IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 34

Civil Appeal No 60 of 2018 and Summons No 138 of 2018

Between

Aathar Ah Kong Andrew

… *Appellant / Applicant*

And

CIMB Securities (Singapore) Pte Ltd

… *Respondent*

Civil Appeal No 61 of 2018

Between

Aathar Ah Kong Andrew

… *Appellant*

And

Citibank Singapore Limited

… *Respondent*

Version No 1: 27 Oct 2020 (22:41 hrs)

Civil Appeal No 62 of 2018

Between

Aathar Ah Kong Andrew

… *Appellant*

And

OUE Lippo Healthcare Limited (Formerly Known as International Healthway Corporation Limited)

… *Respondent*

Civil Appeal No 63 of 2018

Between

Aathar Ah Kong Andrew

… *Appellant*

And

KGI Securities (Singapore) Pte Ltd (Formerly Known as KGI Fraser Securities Pte Ltd)

… *Respondent*

Version No 1: 27 Oct 2020 (22:41 hrs)

In the matter of HC/Originating Summons (Bankruptcy) No 59 of 2017

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

And

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

Aathar Ah Kong Andrew

… *Applicant*

GROUNDS OF DECISION

[Insolvency Law] — [Bankruptcy] — [Voluntary arrangement]

Version No 1: 27 Oct 2020 (22:41 hrs)

TABLE OF CONTENTS

INTRODUCTION **1**

FACTS PERTAINING TO THE PRESENT APPEALS **3**

MR AATHAR'S FIRST VOLUNTARY ARRANGEMENT 5

MR AATHAR'S SECOND VOLUNTARY ARRANGEMENT 7

The first creditors' meeting on 5 October 2017 ..... *7*

The second creditors' meeting on 19 October 2017 ..... *9*

THE JUDGE'S GROUNDS OF DECISION **11**

MATERIAL IRREGULARITY UNDER S 54(1)(*B*) OF THE ACT **12**

THE LITIGATION CLAIMS 14

The relevance of the decision in International Healthway Corp *14*

The operation of r 84 of the Rules *16*

Had the Nominee in fact admitted the Litigation claims? *19*

(1) Had the Nominee set an estimated minimum sum? 21

(2) Had the Nominee resorted to the "objected to" procedure? 23

THE DUTIES OF A DEBTOR AND NOMINEE IN A PROPOSED VOLUNTARY ARRANGEMENT 27

Doubts about Mr Aathar's proposed voluntary arrangement *29*

CONCLUSION **34**

Version No 1: 27 Oct 2020 (22:41 hrs)

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Aathar Ah Kong Andrew
v
CIMB Securities (Singapore) Pte Ltd and other appeals and another matter

[2019] SGCA 34

Court of Appeal — Civil Appeals Nos 60, 61, 62, 63 of 2018 and Summons No 138 of 2018
Andrew Phang Boon Leong JA, Woo Bih Li J and Quentin Loh J
20 February 2019

10 May 2019

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

Introduction

1 The appellant, Mr Aathar Ah Kong Andrew ("Mr Aathar"), is a self-described investor in the commodities and healthcare sector in Indonesia and Singapore. Mr Aathar was a co-founder and substantial shareholder of the International Healthway Corporation Ltd ("IHC"), which is now known as OUE Lippo Healthcare Limited ("OUELH"). OUELH is the respondent in Civil Appeal No 62 of 2018 ("CA 62"). Unless otherwise necessitated by context, these grounds will refer to IHC as OUELH.

2 Mr Aathar claims that in 2015, a slump in the commodities market decimated his investments. The healthcare stocks he had invested in also saw a

sudden and sharp drop in prices. Mr Aathar was a guarantor of several loans. The financial institutions began calling on these obligations and Mr Aathar claims his total liabilities amounted to more than $300m.

3 To stave off proceedings, Mr Aathar proposed a voluntary arrangement under Part V of the Bankruptcy Act (Cap 20, 2009 Rev Ed) ("the Act"). In a voluntary arrangement, an insolvent debtor proposes to his creditors a compromise in satisfaction of his debts, or a scheme of arrangement of his affairs. A creditors' meeting is then summoned and if the proposal is subsequently approved, the voluntary arrangement binds all creditors who had notice of the meeting and who were entitled to vote.

4 We will elaborate in more detail about the procedure concerning voluntary arrangements and the history of Mr Aathar's first voluntary arrangement. It suffices to note that although Mr Aathar's first proposal received the requisite three-fourths majority of votes, the dissenting creditors applied to the court under s 54(1) of the Act to review the decision taken at the creditors' meeting. The assistant registrar hearing the application revoked the approval for Mr Aathar's first voluntary arrangement: see *Re Aathar Ah Kong Andrew* [2017] SGHCR 4 ("the AR GD").

5 The present appeals concern Mr Aathar's ***second*** attempt at a voluntary arrangement. On 14 March 2018, the High Court judge ("the Judge") heard an application by the dissenting creditors, this time to revoke the approval for Mr Aathar's second voluntary arrangement. She granted the application and her grounds of decision can be found in *Re Aathar Ah Kong Andrew* [2018] SGHC 124 ("the GD"). Mr Aathar appeals against the Judge's decision.

Version No 1: 27 Oct 2020 (22:41 hrs)

6 On 20 February 2019, we dismissed Mr Aathar's appeals. We now provide full grounds for our decisions. We pause to note that we find the Judge's observations in her GD at [53] on the nature of voluntary arrangements to be apposite:

> … The object of a voluntary arrangement is to enable a debtor to stave off multiple lawsuits by offering creditors the assurance of earlier satisfaction. Where a good [voluntary] arrangement is struck, all involved benefit as debts may be repaid to the satisfaction of a majority of creditors holding three-quarters of the value of the debtor's liabilities, obviating the longer process and higher costs of bankruptcy administration. …

7 When a proposal for a voluntary arrangement is made, it is not an offer by the debtor to individual creditors, but an offer to all creditors as a class: see the English High Court decision of *Re a Debtor (No 2389 of 1989)* [1991] 2 WLR 578 ("*Re a Debtor (No 2389 of 1989)*"), as cited in David Mohyuddin *et al*, *Schaw Miller and Bailey: Personal Insolvency: Law and Practice* (LexisNexis, 5th Ed, 2017) ("*Personal Insolvency*") at para 6.9. Given the nature of a voluntary arrangement and its ability to bind dissenting creditors, the "essential element of a voluntary arrangement is … the decision of the creditors as ascertained by the approved process": see *Personal Insolvency* at para 6.5.

8 It is therefore crucial to bear these objectives as well as the importance of adherence to the Act and the Bankruptcy Rules (Cap 20, R 1, 2006 Rev Ed) ("the Rules") in mind. With those remarks, we turn to the facts proper.

Facts pertaining to the present appeals

9 Mr Aathar and Mr Fan Kow Hin ("Mr Fan") were co-founders of IHC. Up until 2015, the value of Mr Aathar and Mr Fan's shareholding in IHC was in excess of $166m. As we had stated earlier, Mr Aathar claims that he suffered

Version No 1: 27 Oct 2020 (22:41 hrs)

heavy losses in his investments in 2015.

10 OUELH alleges that around 2015, Mr Aathar and Mr Fan procured IHC to enter into a credit facility for up to $20m ("the Standby facility") with three investment funds, The Enterprise Fund III, Value Monetization III Ltd and VMF3 Ltd, which were managed by Crest Capital Asia Fund Management Pte Ltd, which was in turn a wholly-owned subsidiary of Crest Capital Asia Pte Ltd. These funds are collectively known as the "Crest entities".

11 $17.32m was drawn down on the Standby facility to purchase 59 million shares in IHC from April to September 2015. OUELH's allegations are the subject of Originating Summons No 380 of 2017 ("OS 380"). In proceedings separate from the present appeals, the High Court issued written grounds of decision on OS 380 on 13 November 2018: see *International Healthway Corp Ltd v The Enterprise Fund III Ltd and others* [2018] SGHC 246 ("*International Healthway Corp*"). The decision in *International Healthway Corp* is currently on appeal.

12 Mr Aathar states that in September 2015, the Singapore Exchange ("SGX") issued a trading advisory triggering a devaluation of his shares. These events triggered default provisions and led to calls and demands for payments for various loans, facilities, and guarantees.

13 The respondents in these appeals are some of Mr Aathar's creditors:

(a) The respondent in the first appeal, Civil Appeal No 60 of 2018 ("CA 60"), is CIMB Securities (Singapore) Pte Ltd ("CIMB").

Version No 1: 27 Oct 2020 (22:41 hrs)

(b) The respondent in the second appeal, Civil Appeal No 61 of 2018 ("CA 61"), is Citibank Singapore Limited ("Citibank").

(c) The respondent in the third appeal, CA 62, is OUELH.

(d) The respondent in the fourth appeal, Civil Appeal No 63 of 2018 ("CA 63"), is KGI Securities (Singapore) Pte Ltd (formerly known as KGI Fraser Securities Pte Ltd) ("KGI").

Mr Aathar's first voluntary arrangement

14 On 2 February 2016, Citibank filed a bankruptcy petition against Mr Aathar. On 5 May 2016, Mr Aathar then filed an application under s 45 of the Act ("s 45"), proposing his *first* voluntary arrangement. Although Mr Aathar's first voluntary arrangement is not the subject of the present appeals, they provide the context for the present proceedings.

15 Under his first proposal, Mr Aathar proposed paying his creditors in several tranches after claiming to have received an interest-free loan of $1.5m from an unnamed business associate. Mr Aathar also applied for an interim order, which had the effect of preventing any bankruptcy application being made against him, and other legal processes being commenced or continued against him without leave of court: see s 45. The debtor in a voluntary arrangement is required to appoint a nominee, who will, if the proposal is approved, supervise the implementation of the voluntary arrangement. For the purposes of his first proposed voluntary arrangement, Mr Aathar's nominee was an accountant.

16 Mr Aathar's proposal received an 83% vote share in favour of the voluntary arrangement: see the AR GD at [5]. As a creditors' meeting could by

Version No 1: 27 Oct 2020 (22:41 hrs)

special resolution (*ie*, by a three-fourths majority) approve a voluntary arrangement under s 51 of the Act and r 85(1) of the Rules, this meant that Mr Aathar's first voluntary arrangement had secured the requisite approval.

17 Nevertheless, several dissenting creditors (which included several of the respondents in the present appeals) filed an application under s 54(1) of the Act, seeking that the court review and revoke the approval of the first voluntary arrangement. Among other things, the dissenting creditors alleged that Mr Aathar had failed to provide full and candid disclosure in his statement of affairs. The nominee was also alleged to have failed to properly adjudicate on the amount of debt each creditor was owed, and had essentially deferred entirely to Mr Aathar.

18 The dissenting creditors' application was heard before an assistant registrar, who was of the view that Mr Aathar's lack of candour in his statement of affairs, and the first nominee's insistence in relying solely on the same, were material irregularities. Accordingly, he revoked the approval for Mr Aathar's first voluntary arrangement: see the AR GD at [10]–[12], [49] and [50]. Although Mr Aathar filed a notice of appeal against the assistant registrar's decision, he subsequently withdrew his appeal on the day of the hearing itself.

19 By this time, more than 12 months had passed since Mr Aathar's first attempt at a voluntary arrangement. On 21 June 2017, availing himself of s 48(1)(*b*) of the Act, Mr Aathar then applied for another interim order and proceeded to file a *second proposal* for a voluntary arrangement.

Version No 1: 27 Oct 2020 (22:41 hrs)

Mr Aathar's second voluntary arrangement

20 Under his second proposal, Mr Aathar claimed there were "ultra-high networth persons who [were] prepared to help [him] in return for working and building a business for them". Mr Aathar stated that he had obtained a letter of commitment from a financial contributor who would contribute $3m. Mr Aathar proposed to pay the total of $3m in five progressively larger tranches to his creditors within 48 months and an additional $63,600 per year out of his own earnings. Mr Aathar's statement of accounts reflected a debt of $317.7m.

21 For the purposes of the second voluntary arrangement, Mr Aathar appointed a senior legal practitioner as his nominee ("the Nominee"). The Nominee wrote to Mr Aathar requesting further documentation pursuant to his second proposal. In particular, the Nominee asked Mr Aathar to identify his financial contributor. Mr Aathar replied, attaching a letter dated 20 June 2017 from PT Cahaya Bangun Sarana ("PT Cahaya"), which was signed by one "Herman". The letter replicated the pay-out of the loan on the terms of the progressive payments referred to earlier.

22 At this juncture, we note that this one-page letter did not appear to indicate any concrete terms of performance by Mr Aathar toward PT Cahaya or "Herman", save that Mr Aathar was required to "continue to remain to assist [them] to explore and advise business and operational opportunities in Indonesia in the healthcare and [commodities] business" (*sic*).

The first creditors' meeting on 5 October 2017

23 On 5 October 2017, the Nominee convened the first creditors' meeting. He indicated that he was in the process of assessing several of the creditors'

Version No 1: 27 Oct 2020 (22:41 hrs)

claims, including those of OUELH and the Crest entities, as well as the supporting documents provided by the other creditors. The Nominee told the creditors present that he was aware that approval for Mr Aathar's first voluntary arrangement had been revoked by the court and as such they were "proceeding with a great deal of caution".

24 During the first creditors' meeting, several of the respondents' counsel raised issues with regard to the transparency and veracity of Mr Aathar's assets and debts. First, questions were asked about the significant debts owed to three Indonesian companies alone – PT Fajar Perkasa Trading, PT Berkah Tujuh Saudara and PT Entete Mining – which appeared to amount to $178m. OUELH was concerned that the documentation in support of these claims did not appear to be substantial. We pause here to note that the *bona fides* of any alleged creditor's claim in a creditors' meeting is of necessary importance. As approval for a proposed voluntary arrangement requires a three-fourths majority in value, the amount of a creditor's debt would necessarily affect its vote share, and the weight it could cast toward approval or rejection of a debtor's proposal.

25 Second, it was pointed out that another creditor, Golden Cliff International Limited ("Golden Cliff"), had claimed $29.375m in debt, but shared an address with Mr Fan. As Mr Aathar was alleged to have owed Mr Fan $25m in debt under the first voluntary arrangement, Citibank was concerned that Golden Cliff was simply taking Mr Fan's place as a creditor. This would have been of some concern because Mr Fan had been adjudged a bankrupt in March 2017 and his claim could not count towards voting rights unless done so by his private trustee: see the GD at [41].

Version No 1: 27 Oct 2020 (22:41 hrs)

26 Third, counsel for another creditor Mr Low See Ching ("Mr Low"), queried why the debt for Mr Low had been reduced by the Nominee from $8m to $1.67m, whereas Mr Low had previously been given full credit of $8m under the first voluntary arrangement. OUELH also indicated that although its claim had been listed by Mr Aathar as $1.5m, in its own estimation the claim was $55m (a figure later revised down to $35m).

27 Having heard the concerns of some of the creditors, the Nominee agreed to look into their queries and to scrutinise any supporting documents, which he assured them had to satisfy him beyond a *prima facie* level. He requested that the meeting be adjourned for two weeks for him to determine the claims.

The second creditors' meeting on 19 October 2017

28 The Nominee convened a second creditors' meeting on 19 October 2017. He made available a list of liabilities to show how he had arrived at his adjudication of the claims. The Nominee invited the creditors to inspect the documents he had relied upon to reach his adjudication. Mr Aathar's counsel, who had been present to hear the creditors' concerns at the first creditors' meeting, was also present at this second meeting.

29 The Nominee explained that he had adjudicated Golden Cliff's claim from $29.375m down to $3.064m based on the fact that this was the only amount for which he was able to find supporting documentation. He also adjudicated the contingent claims by the three Indonesian companies referred to at [24] above from $88m to zero.

30 The Nominee had written "Unable to determine" next to his adjudication of the claims by Mr Low (claiming over $8m), the Crest entities (claiming over

Version No 1: 27 Oct 2020 (22:41 hrs)

$59m), and IHC (claiming over $35m). We refer to these as the "Litigation claims". When asked, the Nominee stated he meant that they had a zero value, but he was then asked to reconsider by Mr Low and OUELH's counsel on an "objected to" basis pursuant to this Court's decision in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd and another appeal* [2012] 2 SLR 213 ("*TT International*"). The Nominee then appeared to accede to the request and stated that he would indicate where he was "not able to take a position" on the claims.

31 The Nominee then conducted a vote. He indicated that, based on his preliminary calculations, if Mr Low's (voting against), Golden Cliff's (voting for), and the Crest entities' (voting against) claims were taken into account, Mr Aathar's proposal would not receive the requisite 75% approval. However, if those claims were not taken into account, there would be sufficient votes to pass Mr Aathar's second proposal. The meeting was then concluded as the Nominee proceeded to draw up his report.

32 On 25 October 2017, the Nominee wrote to the creditors, indicating that Mr Aathar's second proposed voluntary arrangement had passed. He enclosed a copy of the creditors' meeting report ("the Nominee's Creditors' Meeting report"), which indicated two sets of results. One set of results showed an approval figure of 80.07% on total liabilities of $202.4m. Significantly, even though OUELH, the Crest entities and Mr Low had all voted *against* the proposed voluntary arrangement, their votes were ascribed a nil value. In the other set of results, the Nominee admitted the Crest entities' and Mr Low's claims in full, while disregarding OUELH's claims. Under this set of results,

Version No 1: 27 Oct 2020 (22:41 hrs)

Mr Aathar's proposal for the second voluntary arrangement would not pass as it received slightly less than 60% of the votes.

The Judge's grounds of decision

33 The respondents brought an application to the court to review and revoke the approval for Mr Aathar's second voluntary arrangement. The gist of the Judge's reasoning was an application of the principles in the English High Court's decision in *Andrew Fender v The Commissioners of Inland Revenue* [2003] EWHC 3543 (Ch) ("*Andrew Fender*") at [11]. In particular, the Judge was of the view that there were four material irregularities that would operate such that the court would have reason to set aside the result of the creditors' meeting.

34 First, the Judge rejected the Nominee's explanation that he had not actually agreed to set a minimum sum to the Litigation claims, or that if he had set a sum he could subsequently invalidate them by setting a nil value to them in the Nominee's Creditors' Meeting report on 25 October 2017. Applying r 84(3) of the Rules, the Judge considered that the Nominee "had previously settled a sum" on an "objected to" basis to the Litigation claims and then proceeded to unilaterally ignore them. His apparent backtracking from this decision would have been a material irregularity. On the other hand, if the Nominee failed to set a minimum sum but allowed OUELH to vote, then that would also have been a material irregularity. If he was in doubt, he should otherwise have admitted the claim as "objected to" and then allowed the court to invalidate those claims under r 84(7): see the GD at [24]–[30].

35 Second, there were 24 Indonesian creditors (including the three referred to earlier at [24] above). Although the Nominee had adjudicated down their

Version No 1: 27 Oct 2020 (22:41 hrs)

contingent claims, they still comprised over $130m in debt, forming some 64% of the total adjudicated amount. The Judge's attention was drawn to the fact that in Mr Aathar's *first* voluntary arrangement, the Indonesian creditors had waived their rights to be repaid by Mr Aathar, but in an apparent change of heart they now intended to participate in the distribution of funds. Among other things, the Judge was not satisfied with Mr Aathar's unsupported explanation for the Indonesian creditors' change of mind, nor with the degree of scrutiny exerted by the Nominee on the Indonesian creditors' claims: see the GD at [31]–[36].

36 Third, the Nominee had initially admitted $3m of Golden Cliff's claim, but in his final adjudication he included a further $20.7m on a contingent basis. Before the Judge, the Nominee conceded that the inclusion of the $20.7m was "obviously an error". The Judge was of the view that Mr Aathar had not been candid about Golden Cliff's claim and she appeared persuaded that the debt owed to Golden Cliff was simply the same debt claimed to be owed to Mr Fan in the first voluntary arrangement: see the GD at [38]–[42].

37 Fourth, the Judge was of the view that r 68(2)(*b*) of the Rules requiring the debtor to state the proposed source of his funding was not satisfied as the letter from PT Cahaya was suspect. She was of the view that the source of Mr Aathar's funds was opaque and a minute proportion of his total debt, creating a severe risk of a nil return for his creditors: see the GD at [43]–[48].

Material irregularity under s 54(1)(*b*) of the Act

38 Before us, counsel for Mr Aathar, Mr Goh Kok Leong ("Mr Goh") replicated much of Mr Aathar's submissions before the Judge but focused his oral arguments on the first and second limbs of the Judge's reasoning. Before

Version No 1: 27 Oct 2020 (22:41 hrs)

we turn to them, we propose to elucidate some of the general principles applicable in voluntary arrangements.

39 In the court below, the respondents applied under s 54(1) of the Act, which states as follows:

> **54.**—(1) Any debtor, nominee or person entitled to vote at a creditors' meeting summoned under section 50 may apply to the court for a review of the decision of the meeting on the ground that —
>
> (*a*) the voluntary arrangement approved by the meeting unfairly prejudices the interests of the debtor or any of the debtor's creditors; or
>
> (*b*) there has been ***some material irregularity*** at or in relation to the meeting.
>
> …
>
> [emphasis added in bold italics]

In particular, the respondents alleged there had been a material irregularity pursuant to s 54(1)(*b*) of the Act.

40 A material irregularity can occur at several stages in a proposed voluntary arrangement, including the debtor's proposal (see rr 67–70 of the Rules), the debtor's statement of affairs (r 75), the preparation of the nominee's report to the court on the debtor's proposal (rr 76–78), and the nominee's chairmanship of a creditors' meeting (rr 81–89). The court is concerned to look at the whole process: see *Andrew Fender* at [11].

41 What is to count as a "material" irregularity? In *Andrew Fender* (at [11]), Norris J observed that not every mistake or omission will found the jurisdiction to set aside the result of the creditors' meeting. An irregularity is "material" if, objectively assessed, the procedure had been carried out correctly (or certain

Version No 1: 27 Oct 2020 (22:41 hrs)

facts truthfully told), it would likely have made a material difference in the way the creditors would have considered and assessed the terms of the proposed voluntary arrangement. This applies not only to those personally present at the creditors' meeting, but also those who had given proxies: see the English Court of Appeal decision of *Cadbury Schweppes plc v Somji* [2001] 1 WLR 615 at [25] in the context of omissions, and as cited in *Andrew Fender* at [11].

42 We would remark that it is of no small importance that these seemingly procedural rules are complied with because they yield *substantive outcomes*. This court had observed as much in the context of a creditors' meeting in a proposed scheme of arrangement under s 210 of the Companies Act (Cap 50, 2006 Rev Ed) in *TT International* at [73], where it was said that "we cannot overstate the importance of respecting and safeguarding the integrity of the voting outcomes of the scheme creditors' meeting(s)". Those observations are also applicable in the context of voluntary arrangements, where a dissenting minority creditor may, in the final analysis, find itself involuntarily bound by a voluntary arrangement.

The Litigation claims

The relevance of the decision in International Healthway Corp

43 We turn to Mr Goh's principal argument on the Litigation claims. As a preliminary issue, Mr Goh sought to adduce Hoo Sheau Peng J's decision in *International Healthway Corp* pursuant to Summons No 138 of 2018 ("SUM 138"). Its purported relevance in the present appeals lay in the fact that OUELH's claim against Mr Aathar (during the creditors' meetings) was connected to Mr Aathar's alleged role as a co-guarantor for OUELH (then-IHC) for the Standby facility from the Crest entities (see [11] above). In *International*

Version No 1: 27 Oct 2020 (22:41 hrs)

Healthway Corp, Hoo J ordered (at [85]) that the acquisition by the Crest entities of IHC's shares on IHC's behalf pursuant to the Standby facility was void under s 76A(1)(*a*) of the Companies Act, that the Standby facility and security agreements had been validly avoided by IHC under s 76A(2) of the same Act, and further that IHC did not bear any contractual obligation or liability to the Crest entities in relation to the Standby facility and other related arrangements.

44 Mr Goh's essential point was that since Hoo J had held that IHC (and now OUELH) no longer bore any liability to the Crest entities, there could not have been a material irregularity since OUELH would have been exercising a vote that they had never been entitled to.

45 As Hoo J's decision in *International Healthway Corp* is a matter of public record, we made no order on SUM 138 and permitted Mr Goh to refer to it. In any event, we do not find Mr Goh's reference to this particular decision to be of any assistance to his argument in these appeals. We would first note that Hoo J's decision has been appealed by the Crest entities. We certainly do not intend to discuss any of the substantive merits of that appeal, but the fact of the Crest entities' appeal necessarily implies that Mr Aathar's liabilities (in so far as Mr Goh is attempting to rely on Hoo J's decision) are still subject to the outcome of that appeal.

46 More importantly, Hoo J's decision (pending further submissions on some additional points) in *International Healthway Corp* was rendered on 21 May 2018. Her full written grounds were issued on 13 November 2018. These were well *after* the second creditors' meeting and the issuance of the Nominee's Creditors' Meeting report, which took place on 19 October and

Version No 1: 27 Oct 2020 (22:41 hrs)

25 October 2017, respectively. At the time that the voting took place, OUELH and the Crest entities would certainly have had an outstanding claim against Mr Aathar pursuant to the Standby facility. We will return to the significance of this point later, but it suffices for the moment to state that Mr Goh's reliance on *International Healthway Corp* was of no assistance whatsoever in the context of the present appeals.

The operation of r 84 of the Rules

47 We return to Mr Goh's principal argument, which was levelled against the Judge's view on several aspects of r 84 of the Rules, *ie*, on whether an estimated minimum sum should have been set, whether such a minimum sum was *in fact* set by the Nominee, and how the Litigation claims should have been dealt with under the "objected to" procedure. The material portions of r 84 read as follows:

> **84.—**(1) Every creditor who has been given notice of the creditors' meeting shall be entitled to vote at the meeting or any adjournment of it.
>
> …
>
> (3) A creditor shall not vote in respect of —
>
> (*a*) a debt for an unliquidated amount; or
>
> (*b*) any debt the value of which is not ascertained,
>
> unless the chairman agrees to put upon the debt an estimated minimum value for the purpose of entitlement to vote.
>
> (4) The chairman shall have the power to admit or reject a creditor's claim for the purpose of his entitlement to vote, and such power shall be exercisable with respect to the whole or any part of the claim.
>
> (5) The chairman's decision on entitlement to vote shall be subject to appeal to the court by any creditor or by the debtor.
>
> (6) If the chairman is in doubt whether a claim should be admitted or rejected, he shall mark it as objected to and allow

Version No 1: 27 Oct 2020 (22:41 hrs)

> the creditor to vote, subject to his vote being subsequently declared invalid if the objection to the claim is sustained.
>
> (7) If on an appeal the chairman's decision is reversed or varied by the court or a creditor's vote is declared invalid, the court may —
>
> (*a*) order another meeting to be summoned; or
>
> (*b*) make such other order as it thinks just.
>
> …

48 How should the procedure under r 84 of the Rules be interpreted? In our view, r 84 is a comprehensive and sequential process for the determination and adjudication of claims in a creditors' meeting. Once this is appreciated, Mr Goh's objections to the Judge's decision fall away. Let us elaborate.

49 First, under r 84(1) of the Rules, there is a presumption that a creditor who has been summoned to a creditors' meeting has an entitlement to vote: see the English High Court decision of *Re a debtor (No 222 of 1990), ex parte the Bank of Ireland and others* [1992] BCLC 137 ("*ex parte the Bank of Ireland*") at 140.

50 Second, a creditor may nevertheless have an unliquidated debt or debt of an unascertained value. It would not have the ability to vote under r 84(3) of the Rules *unless* the nominee agrees to place a "just" estimated minimum value: see generally, the Supreme Court of New South Wales (Equity Division) decision of *Selim v McGrath* [2003] NSWSC 927 ("*Selim*") at [99]–[105]; see also the English High Court decision of *In re Cranley Mansions Ltd* [1994] 1 WLR 1610 ("*Cranley Mansions*") at 1628G–H. We have observed that a "just" estimate is a reasonable one where the nominee does his best with the factual material furnished without undertaking a detailed inquiry: see *TT International* at [107].

Version No 1: 27 Oct 2020 (22:41 hrs)

51 Third, the nominee and the creditor may be unable to agree to place such an estimated minimum value. In this regard, this may be because it is "impossible to ascribe any sensible value to a claim" (*ie*, the creditor is unable to avail itself of the exception under r 84(3) of the Rules) ***or*** if the nominee otherwise exercises his power to exclude some or all of the creditor's claim (under r 84(4)); the nominee *must in either case provide* ***written*** *reasons for his rejection*. A nominee's decision to accept, or his reasons to reject the claims of any creditor is then subject to appeal to the court under r 84(5) by any creditor or by the debtor: see *TT International* at [102]–[104] and [107]; see also *ex parte the Bank of Ireland* at 142.

52 Fourth, if the debt is liquidated and of an ascertainable amount (under r 84(3) of the Rules) ***or*** if it is unliquidated or of an unascertainable amount but the nominee *nevertheless agrees to place an estimated minimum sum*, then there is no rejection under r 84(4) and that creditor is now allowed to vote: see *Selim* at [95]. However, the nominee may still entertain doubts about whether such (proportions of) claims should be admitted or rejected. In such circumstances, he *should* mark it as "objected to" and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being maintained: see *TT International* at [102] and [107]; see also *ex parte the Bank of Ireland* at 142.

53 The "objected to" procedure under r 84(6) of the Rules is a "fallback position where [the nominee] is in [real] doubt as to what decision to make, but [the nominee] should consider the merits of the debt first [as] there is no reason for the [nominee] to abdicate his responsibility to make a decision as to admissibility": see *Personal Insolvency*, at para 6.193.

Version No 1: 27 Oct 2020 (22:41 hrs)

54 Fifth, if the objections to the "objected to" votes are maintained, the "objected to" votes (and their effect on the overall outcome on the proposal for the voluntary arrangement) nevertheless *remain* until the outcome is determined by the court on appeal. It is for the court to decide under r 84(7) of the Rules whether the "objected to" votes were invalid: see the Northern Ireland Chancery Division (Bankruptcy) decision of *Official Receiver v Thompson* [2002] NICh 10 and the GD at [27]; see also *TT International* at [108].

55 In this regard, we agree with the Judge that a nominee cannot decide of his own accord to invalidate an "objected to" vote. That would contravene the schema of r 84 of the Rules. Logically speaking, if a nominee was of the view that the vote should be invalidated (only because it was unliquidated or was of an unascertainable value and he was unable to agree to set an estimated minimum sum as it was impossible to do so under r 84(3)), then it would still have been incumbent on him to furnish written reasons, which would then be subject to appeal to the court. Regardless of whether he decides to admit or reject a vote, there are no situations where the nominee would have the ability to usurp the court's role "without any possibility of any further audit of his decision": see *TT International* at [104]. As can be seen, r 84 of the Rules may be a "rough and ready" procedure (see *TT International* at [108]), but it is nevertheless a comprehensive one.

Had the Nominee in fact admitted the Litigation claims?

56 Upon consideration of the minutes of the second creditors' meeting, it is apparent to us that the Nominee had considered the Litigation claims to be unliquidated or of an unascertainable value (under r 84(3)). He then proceeded to ascribe an estimated minimum sum to the Litigation claims (the exception to r 84(3)). Although he had doubts about the Litigation claims, the Nominee was

Version No 1: 27 Oct 2020 (22:41 hrs)

invited not to reject the claims, but to utilise the "objected to" procedure (under r 84(6)) and he did, in fact, have recourse to the same. It follows that the Litigation claims were admitted on an "objected to" basis and we agree with the Judge that it was a material irregularity for the Nominee to have backtracked on his decision when he issued his report on 25 October 2017.

57 We set out the relevant exchange:

> **IHC's counsel:** Sorry, one last question. For claims [that] are stated as "Unable to Determine", are we voting for the full amount?
>
> **Nominee:** "Unable to Determine" means nothing, zero.
>
> **IHC's counsel:** Can I ask you to reconsider that? I think that may be wrong as a matter of procedure and law. In the case of *TT International*, I think there were a couple of situations where there is a contentious claim, and I think what the Court has said is that if the chairman has doubts as to whether the proof should be admitted or rejected, he should mark it as "objected to" and allow the creditor to vote subject to the vote being declared invalid in the event that the objection is being sustained. I think there should be steps to ascertain the claim.
>
> **Nominee:** This is the problem. I cannot ascertain the claim at all. The ascertainment of the claim involved a factual determination and I just couldn't make it because the affidavits were such that, factually, they go against each other. For example, how do I determine an oral agreement?
>
> …
>
> **IHC's counsel:** Can I refer you to paragraph 102 of *TT International*? … I think to the extent that the chairman wishes to reject it in full, I think we need to be given a written reason. And as I mentioned earlier, if you have any doubts as to whether it should be admitted or rejected, you should put it as "objected to" and allow the creditor to vote subject to the vote being

Version No 1: 27 Oct 2020 (22:41 hrs)

> declared invalid in the event that the objection is being sustained.
>
> **Nominee:** I suppose it is correct. The law is the law. Where we are unable to take a position, I have to indicate that I am not able to take a position. I can't admit or reject it because there is ongoing litigation. And that is not just the case with Low See Ching. There are other claims where there is ongoing litigation. In that case, I suppose in accordance to the procedure, we will allow the creditors to vote and we will see what happens later. …
>
> …
>
> **Nominee:** There are things that I haven't rejected but I am unable to determine. For instance, for Low See Ching, I am unable to determine because the positions taken by debtor and creditor are completely opposite.
>
> …

(1) Had the Nominee set an estimated minimum sum?

58 Mr Goh attempted to suggest that the Nominee had not in fact set an estimated minimum sum under r 84(3) of the Rules. Mr Goh relied on the Nominee's statement that "'Unable to Determine' means nothing, zero".

59 This submission is only tenable if one ignores the fact that the Nominee had thereafter acceded to IHC's (OUELH's) counsel's request to apply the "objected to" procedure. And, crucially, after the Nominee had tabulated the votes, he stated that if he took into account Mr Low's, Golden Cliff's, and the Crest entities' claims then the vote share would not reach the requisite 75% approval. It is clear to us that the Nominee was able to arrive at this calculation precisely because he *did attribute* a minimum value to at least Mr Low's and the Crest entities' claims. Hence, we agree with the Judge that the Nominee unilaterally ignored the dissenting votes for which he had settled a sum.

Version No 1: 27 Oct 2020 (22:41 hrs)

60 Mr Goh then submitted that the Nominee did not agree to attribute an estimated minimum sum because he could not have done so. Mr Goh claimed that the Nominee was "unable to ascertain any value to be ascribed" to the Litigation claims. He pointed to the fact that the Nominee had difficulties dealing with the overlapping aspects of the Litigation claims (*ie*, the claims between OUELH and the Crest entities), particularly those that were contingent on the outcomes of the respective suits.

61 It seems to us, with respect, that Mr Goh had misunderstood the Nominee's difficulties with the *merits* of the Litigation claims as a difficulty with the *value* of the said claims. This much is clear from the Nominee's reference that the affidavits as to the claims went against each other, as well as to the ongoing litigation. It has also not escaped our attention that while the votes were being tabulated, the Nominee specifically clarified with IHC's counsel if there might be double counting if he were to accept *both* OUELH's and the Crest entities' claims. IHC's counsel agreed there would be an overlap, but that the Crest entities' claims were larger than OUELH's claims. As such, the Nominee *proceeded to exclude OUELH's dissenting vote and simply utilised the larger figure of the Crest entities' claims*, and tabulated a set of results which showed that Mr Aathar's proposed voluntary arrangement could not meet the 75% approval.

62 It is readily apparent from the foregoing that the Nominee had no difficulty fixing an estimate. As we had alluded to (at [50]–[51] above), a creditor can avail itself of the exception under r 84(3) of the Rules as long as the nominee agrees to place a "just" estimated minimum sum. It is *only* when the nominee finds it *impossible* to ascribe a sensible value that he should attribute a nil value and reject the claim: see *TT International* at [107]. In this

Version No 1: 27 Oct 2020 (22:41 hrs)

regard, Mr Goh could not rely on the Hong Kong Court of Appeal's decision in *Re UDL Holdings Ltd and others* [2000] 4 HKC 778 ("*Re UDL*") at 789D. The context of ongoing arbitration proceedings there had made it "impossible to determine any fixed amount". While the Hong Kong Court of Appeal in *Re UDL* was concerned with the *extent* of the value of the claims succeeding, no such issue appears to have troubled the Nominee in the present case. On the contrary, the fact that the Nominee had devised the solution of simply accepting one set of cross-claims (*ie*, the Crest entities' claims) and not the other, showed it was perfectly possible to set a just minimum sum.

63 Even if we took Mr Aathar's case at its highest and assumed, *in arguendo*, that the Nominee had in fact ascribed a nil value to the Litigation claims because he was unable to set a minimum sum, it was plain to us that the Nominee *could not have set a zero value* to some of these dissenting claims. The Nominee's tabulation had listed Mr Aathar's *own statement of affairs* as admitting to owing the following amounts to Mr Low ($8.385m), the Crest entities ($1.5m), and IHC ($1.5m). In *Roberts v Pinnacle Entertainment Ltd* [2003] EWHC 2394 (Ch), the English High Court considered that the nominee was wrong to have rejected a creditor's claim on the basis that the creditor's written notice had not specified an amount. Evans-Lombe J held this was a material irregularity as the debtor himself had accepted the creditor's claim for a fixed and full amount (at [15]–[18]). It seems to us that the present situation would *a fortiori* require the Nominee to have at least accepted the amounts Mr Aathar had admitted in his statement of affairs.

(2) Had the Nominee resorted to the "objected to" procedure?

64 The foregoing demonstrates to us that the Nominee had in fact set an estimated minimum sum for Mr Low and the Crest entities' dissenting votes.

Version No 1: 27 Oct 2020 (22:41 hrs)

However, this was not the end of the matter, as it was also clear that the Nominee retained his doubts about these claims and hence availed himself of the "objected to" procedure under r 84(6) of the Rules. Nevertheless, as we had indicated (at [54] above), when the objection to such votes is maintained, the votes *remain valid* until the court invalidates them on appeal. Since their effect would have meant that the proposal was rejected, it would have been for Mr Aathar, or one of the creditors voting to approve, to have appealed.

65 Although Mr Aathar contested those principles before the Judge, he did not do so before us. Instead, Mr Goh sought to cast doubt on the Judge's interpretation in her GD (at [25]) of *ex parte the Bank of Ireland*. According to Mr Goh, Harman J's comments on having recourse to the "objected to" procedure in *ex parte the Bank of Ireland* (at 144) was only confined to disputed debts of liquidated amounts.

66 With respect, Mr Goh has misread *ex parte the Bank of Ireland*. Even if it is true that the debts there were liquidated *and* ascertainable, it does not follow that the "objected to" procedure under r 84(6) of the Rules is *only* confined to such debts. As we had explained (at [52] above), the "objected to" procedure applies where the debt is liquidated and ascertainable but the nominee nevertheless entertains doubts ***and also*** in a situation where the debt is unliquidated or unascertainable but the nominee has agreed to place an estimated minimum sum and *still entertains doubts*.

67 We are fortified in our view that the Nominee did, in fact, have recourse to the "objected to" procedure in this case for three additional reasons. First, we think that it is significant that the minutes of the second creditors' meeting show that IHC's counsel had referred to *TT International* and indicated to the

Version No 1: 27 Oct 2020 (22:41 hrs)

Nominee that if he had doubts, he should mark the votes as "objected to" and allow the creditor to vote subject to the vote being declared invalid if the objection was sustained. The Nominee ***agreed*** replying, "*I suppose it is correct … I can't admit or reject it* because there is ongoing litigation … I suppose in accordance to the procedure, *we will allow the creditors to vote* and we will see what happens later" [emphasis added].

68 Second, it is obvious to us (and was in fact *also* pointed out to the Nominee by IHC's counsel at the second creditors' meeting) that if the Nominee chose to reject the Litigation claims instead of objecting to them, he would have had to provide written reasons for rejecting the claims. The fact that the Nominee *had not indicated that he had rejected the Litigation claims, much less provided reasons for rejecting them written or otherwise,* is to us significant.

69 Third, in the Nominee's Creditors' Meeting report of 25 October 2017, and his affidavit before the Judge, the Nominee stated that he was "maintaining [his] objections" to the Litigation claims and that he had encountered difficulties in ascertaining IHC's and the Crest entities' claims due to an overlap. However, the Nominee also claimed he had "marked this amount as objected to and allowed the representative of the Crest entities to vote subject to this portion of his vote being subsequently declared invalid if the objection to the claim is sustained". We find the Nominee's statements to be internally inconsistent and difficult to reconcile. By *his own admission he had admitted the Crest entities' votes* on an "objected to" basis. We do not fault the Nominee for stating that he apprehended an overlap in OUELH's and the Crest entities' claims due to pending litigation (see [46] above). Indeed, counsel for OUELH conceded as much before us. Nevertheless, it is precisely in situations such as these that it is for *the court* to decide under an appeal procedure under rr 84(5) or 84(7) of the

Version No 1: 27 Oct 2020 (22:41 hrs)

Rules whether the votes should be invalidated. Pending the outcome, the effect of the "objected to" votes remains, and it is not for a nominee to invalidate them unilaterally.

70 From the foregoing, there can be no doubt that the Nominee was capable of (and did) set an estimated minimum sum for the Litigation claims. Moreover, he then proceeded to mark them as "objected to" and had tabulated a set of results showing that if he had admitted Mr Low's and the Crest entities' votes, there would have been insufficient votes for Mr Aathar's second voluntary arrangement to pass muster.

71 In the circumstances, we are of the view that the Nominee's Creditors' Meeting report did backtrack on the Nominee's earlier decision to admit those votes on an "objected to" basis. This was a material irregularity, which would have changed the outcome of the creditors' meeting: see *Personal Insolvency* at para 6.408. We would add that a material irregularity may also arise even if the numbers in respect of the irregularity do not at first blush appear capable of changing the outcome of the creditors' meeting. This depends on the nature of the irregularity and the circumstances of the meeting. A creditor may well be capable of bringing forth "strong evidence to establish that [he] would have had a reasonable prospect of persuading other creditors to change their minds": *Personal Insolvency* at para 6.408. However, we need not say more on this, as the facts of the present case clearly show that (on the Nominee's own tabulation) Mr Aathar's proposal would not have secured the requisite 75% approval required under law.

Version No 1: 27 Oct 2020 (22:41 hrs)

The duties of a debtor and nominee in a proposed voluntary arrangement

72 Although the material irregularity identified with respect to the Litigation claims would have been sufficient (in and of itself) to taint the creditors' meeting and thereby necessitate the dismissing of Mr Aathar's appeals, we proceed to consider two other aspects of Mr Aathar's second voluntary arrangement proposal in respect of a debtor's duty of honesty as well as full disclosure and a nominee's duty of objectivity and scrutiny.

73 Voluntary arrangements were introduced by way of the Act in 1995. These replicated portions of the UK Insolvency Act 1986 (c 45), and the cases that construe those portions may be considered helpful: see Kala Anandarajah *et al*, *Law and Practice of Bankruptcy in Singapore and Malaysia* (Butterworths Asia, 1999), at p 22.

74 In the UK, "individual voluntary arrangements" had somewhat of a rocky start. Lindsay J in the English High Court decision of *Re a debtor (No 140 IO of 1995)* [1996] 2 BCLC 429 ("*Greystoke*") had outlined the origins of individual voluntary arrangements as a procedure under the UK Bankruptcy Act 1869. He noted that the previous procedure "had long before fallen into disrepute" as "several notorious cases [of] 'collusive arrangements between creditors and the debtor or trustee to submit bogus or inflated claims were not uncommon'. That procedure had thus been scrapped in 1883". In its place was a procedure placing heavy responsibilities on insolvency practitioners involved, which envisaged full details being provided by the debtor of his financial position and statutory declarations of the truth of the information provided (at 432).

Version No 1: 27 Oct 2020 (22:41 hrs)

75 As Lindsay J noted, the UK Insolvency Act 1986 (c 45) is predicated on the fact that the insolvency practitioner (*ie*, the nominee) would *initially* be dependent on full and candid disclosure by the debtor, and that the nominee would have to discharge heavy responsibilities (at 433). This is because the nominee obtains his initial sources of information *from the debtor*, such as the details of the proposal and the debtor's statement of affairs: see rr 67–68, and 75 of the Rules. However, the nominee does have some additional powers such as access to the debtor's accounts and reports and the ability to call on the debtor for additional disclosure: see rr 76–77 of the Rules.

76 The fact of the nominee's initial dependence on the debtor heightens the "consequential need for complete candour by the debtor" (see *Greystoke* at 433). A debtor who puts forward a proposed voluntary arrangement should be not only honest, but should also take care to put all relevant facts before the creditors: see *Re a Debtor (No 2389 of 1989)* at 586. We cannot overemphasise this duty of full disclosure that falls upon the debtor. If a debtor wishes to take advantage of an arrangement that would spare him the otherwise undesirable consequences of bankruptcy proceedings, the onus must be on him to be forthcoming to his creditors.

77 There is also a corresponding duty on the nominee. In *TT International* at [72], we had stressed that there was a *duty of independence* on a proposed scheme manager. This duty applies with equal force to a nominee in a proposed voluntary arrangement. To put it plainly, a nominee is not to be a rubber stamp for the debtor. On the contrary, a nominee should satisfy his doubts about, amongst other things, the propriety and feasibility of the debtor's proposal, and consider the quality of the debtor's answers to the nominee to resolve those doubts, and the advantages as well as costs of further independent inquiry to

Version No 1: 27 Oct 2020 (22:41 hrs)

resolve continuing doubts. If the nominee is unable to satisfy those doubts, then he should not be unequivocally reporting under s 49 of the Act that a creditors' meeting should be called. A proposal put forth at the creditors' meeting is one that "has survived scrutiny" and is "capable of being not unfairly voted upon [by] the creditors": see *Greystoke* at 435–436.

78 Of course, a nominee is not expected to test *every* aspect of a proposal, but we agree with the Judge that, at a minimum, where the fullness or candour of the debtor's information has properly come into question, the nominee should take such steps as are in all the circumstances reasonable to satisfy those doubts: see *Greystoke* at 435, cited in the GD at [16].

Doubts about Mr Aathar's proposed voluntary arrangement

79 Applying the principles to the present case, there was much in Mr Aathar's second proposed voluntary arrangement that gave us pause. To begin with, the details surrounding the source of Mr Aathar's funding were, to put it generously, somewhat lacking. It bears noting that the *one-page letter* from PT Cahaya dated 20 June 2017 and signed by one "Herman" was only supplied by Mr Aathar *after* he was asked by the Nominee (on 25 August 2017) to identify the supposed contributor and to provide the terms and conditions of the funding.

80 We would have thought under r 68(2)(*b*) of the Rules, Mr Aathar would have been obliged to have supplied such information even before the Nominee's queries. We agree with the Judge that Mr Aathar had been economical with information *despite* the assistant registrar having already raised doubts about his first voluntary arrangement (see the GD at [46]). We also agree with the Judge that the terms of PT Cahaya's letter also constituted grounds for suspicion.

Version No 1: 27 Oct 2020 (22:41 hrs)

Mr Aathar did not produce an affidavit from "Herman" (or any representative of PT Cahaya) to back up the veracity of his source of funding. Instead, he was content to assert in his submissions that it was the respondents who had not adduced evidence to show that PT Cahaya was not the source of the loan (see the GD at [47]). We find Mr Aathar's failure to produce further evidence from "Herman" (or PT Cahaya) odd, since Mr Aathar had claimed in his affidavit before the Judge that the "loan is made on the basis of my relationship with my sponsor and there is a lot of trust. My sponsor believes in me and that I can rebuild my career and business. Hence my sponsor is prepared to back me".

81 Further, there were the 24 Indonesian creditors whose claims *after* the Nominee had adjudicated them down, still comprised some $130m out of an overall adjudicated amount of $202m. This was not only a significant amount, but if accepted would also form a significant ***proportion*** of the overall claims against Mr Aathar. In our view, Mr Aathar's proposal for the purported $3m to be paid out in his second proposed voluntary arrangement had to be viewed in this context. In particular, the Indonesian creditors had, in Mr Aathar's first voluntary arrangement, opted to *forgo their share of the pay-out*. This time round, they had elected to take a pro rata share of Mr Aathar's arrangement (*ie*, a large proportion of the purported $3m loan). This apparent *volte-face* on the part of the Indonesian creditors called for an explanation. But, as with PT Cahaya, Mr Aathar's explanations for this were tenuous at best. Similarly, no affidavit was provided by any of the Indonesian creditors.

82 Third, there was the issue with regard to Golden Cliff, who had voted to approve Mr Aathar's second voluntary arrangement. Its claim was for $29.375m. We agree with the Judge that the circumstances suggested that Golden Cliff was simply attempting to step into Mr Fan's shoes as a creditor:

Version No 1: 27 Oct 2020 (22:41 hrs)

see the GD at [41]. A crucial point of note was that Golden Cliff's address was *the same address* as that used by Mr Fan in Mr Aathar's first voluntary arrangement. This concern was, in fact, raised by the respondents to the Nominee during the first creditors' meeting on 5 October 2017. We would observe that not only did the Nominee agree to look into it, but *Mr Aathar's counsel* was also personally present at *both* creditors' meetings to advise Mr Aathar about the creditors' concerns and to address the respondents' queries. However, it was only until *after* the second creditors' meeting and when the respondents took out the application to review the approval for the second voluntary arrangement that Mr Aathar then claimed that he had made a "simple mistake" in confusing Mr Fan with Golden Cliff during the first voluntary arrangement and that he had "corrected" it in the second voluntary arrangement. Before us, Mr Goh submitted that this was a common mistake made by commercial men who sometimes confuse the corporation with its representative executing the agreement. We set little store by this submission. Given Mr Aathar's duties of candour, we would have expected such an explanation – if at all true – to have been supplied at the earliest opportunity. At the very latest, it should have been provided when the respondents had highlighted their concerns to Mr Aathar's counsel.

83 Aside from the *bona fides* regarding the identity of the creditor in Golden Cliff's claim, the claim itself was plagued with various insuperable difficulties. To support the claim, Mr Aathar had supplied the Nominee with a loan agreement between himself and Golden Cliff to borrow up to $30m. But even if this agreement was authentic, it would still have been necessary for Mr Aathar to have shown that monies were in fact disbursed to him. Mr Goh alluded to "extensive supporting documents" provided by Mr Aathar, but a close perusal of these bank statements showed that for the vast majority of the

Version No 1: 27 Oct 2020 (22:41 hrs)

purported disbursement, there were simply various handwritten markings stating "GC" next to the figures.

84 At the start of the second creditors' meeting, the Nominee rejected most of Golden Cliff's claim (save for about $3m) citing insufficient documentation. Curiously, *after* the meeting, the Nominee then admitted an additional $20.7m on a contingent basis in the Nominee's Creditors' Meeting report. Before the Judge, the Nominee then stated that the $20.7m claim ***should not have been admitted*** and it was "obviously an error". He conceded there had been another error in admitting claims of $4.2m on a contingent basis from Dallacy International Inc, another creditor voting in favour of Mr Aathar's proposed voluntary arrangement.

85 All of the foregoing suggests to us that a material irregularity had arisen as Mr Aathar had not fulfilled his duties of candour and full disclosure in his role as a debtor proposing a voluntary arrangement. Importantly, serious doubts had arisen with respect to the source of his funding, as well as the *bona fides* of the Indonesian creditors' claims and Golden Cliff's claims. In those circumstances, we did not think that the Nominee had exercised the requisite degree of scrutiny and care demanded of him.

86 In fairness, we note that the Nominee did query multiple aspects of Mr Aathar's proposed voluntary arrangement and sought details of the same from him. This certainly was not a situation of the Nominee simply rubber-stamping Mr Aathar's proposal. However, given the various doubts that had already arisen during Mr Aathar's first proposed voluntary arrangement, it would have been incumbent on the Nominee to have been circumspect about

Version No 1: 27 Oct 2020 (22:41 hrs)

the veracity of the explanations put forth by Mr Aathar and the claims of several of the creditors during his second proposal.

87 We are therefore somewhat surprised that several of these material irregularities could have occurred, since it was apparent that the Nominee was not oblivious to the necessity for such scrutiny. As he told the creditors at the first creditors' meeting:

> You know the history of this matter. A proposal has been tried previously and a court order was made to set aside the nominee's report. We don't want to repeat the same mistakes, so we are proceeding with a great deal of caution.

88 Before us, Mr Goh submitted that even if the Nominee had not exerted sufficient care and scrutiny, he had invited the respondents to inspect the supporting documents before voting. He added that the respondents were all represented by counsel during the creditors' meetings and therefore could not be said to have been prejudiced.

89 We find Mr Goh's submission to be unmeritorious. A nominee's duty of diligence and scrutiny cannot be abdicated to the creditors, no matter how savvy or well represented. The onus is on a nominee to *satisfy himself* (and not simply the creditors) that he has received adequate information that goes to the veracity of the debts: see *Greystoke* at 434–435. It is *the nominee* who is required to cast a "critical eye" on the debtor's statement of assets and liabilities and to assess whether the proposal is in accordance with the Act and the Rules: see *ex parte the Bank of Ireland* at 140.

90 This much is reinforced by the fact that s 46 of the Act requires the nominee to be either a public accountant or a solicitor. In fact, Mr Goh consistently made much of the fact that the Nominee is an experienced solicitor,

Version No 1: 27 Oct 2020 (22:41 hrs)

which we would have thought would have been more grist for the mill to the effect that the Nominee should have been additionally circumspect.

Conclusion

91 In the circumstances, we agree entirely with the Judge that there were several material irregularities in Mr Aathar's second voluntary arrangement. We saw no reason to disturb any of her findings or her orders and accordingly we dismissed the appeals.

92 We ordered that Mr Aathar pay $3,000 in costs (all-in) to Citibank and $20,000 in costs (all-in) to each of the other respondents. We also made the usual consequential orders.

Andrew Phang Boon Leong	Woo Bih Li	Quentin Loh
Judge of Appeal	Judge	Judge

Goh Kok Leong, Charlene Sim Yan and John Paul Koh (Ang & Partners) for the appellant in Civil Appeals Nos 60, 61, 62, 63 of 2018 and the applicant in Summons No 138 of 2018;
Ho Seng Giap and Adly Rizal bin Said (Tito Isaac & Co LLP) for the respondent in Civil Appeal No 60 of 2018 and Summons No 138 of 2018;
Wong Yao Fang (Fabian & Khoo) for the respondent in Civil Appeal No 61 of 2018;
Chow Chao Wu Jansen and Danitza Hon Cai Xia (Rajah & Tann Singapore LLP) for the respondent in Civil Appeal No 62 of 2018;
Goh Siong Pheck Francis, Lim Ke Xiu, Shaun Leong Li Shiong and Toh Wei Qing Geraldine (Eversheds Harry Elias LLP) for the respondent in Civil Appeal No 63 of 2018.

Version No 1: 27 Oct 2020 (22:41 hrs)