasonable* fee, and the time costs for the period from August 2012 to November 2012. In respect of both time periods, there is no evidence of the number of hours worked, what the Plaintiff's work entailed and the number of staff deployed. In the absence of the requisite evidence to justify the Unbilled Time Costs, to nevertheless allow full recovery for these unbilled time

63 Plaintiff's Written Submissions dated 14 February 2017 at para 185.

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costs would also most probably award the Plaintiff a premium over the actual time costs incurred.

Comparison evidence

62 The Plaintiff relies on examples of professional fees charged in other restructuring engagements to indicate benchmarks for comparison. These examples are what could be obtained from public sources. While some of the comparators were the Plaintiff's own engagements, the Plaintiff submits that these should not be disregarded as they were fees that were charged and "willingly paid" – these fees reflect the then prevailing market rates in Singapore which companies were prepared to pay for being advised on restructuring. In fact, one of the examples tendered, involving Jaya Holdings Limited ("Jaya"), handled by the Plaintiff, would perhaps be the "most comparable case" to the Defendant's context in terms of, *inter alia*, the quantum of debt restructured: in that case fees totalling about $21.1m, with a VAF of $15m was charged and paid.[64]

63 The Defendant argues that some of the cases that the Plaintiff relies on are clearly distinguishable as these involve some of "the largest and most complex insolvencies globally". Complex insolvencies such as Lehman Brothers Holdings, Inc ("Lehman Brothers") and Nortel Network Corporation ("Nortel") would naturally have resulted in larger quantum of fees being incurred. Instead, the fees charged in less complex matters such as Farepak Food & Gifts and Alpari (UK) Limited were within the range of about $10.3m which the Defendant submits is appropriate in the present case. Additionally, it is not "a fair or objective comparison" for the court to look at matters which are the Plaintiff's own. In any event, in relation to some of the examples such as

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64 Plaintiff's Reply Submissions dated 20 March 2017 at paras 18 and 20.

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Citiraya Industries Ltd ("Citiraya"), it is also unclear whether the figures indicated were pure time costs or whether they included a success fee.[65]

64 In my judgment, comparison figures may assist, as precedents do, in the determination of legal costs. But that assistance is premised on like being compared with like: that the facts underlying each case or precedent bear a resemblance to what is before the court. The difficulty with precedents for legal costs is that much would have to turn on the facts of the specific case. The variation is further compounded when one turns to comparisons between fees charged in restructuring schemes. What makes the situation even more complex is that unlike legal costs, which are ultimately determined by the court and for which there are guidelines in place, fees for schemes are currently left entirely for determination by the market forces. There is no third party control on the fees imposed. The comparisons must thus be considered only as indicative of what may be agreed. Even if the schemes in question are comparable, it by no means automatically follows that the fees agreed are fair and reasonable. Percentage indications, *ie*, the fees charged in proportion to the total debts restructured, are also not that useful – larger deals may attract lower percentages, while lower deals may attract larger percentages.

65 Of the comparisons made by the Plaintiff, I leave aside Lehman Brothers and Nortel, as these were large, multi-jurisdictional restructurings and insolvencies. Both were of an entirely different scale in terms of the value, legal issues and cross-border elements involved. I also did not place much weight on the fees charged in foreign insolvencies – the circumstances, framework and thus work done for restructurings in other jurisdictions such as the United States, the United Kingdom and Australia may differ materially. Without further

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65 Defendant's Response to the Plaintiff's Exhibits dated 10 March 2017 at para 13.

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submissions on whether this is so, it would not be meaningful to look to these as comparators.

66 That leaves then the restructurings that took place in Singapore. Of these, MF Global was a significantly complex bankruptcy, for which I accept different considerations may have applied in determining the professional fees. As highlighted by the Defendant, the matter engaged multiple jurisdictions and involved numerous customers as well as creditors competing in relation to assets in all the various jurisdictions (moneys were owed to both customers as well as creditors).[66] MF Global had over 6000 customers with "complex trading positions" in various types of financial contracts. As noted by MF Global's liquidator, Mr Bob Yap, MF Global is "one of the biggest and most complex bankruptcies in Singapore because of the number of customers involved and the multi-jurisdictional nature of the business" and the task of "sorting out customers from creditors and customers' entitlements was complex and laborious" (see "MF Global Singapore creditors may get as much as 91% of money back", *Media Release* (28 May 2012)).

67 Lastly, the fees charged in relation to the Plaintiff's own work, *ie*, Citiraya, Jaya, and Seatown Corporation Ltd, could not be of much weight. The fact that the Plaintiff may have asked for and been paid the fees in question could not be evidence of the *reasonableness* of the fees charged by the Plaintiff in the present case, since in those cases, that specific question of reasonableness was not an issue. What these fees merely show is what the market is willing to pay, which, as noted above at [45], is not the relevant inquiry.

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66 Defendant's Response to the Plaintiff's Exhibits dated 10 March 2017, Annex A.

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Overall assessment

68 In this application, the Plaintiff seeks a total payment in excess of $39.6m for its work done for the Defendant (see [13] above). In this connection, it bears pointing out that despite already being paid some $10.8m (~$10.3m + the Deposit), the Plaintiff is additionally claiming (a) $1.27m in unpaid time costs, (b) the VAF of $27.6m plus 5% of the Disputed Claims and (c) disbursements amounting to $3285.40. Even if the actual VAF to be determined based on the formula set out at [38] above yields a lower figure, the possible sum for the VAF is nevertheless an estimated *$15m* to *$30m* – as observed by the Court of Appeal in *TTI 2012*, "[b]y any standard, this is an extraordinary amount that will leave many breathless" (at [6]).

69 As noted above, it is not possible to come to a clear conclusion on the value that was created by the Plaintiff's efforts. This thus leaves me with only a broad-brush approach to determine what would be a fair, adequate and reasonable fee for the Plaintiff's efforts. Certainly, there is some element of contribution by the Plaintiff, but it is not anywhere close to the contractual figure nearing $28m. In the calculation the Plaintiff puts forth, the value of the items to be counted as part of the base figure includes various assets, funds and projects that cannot be unequivocally ascribed to the Plaintiff's efforts, *eg*, the Big Box Project and the increase in share price could not be wholly or even significantly credited to the Plaintiff.

70 Holistically considering the value of the work, the time costs, and the other relevant factors, I am of the view that an appropriate figure that provides a fair, reasonable and adequate compensation is an uplift on the actual time costs incurred. As noted above at [60]–[61], both the Billed Time Costs and the Unbilled Time Costs are to be taken to already include a premium over the

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actual time costs. One possible approach is to discount the premium from the actual time costs and then add an element for any extra value added that was not covered by the time costs, including compensation for any special expertise or judgment exercised. But as noted above, any such calculation, especially the quantification of the latter element, would be largely speculative. The preferable option instead is to treat these additional premiums as the compensation for the value contributed by the Plaintiff for the Defendant.

71 In the absence of clear evidence supporting the Plaintiff's claim, allowing the Plaintiff to fully recover the Billed Time Costs, the Unbilled Time Costs, disbursements as well as the $500,000 Deposit, would seem to be a fair, reasonable and adequate fee, considering the value in question as best as can be determined now, the time expended, and the Scheme created. This sum might be quite far off the amount claimed by the Plaintiff under the Contract. It is certainly not what the Plaintiff expected when it embarked on the work. But the Plaintiff's expectation does not determine the assessment – instead the task entrusted to this court is to determine a fair, adequate and reasonable fee. One's expectation would not necessarily reflect a fair or a reasonable fee, at least from an objective or neutral perspective.

72 In relation to the outstanding disbursements of $3285.40 (before GST), I allow this claim for two reasons. First, from a perusal of the Plaintiff's policy terms for charging of disbursements and out-of-pocket expenses to its clients,[67] there is nothing unreasonable about the itemised list of possible disbursements. Second, no arguments are raised by the Defendant that the outstanding disbursements claimed by the Plaintiff were unreasonably incurred.[68]

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67 Nicky Tan Ng Kuang's affidavit dated 10 August 2016 (NT-17), pp 564–565.

68 Plaintiff's Written Submissions dated 14 February 2017 at para 204.

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73 The only further issue is the question of the Credit Note. This was a waiver by the Plaintiff of the sum of $401,150 owed by the Defendant on the *condition* that the payment owing from the Defendant was to be paid within a certain time. As it turned out, the Defendant made a belated payment. In these circumstances, it would not be appropriate to hold the Plaintiff to the Credit Note because the conditions for triggering the note were not met and the value of the note should thus not be deducted. Accordingly, the Defendant should pay $401,150 to the Plaintiff for the time costs incurred by the Plaintiff in April 2009.

Miscellaneous

74 Just a week before the parties were to file their written submissions, the Plaintiff filed Summons No 560 of 2017 to seek leave for the former lawyer acting for the Defendant in the matter, to give evidence orally and/or produce documents on behalf of the Plaintiff. His evidence was however not called in the end because a consent order was reached between the parties that his evidence can be dispensed with on the condition that the Defendant agrees that the former lawyer confirms and supports the evidence in respect of a portion of the third affidavit of Mr Nicky.[69]

Conclusion

75 For the above reasons, I find that a fair, adequate and reasonable fee for the Plaintiff's work done is the Billed Time Costs (including the value reflected in the Credit Note), the Unbilled Time Costs, the outstanding disbursements as well as the Deposit of $500,000. All in all, these sums add up to a total professional fee of $12,042,899.40. Accordingly, in addition to the $10,766,164 ($10,266,164 + $500,000 Deposit) that has already been paid by the Defendant,

[69] Order of Court dated 21 February 2017 (ORC 1197/2017).

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the Defendant has to pay the Plaintiff an additional $1,276,735.40. Since these sums exclude the corresponding GST, any unpaid GST has to also be paid by the Defendant.

76 Directions for arguments on costs will be given separately.

Aedit Abdullah
Judicial Commissioner

Edwin Tong SC, Kenneth Lim Tao Chung (Kenneth Lin Daocong), Peh Aik Hin, Tham Chuen Min, Jasmine (Tan Jianmin) and Chua Xinying (Allen & Gledhill LLP) for the plaintiff;
Chan Hock Keng, Ong Pei Chin, Lawrence Foo and Chong Wan Yee Monica (Zhang Wanyu) (WongPartnership LLP) for the defendant.

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