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17. INSOLVENCY LAW

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Introduction

17.1 2018 was a fruitful year as there were important decisions that gave useful guidance on insolvency law and, in particular, statutory provisions introduced by significant amendments to the Companies Act[1] in 2017. These include *Re IM Skaugen SE*,[2] which addressed, *inter alia*, the requirements for an application for an interim moratorium under s 211B of the Companies Act, and *Re Zetta Jet Pte Ltd*,[3] the first reported decision on the recognition of foreign insolvency appointment holders pursuant to the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Cross-border Insolvency[4] ("Model Law") (Tenth Schedule to the Companies Act). The High Court also dealt with principles governing classification of creditors and release of third-party rights in schemes of arrangement,[5] as well as questions on bondholder voting and third-party securities in judicial management.[6]

1 Cap 50, 2006 Rev Ed.
2 [2019] 3 SLR 979.
3 [2018] 4 SLR 801.
4 30 May 1997.
5 *Re Empire Capital Resources Pte Ltd* [2018] SGHC 36.
6 *Re Swiber Holdings Ltd* [2018] 5 SLR 1358; [2018] 5 SLR 1130.

Winding up of companies

Underlying debt governed by arbitration agreement

17.2 In *VTB Bank (Public Joint Stock Co) v Anan Group (Singapore) Pte Ltd*,[7] the High Court was faced with an application to wind up a company on the ground that it was unable to pay its debts. The company opposed the application on the basis that the underlying debt was disputed and was governed by an arbitration agreement.

17.3 In determining whether the debt was disputed, the honourable judicial commissioner held that the company had to establish that there were triable issues in connection with the underlying debt. This is notwithstanding the fact that the underlying dispute was governed by an arbitration agreement. In arriving at this conclusion, the honourable judicial commissioner recognised that his decision would depart from the *prima facie* standard applied in the earlier High Court decision in *BDG v BDH*[8] ("*BDG*").

17.4 It appears from the judgment that the honourable judicial commissioner would have been amenable to applying the test adopted in *BDG* but for the fact that he considered himself bound by the Court of Appeal decision in *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd*[9] ("*Metalform*"). In *Metalform*, the debtor company sought an injunction to restrain the creditor from presenting a winding-up application on the basis that it had a cross-claim which was equal to or larger than the underlying debt. In that case, it was common ground that the *cross-claim* ought to be resolved by an arbitrator.

17.5 Thus, the honourable judicial commissioner concluded that *Metalform* stood for the proposition that:[10]

> … even if there is a dispute between the parties which goes to the crux of the applicant-creditor's winding-up petition and such dispute is governed by an arbitration agreement, the standard of proof is that of triable issues.

17.6 He did not consider it to be of much significance that *Metalform* was a "cross-claim" case while the application in *VTB Bank*[11] was a "disputed debt" case. In his judgment, there is no distinction between a

7 [2018] SGHC 250.
8 [2016] 5 SLR 977.
9 [2007] 2 SLR(R) 268.
10 *VTB Bank (Public Joint Stock Co) v Anan Group (Singapore) Pte Ltd* [2018] SGHC 250 at [58].
11 See para 17.2 above.

genuine cross-claim of substance in an amount exceeding the amount of the petitioner's debt and a seriously disputed debt in so far as both situations may call into question the *locus standi* of the creditor to present a winding-up petition against the debtor.

17.7 Likewise, the honourable judicial commissioner did not consider it to be material that *Metalform*[12] involved an application by the debtor-company to pre-emptively restrain the creditor from commencing winding-up proceedings, while *VTB Bank* concerned a company resisting the winding-up application itself: following the Court of Appeal decision in *Pacific Recreation Pte Ltd v S Y Technology Inc*.[13] On the facts, the honourable judicial commissioner found that no triable issues were raised in respect of the underlying debt and he accordingly ordered that the company be wound up.

17.8 The High Court's decision in *VTB Bank* is significant and merits closer analysis. While it appears to cut against the robust judicial policy of upholding arbitration agreements, it should be noted that the company did not apply to *stay* the winding-up proceedings pursuant to s 6 of the International Arbitration Act.[14] Such an application could have been made on the basis that the winding-up proceedings amount concerned a matter which is the subject of the arbitration agreement (*viz*, whether the underlying debt was due). The outcome could well have been different had such an application been made.

17.9 Further, it is not clear that the honourable judicial commissioner is bound by *Metalform*. While both parties agreed that the dispute in relation to the cross-claim ought to be referred to arbitration, no submissions were made by parties as to the impact this had on the applicable standard for the grant of an injunction against the commencement of winding-up proceedings and no finding was made in this regard. As such, it is submitted that *Metalform* did *not* decide on the applicable standard of proof where the underlying debt was governed by an arbitration agreement; that question was not engaged at all.

Substitution of applicant for plaintiff to winding-up application

17.10 In *Prospaq Group Pte Ltd v Yong Xing Construction Pte Ltd*,[15] the High Court was confronted with the question as to whether an applicant could be substituted as the plaintiff in ongoing winding-up proceedings

12 See para 17.4 above.
13 [2008] 2 SLR(R) 491.
14 Cap 143A, 2002 Rev Ed.
15 [2018] SGHC 27.

where its judgment debt and statutory demand post-dated the commencement of the winding-up proceedings.

17.11 The honourable judicial commissioner observed that r 33(1) of the Companies (Winding Up) Rules[16] ("CWUR") provides that only someone with the "right to make *the* winding-up application" could be substituted as a plaintiff. Nevertheless, he held that the applicant had standing under r 33(1) to be substituted as the plaintiff as the fact situation was congruous with the earlier High Court decision in *Re People's Parkway Development Pte Ltd*[17] ("*People's Parkway*").

17.12 In *People's Parkway*, L P Thean J (as he then was) held that although the applicant's statutory demand was issued after the date of commencement of the winding-up application, the applicant would have had a right to present a winding-up petition against the debtor company as the underlying debt was in existence even before that date even if the quantum thereof was disputed. Following the reasoning of Thean J, the honourable judicial commissioner held that the underlying debt was for unpaid invoices for supply of construction materials which pre-dated the commencement of the winding-up proceedings. As such, the honourable judicial commissioner held that the applicant had "a right to make the winding-up application" under r 33(1) of the CWUR and accordingly made an order substituting the applicant for the original plaintiff.

Discretion not to wind up company

17.13 In *Prospaq Group Pte Ltd v Yong Xing Construction Pte Ltd*,[18] the High Court declined to grant a further adjournment as it would not be in the interests of the general body of creditors to drag the matters indefinitely.

17.14 Relying on the Court of Appeal decision in *BNP Paribas v Jurong Shipyard Pte Ltd*[19] ("*Jurong Shipyard*"), which held that while the general rule is that the creditor is *prima facie* entitled to a winding-up order where a company is unable or deemed to be unable to pay its debts, an adjournment may be justified in exceptional circumstances, such as where the defendant company is "temporarily insolvent" but commercially viable, such that it merited being allowed time to resolve issues at hand or seek alternative measures.

16 Cap 50, R 1, 2006 Rev Ed.
17 [1991] 2 SLR(R) 567.
18 See para 17.10 above.
19 [2009] 2 SLR(R) 949.

17.15 The honourable judicial commissioner was satisfied that, on the facts, the company was clearly not "temporarily insolvent". Despite having been afforded a generous time frame of ten months' adjournment following three months of moratorium, it was unable to resolve its outstanding debts. Furthermore, the company's hope of a white knight investor also did not materialise. In the circumstances, the High Court declined to grant a further adjournment and instead ordered that the company be wound up.

Presumption of insolvency

17.16 2018 saw a trilogy of cases where the High Court was confronted with the argument that it should not find the debtor company insolvent even though it had failed to satisfy a statutory demand pursuant to s 254(2)(*a*) of the Companies Act. All of these cases appeared to proceed on the assumption that a debtor company is entitled to demonstrate that it is in fact solvent in such an event.

17.17 In *Prospaq Group Pte Ltd v Yong Xing Construction Pte Ltd*,[20] the debtor company sought to stave off liquidation by arguing that the presumption of insolvency following a failure to meet a statutory demand was rebutted on the facts. On the facts, the honourable judicial commissioner was satisfied that the company was insolvent but accepted that the debtor company may rebut this presumption of insolvency.

17.18 In arriving at his conclusion, the honourable judicial commissioner had regard to s 254(2)(*c*) of the Companies Act which provides that a company shall be deemed unable to pay its debts if:

> … it is proved to the satisfaction of the Court that the company is unable to pay its debts; and in determining whether a company is unable to pay its debts the Court shall take into account the contingent and prospective liabilities of the company.

17.19 The honourable judicial commissioner also recognised that a company is deemed insolvent if it is either balance sheet insolvent[21] or it is unable to meet current demands upon it.[22] On the facts, he found that the company was commercially insolvent, given that it was unable to pay off its substantial and long outstanding debts despite having been afforded more than a year since the commencement of the winding-up proceedings to do so.

20 See para 17.10 above.
21 *Re Great Eastern Hotel (Pte) Ltd* [1998] 2 SLR(R) 276 at [85].
22 *Re Dayang Construction and Engineering Pte Ltd* [2002] 2 SLR(R) 197 at [40].

17.20 A similar argument was attempted in *Tarkus Interiors Pte Ltd v The Working Capitol (Robinson) Pte Ltd*[23] ("*Tarkus*"). In her judgment, the learned judge accepted that the company could rebut the presumption of insolvency under s 254(2)(*a*) of the Companies Act by showing that the company was in fact solvent following the earlier High Court decisions in *Export-Import Bank of India v Surya Pharmaceutical (Singapore) Pte Ltd*[24] and *Starluck Construction Pte Ltd v HSS Engineering Pte Ltd*.[25]

17.21 The learned judge, however, dismissed the argument finding that the objective evidence contradicted the company's claims that its total assets exceeded its total liability or that it would be able to raise sufficient money through third-party investments. The learned judge also found that the company's substantial valuation of its business operations for sale was baseless. In contrast, the plaintiff applicant provided sufficient evidence that the company was indeed insolvent: (a) the company did not pay its debts despite several demands from the plaintiff to do so; (b) the net liabilities of the company exceeded its net assets significantly in the financial year ending 31 December 2016; and (c) the prospects of fresh capital were too speculative. As such, the learned judge held that the plaintiff could rely on not only s 254(2)(*a*) but also s 254(2)(*c*) of the Companies Act, although this provision was not raised by the parties.

17.22 In *The Working Capitol (Robinson) Pte Ltd v Capitol Concepts Pte Ltd*[26] ("*Capitol Concepts*") the defendant company argued that the presumption of insolvency was rebutted on the facts as its total assets exceeded its total liabilities. The honourable judicial commissioner appeared to accept that it was open to the debtor company to rebut the presumption but found on the facts that the surplus was insufficient to pay off even the debt due to the plaintiff applicant.

17.23 The honourable judicial commissioner went on to add that the insolvency of a company can be established as a fact by assessing various factors apart from its total assets and liabilities. Under s 254(2)(*c*) of the Companies Act, the court may also consider the company's accumulated losses to see if they are in excess of its capital; the nature of assets of the company; current liabilities over current assets; prospects of fresh capital or financial support from shareholders; and incoming payments from any source to discharge the debts, including credit resources.[27] On the

23 [2018] SGHC 105.
24 [2015] SGHC 258.
25 [2013] SGHC 72.
26 [2018] SGHC 214.
27 *Chip Thye Enterprises Pte Ltd v Phay Gi Mo* [2004] 1 SLR(R) 434 at [17].

facts, the honourable judicial commissioner found that the defendant company's current liabilities substantially exceeded its current assets and its cash and cash equivalents fell far short of its total liabilities. These factors along with the fact that the defendant company could not pay its debts as they fell due meant that the defendant company was unable to rebut the presumption of insolvency.

17.24 None of these cases appear to have grappled with the fact that ss 254(2)(*a*) and 254(2)(*c*) of the Companies Act provide *alternative* bases for *presuming* that the debtor company is unable to pay its debts. In the circumstances, it is reasonably arguable that a debtor company should not be entitled to rely on factors which may otherwise militate against a finding of presumed insolvency pursuant to s 254(2)(*c*) to rebut the presumption under s 254(2)(*a*) if a valid statutory demand has not been satisfied. Perhaps the concern underpinning these decisions is that companies that are temporarily insolvent should not be placed in liquidation, and the courts have attempted to address this concern by negating the statutory presumption of insolvency pursuant to s 254(2)(*a*). It is submitted that the better approach in such circumstances, where a winding-up application is being made against a company that is temporarily insolvent but commercially viable, is that the court may exercise its discretion not to wind up the company despite its insolvency.[28]

Disputed debt

17.25 There were a couple of cases in 2018 dealing with the applicable test in determining whether a debt underpinning a winding-up application is *bona fide* disputed, namely, *Capitol Concepts*[29] and *Tarkus*.[30]

17.26 In *Capitol Concepts*, the defendant company was the parent of a group of companies ("the Group"), which included the plaintiff applicant, which was itself in liquidation and a wholly-owned subsidiary of a wholly-owned subsidiary of the defendant company. Prior to its liquidation, the plaintiff applicant was one of only two entities in the group that generated revenue.

17.27 The plaintiff applicant had extended various loans to the defendant company which the latter failed to discharge. As such, the plaintiff (in liquidation) served a statutory demand which the defendant company failed to satisfy. This resulted in the plaintiff's application to

28 See *BNP Paribas v Jurong Shipyard Pte Ltd* [2009] 2 SLR(R) 949.
29 See para 17.22 above.
30 See para 17.20 above.

wind up the defendant. The defendant company resisted the application on the basis that there was a substantial and *bona fide* dispute as to the alleged debt.

17.28 The defendant company first argued that there was at least a triable issue as regards whether the underlying debt had been set off pursuant to an implied contractual set-off agreement amongst members of the group. In this regard, the defendant company argued that the group was a family-run business with the practice of setting off or writing off mutual debts owed to each other. The honourable judicial commissioner, however, rejected these arguments. He held that the evidence adduced by the defendant company did not even meet the low threshold of triable issues.

17.29 While the group's general ledgers and financial statements indicated that the group's members had the practice of granting loans to each other, this did not necessarily indicate that the group had a practice of *setting off* these inter-company loans. The honourable judicial commissioner also observed that the defendant company had conflated write-offs with set-offs. The pivotal evidence relied upon by the defendant company referred only to write-offs within the group; it did not show that there was any practice of set-off amongst its members. In any case, the evidence produced by the defendant company only covered one party and a fairly limited time frame. The honourable judicial commissioner held that this was clearly insufficient to show that there was a "practice" of setting off inter-company loans given the absence of a sufficient and consistent pattern of conduct. Finally, the honourable judicial commissioner also noted that the parties' general ledger contained no indication of any set-off having been implemented. As such, he had no hesitation to dismiss the argument that there was a practice of setting off mutual debts.

17.30 As regards the defendant company's secondary argument that the underlying debt was set off pursuant to a tripartite agreement it had with the plaintiff applicant and another subsidiary of the defendant, the honourable judicial commissioner held that the evidence simply did not support the existence of any such agreement. Accordingly, the honourable judicial commissioner found that there was no *bona fide* or substantial dispute of the underlying debt.

17.31 In *Tarkus*,[31] the learned judge accepted that a winding-up application would be an abuse of process if the underlying debt is disputed on substantial or *bona fide* grounds.[32] The learned judge,

31 See para 17.20 above.

32 *BNP Paribas v Jurong Shipyard Pte Ltd* [2009] 2 SLR(R) 949 at [7].

however, found on the facts that there was no substantial or *bona fide* dispute in relation to the underlying debt, which arose from a construction contract between the parties.

17.32 The defendant company first argued that it had a potential counterclaim against the plaintiff applicant. The learned judge noted that this argument was raised very late in the day and lacked credibility. She also observed that the defendant company had admitted liability for the debt on various occasions and the project consultant for the works indicated no defects which could ground any such counterclaim. Finally, the learned judge also considered the fact that the defendant company did not even attempt to quantify the damages it would have been entitled to under the potential counterclaim.

17.33 The defendant company also sought to argue that it was an abuse of process for the plaintiff applicant to have brought a winding-up application. It was contended that the plaintiff applicant ought to have first applied for an adjudication under the Building and Construction Industry Security of Payment Act.[33] The learned judge rejected this argument holding that there was no reason for the plaintiff to have first sought adjudication of what was in substance an admitted debt.

17.34 Finally, the defendant company contended that the statutory demand underpinning the winding-up application had been "superseded" by a subsequent agreement between the parties. Essentially, the defendant company sought to argue that a new agreement had released it from the strictures of the statutory demand. On this issue, the learned judge characterised the argument as being whether the underlying debt had been compounded to the reasonable satisfaction of the creditor pursuant to s 254(2)(*a*) of the Companies Act. Specifically, the learned judge followed the Court of Appeal decision in *Bombay Talkies (S) Pte Ltd v United Overseas Bank Ltd*[34] where it was held that "a debt is compounded when it is discharged or rendered unenforceable pursuant to an agreement between the debtor and the creditor".[35]

17.35 As such, the learned judge adopted a two-step analysis considering first whether there was an agreement between the parties to settle their dispute and which documents comprised that agreement; and, if so, whether its terms contained a discharge of the defendant company's liability. On the first step, the learned judge found that there was no offer and acceptance in the parties' correspondence.

33 Cap 30B, 2006 Rev Ed.
34 [2016] 2 SLR 875.
35 *Bombay Talkies (S) Pte Ltd v United Overseas Bank Ltd* [2016] 2 SLR 875 at [17].

Nevertheless, the learned judge proceeded to assess the terms of the putative agreement on the possibility of an oral acceptance or acquiescence by conduct on the part of the defendant company. On the second step of the analysis, the learned judge concluded that there was a condition precedent that the agreement would not take effect unless a cheque which the defendant company had presented was cleared within a stipulated date. On the facts, the cheque did not clear. As such no agreement came into effect. Further, the learned judge noted that the plaintiff applicant had expressly warned the defendant company that it would not "hesitate to take the necessary legal action" and that this was sufficient to preserve the plaintiff's right to revive the statutory demand.[36] As such, there was no agreement to discharge or render unenforceable the debt. The fact that the letter did not (unlike in *Bombay Talkies*) expressly mention the possibility of "instituting winding up" did not, in the learned judge's view, change the analysis.[37] In arriving at this conclusion, the learned judge observed that a creditor who is willing to give a deserving debtor time to pay ought not to be lightly said to have foregone his rights where he has expressly reserved those rights. Applying the principle in *Foakes v Beer*[38] and *Re Selectmove Ltd*,[39] indulging a debtor with more time while accepting the promise of future part payment ought not to be easily construed as discharging full payment of the debt.

Applicability of Clayton's Case

17.36 In *Pars Ram Brothers (Pte) Ltd v Australian & New Zealand Banking Group Ltd*[40] ("*Pars Ram Brothers*"), the High Court had to consider how the sale proceeds of commingled stocks were to be distributed amongst the competing claimants. Specifically, the High Court was asked to consider if the "first in, first out" method laid down in *Clayton's Case*,[41] the rolling charge method or the *pari passu* method ought to be applied.

17.37 In *Pars Ram Brothers*, the company in liquidation held a stock of perishable pepper stock. As such, the liquidators decided to sell the pepper stock and to hold the sale proceeds on trust pending determination as to how the sale proceeds ought to be distributed

36 *Tarkus Interiors Pte Ltd v The Working Capitol (Robinson) Pte Ltd* [2018] SGHC 105 at [27].
37 *Tarkus Interiors Pte Ltd v The Working Capitol (Robinson) Pte Ltd* [2018] SGHC 105 at [28].
38 (1884) 9 App Cas 605.
39 [1995] 1 WLR 474.
40 [2018] 4 SLR 1404.
41 [1814–1823] All ER Rep 1.

amongst the competing creditors. Following the sale, it appeared that the claims of the competing creditors exceeded the total sale proceeds. In the circumstances, the liquidators applied under s 310(1)(*a*) of the Companies Act for the court to determine the proper method of distribution.

17.38 The "first in, first out" approach established in *Clayton's Case* provides that "when sums are mixed in a bank account as a result of a series of deposits, withdrawals are treated as withdrawing the money in the same order as the money was deposited".42

17.39 The honourable judicial commissioner, it is submitted, rightly accepted that the rule ought to be limited in its application. As recognised in *Barlow Clowes International Ltd v Vaughan*,[43] ("*Barlow Clowes*") it is unclear if the rule can be applied outside a banker–customer relationship. Further, the rule results in "capricious consequences" favouring later contributors over earlier contributors. As such, the honourable judicial commissioner considered that the rule should only be applied in exceptional cases and should not be applied if there is a preferable alternative that produces a more just and equitable outcome or if the application of the rule would be contrary to the express, inferred or presumed intention of the parties. Notably, none of the competing creditors advocated for this approach.

17.40 As regards the remaining two methods, the honourable judicial commissioner recognised that both of them involved calculations on a *pari passu* basis. However, the rolling charge method requires the contributor's rateable interest in the mixed fund to be recalculated at every instance of withdrawal, while the *pari passu* method only requires the rateable interest to be calculated at the point of distribution. As such, the *pari passu* method may be unfair to recent contributors as their interests in the mixed fund may be diminished by withdrawals prior to their contribution. Therefore, the rolling charge method is more precise and produces "the most just result". Nonetheless, the honourable judicial commissioner recognised that the *pari passu* method is often applied as it is more cost-efficient, practical and simple to implement.

17.41 Against this background, the honourable judicial commissioner held that the rolling charge method should be preferred unless it is impracticable or unworkable. She noted that even cases that applied the *pari passu* method have acknowledged that the rolling charge method would have been adopted if it had been practical to do so. In doing so, the honourable judicial commissioner drew guidance from the leading

42 *Barlow Clowes International Ltd v Vaughan* [1992] 4 All ER 22 at 35.
43 [1992] 4 All ER 22.

English decision in *Barlow Clowes* where 11,000 investors were owed moneys and applying the rolling charge method would have been too difficult and expensive.

17.42 On the facts, while the warehousing and storage arrangements were random, the handwritten warehouse ledgers containing the date of transfer, description of the stock, quantity of the stock transferred and the amount of balance stock were recorded in chronological order. As such, there was no evidentiary difficulty and the parties were even able to agree on a set of figures to be paid out assuming that the rolling charge method were applied. Clearly, it would not have been impracticable for the rolling charge method to be used.

17.43 In determining the proper distribution method, the honourable judicial commissioner also considered whether there was any prior agreement between the parties as to the distribution method. Where the parties have expressly agreed on the method of distribution, the court would give effect to the agreement unless it is unworkable or impracticable to do so. In the absence of an express agreement, the court will look at the parties' presumed intentions, which are to be inferred from the facts of the case. On the facts, the honourable judicial commissioner found that the parties did not agree for the *pari passu* method to be applied. In arriving at her conclusion, the honourable judicial commissioner noted that the competing creditors had expressly attempted to segregate their interest in the respective trust receipts; this was antithetical to any common intention for the *pari passu* method to be applied. For the foregoing reasons, the honourable judicial commissioner applied the rolling charge method in distributing the sale proceeds among the competing creditors.

Challenge to liquidator's decision and leave to commence legal action against company and liquidator

17.44 Issues of challenging a liquidator's decision and seeking leave to commence legal action against the company and the liquidator were addressed in *Carpe Diem Holdings Pte Ltd v Carpe Diem Playskool Pte Ltd*.[44]

17.45 The applicant creditor had a franchise agreement ("the Franchise Agreement") with the company under which it would have the option to obtain the lease of the premises upon termination of the Franchise Agreement. The company instead sold its business and the lease to a third-party purchaser. After the company entered into a

44 [2018] SGHC 37.

creditors' voluntary liquidation, the appointed liquidator completed the assignment of the lease to the purchaser. The creditor sought to challenge the liquidator's decision to do so.

17.46 Instead of submitting a proof of debt to the liquidator setting out its claim for damages against the company for breach of the Franchise Agreement, the creditor sought to, *inter alia*, reverse the decision of the liquidator to complete the assignment of the lease to the purchaser on the basis that the assignment was wrongful. The creditor also sought to obtain leave pursuant to s 299(2) of the Companies Act to commence proceedings against the company and the liquidator. As against the purchaser, the creditor asserted a claim under the tort of conversion or inducement of breach of contract.

17.47 The High Court rejected the creditor's claim that the assignment of the lease to the purchaser was wrongful. The court found that the purchaser had acquired an equitable interest in the lease and such interest was first in time to any interest that the creditor might have pursuant to the exercise of the option clause in the Franchise Agreement. Therefore, the liquidator was correct to complete the assignment of the lease to the purchaser. This case raised an interesting question of competing equitable interests in the transfer of a lease. It was found on the facts that the applicant creditor could not have acquired any equitable interest earlier than the purchaser of the lease. It was correct for the court to hold that the purchaser of the lease would have been able to obtain specific performance of the transfer of the lease, and the liquidator was justified in completing the transfer.

17.48 The court also rejected the creditor's allegation that the assignment of the lease was wrongful as the liquidator had failed to disclaim the Franchise Agreement and was thus prohibited from proceeding with the sale to the purchaser. Section 332(1) of the Companies Act allows a liquidator to disclaim certain categories of onerous property of the company in liquidation. Here, the court clarified that there is no duty to disclaim under s 332(1), but a discretion on the part of the liquidator.

17.49 Even if there were such a duty, the liquidator would not be able to disclaim the Franchise Agreement as it did not fall within any of the categories of property which could be disclaimed under the limbs of s 332(1). Further, even if s 332(1) were wide enough to encompass the Franchise Agreement, it would not have been correct to exercise the power to disclaim, which is intended to facilitate liquidation, and not

merely because "it would be better in the liquidator's view not to have to perform the contract".[45]

17.50 In any event, the court held that a failure to disclaim the Franchise Agreement did not give the creditor an interest in the lease. Instead, the creditor's remedy was for damages for the breach of the Franchise Agreement, which should be pursued by filing proof of debt.

17.51 The court also denied the creditor's application for leave to commence proceedings against the company and the liquidator. Leave of court is required under the Companies Act to commence proceedings against a company in liquidation. Here, the court applied the case of *Korea Asset Management Corp v Daewoo Singapore Pte Ltd*,[46] which sets out the relevant factors when determining whether to grant such leave. The court denied the creditor leave to commence proceedings against the company as the term of tenancy under the lease had expired, and there was no interest which could be restored to the creditor. Further, the creditor had an existing remedy within the insolvency framework, as it could claim in damages for breach of the Franchise Agreement through filing a proof of debt.

17.52 Leave of court is also required under common law to commence proceedings against a liquidator. The court applied the case of *Excalibur Group Pte Ltd v Goh Boon Kok*,[47] which holds that "the applicant must at least be able to show a *prima facie* arguable case".[48] Here, the court correctly found that the creditor had not shown a *prima facie* arguable case that the decisions of the liquidator should be reversed or modified.

17.53 Finally, the court rejected the creditor's allegation that the purchaser was liable for the tort of conversion. The tort of conversion applies only to personal property, while the lease related to real property. Further, the tort of conversion applied only when there were unauthorised dealings, which was not the case in this instance.

Breach of fiduciary duties by directors of insolvent company

17.54 In *Trans Asian Shipping Services Pte Ltd v Pua Teck Ann*,[49] a judgment creditor of a company brought proceedings against the directors of the company for breach of fiduciary duties and for

45 *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, Revised 3rd Ed, 2009) at para 17.159.
46 [2004] 1 SLR(R) 671.
47 [2012] 2 SLR 999.
48 *Excalibur Group Pte Ltd v Goh Boon Kok* [2012] 2 SLR 999 at [53].
49 [2018] SGDC 207.

conspiracy. Notably, the court had to determine whether the directors of a company owed fiduciary duties to the company's creditors.

17.55 The two defendants were the shareholders and directors of two companies ("the Company" and "Cargoways Shipping"). The plaintiff was a judgment creditor of the Company, having previously succeeded in a negligence suit against the Company.

17.56 The plaintiff then took out an application for examination of the Company, whereupon it was revealed that the Company had ceased trading and had sold its fixed assets to Cargoways Shipping. The sum obtained from the sale had been paid to the first defendant through two payments in discharge of loans he had previously made to the Company.

17.57 The plaintiff, rather than enforcing its judgment or commencing winding-up proceedings, sued the defendants for recovery of the judgment debt. The plaintiff alleged that the defendants had breached their fiduciary duty owed to the plaintiff as judgment creditor of the Company by selling its assets and making payment to the first defendant when the Company was either insolvent or in a financially parlous situation. Alternatively, the plaintiff alleged that the defendants had acted in a conspiracy, both by lawful and unlawful means, that resulted in loss to the plaintiff.

17.58 In considering the fiduciary duties owed by the defendants, the court examined two opposing lines of cases. In *Federal Express Pacific Inc v Meglis Airfreight Pte Ltd*,[50] the High Court held that directors owe fiduciary duties not only to the company but to the creditors when the company faces potential insolvency. On the other hand, in *Liquidators of Progen Engineering Pte Ltd v Progen Holdings Ltd*[51] ("*Progen*"), the Court of Appeal commented in *obiter* that, when a company is insolvent or in a parlous financial situation, directors have a fiduciary duty to take into account the interests of the company's creditors. However, this fiduciary duty is owed to the company and not directly to the creditors, as a direct claim by the creditors would contravene the collective procedure of insolvency.

17.59 The approach in *Progen* was followed in *Max-Sun Trading Ltd v Tang Mun Kit*[52] ("*Max-Sun*"), where the High Court held that creditors cannot, without the help of the liquidator, directly recover from directors for the breach of such fiduciary duty.

50 [1998] SGHC 417.
51 [2010] 4 SLR 1089.
52 [2016] 5 SLR 815.

17.60 The court here chose to adopt the principle in *Progen* and *Max-Sun*. It is correct that when a company is in financial distress, the directors have a fiduciary duty to consider its creditors' interests, and that this fiduciary duty is owed to the company and not directly to the creditors. Otherwise, there would be the risk of circumventing the liquidation process. The court thus found that the defendants did not owe any fiduciary duties to the plaintiff directly.

17.61 As a separate cause of action, the plaintiff alleged conspiracy by both lawful and unlawful means against the defendants. The acts complained of here were the alleged unfair preference transactions and the alleged breach of fiduciary duties by the defendants. However, as the Company remained a live entity at the material time, the cause of action for unfair preference did not arise.

17.62 Further, the court had already found that the fiduciary duties were owed not to the plaintiff but to the Company itself. There was thus no unlawful act against the plaintiff on which to base the conspiracy. The court further found that allowing the conspiracy claim would defeat the very object of the liquidation regime, which would permit the plaintiff recovery only *pari passu* with other unsecured creditors upon the liquidation of the Company. The court thus set aside the plaintiff's claim.

Assignment of causes of action by liquidator

17.63 *Solvadis Commodity Chemicals Gmbh v Affert Resources Pte Ltd*[53] concerned a litigation funding arrangement whereby the liquidator sought to assign the causes of action of a company undergoing liquidation to a third-party liquidation funder. The High Court considered how to balance the realisation of a company's assets and preventing undue trafficking in assets and causes of action in liquidation, as well as the circumstances under which the court should approve such arrangements.

17.64 The liquidators of the company ("the Liquidators") sought the court's approval under s 273(3) of the Companies Act of an agreement between the company and the third-party funder ("the Funder") ("the Agreement"). The Liquidators sought to sell and assign certain properties and things in action to the Funder pursuant to their statutory power of sale under s 272(2)(*c*) of the Companies Act.

53 [2018] 5 SLR 1337.

17.65 The Agreement provided that the company would assign to the Funder its rights of recovery of receivables due from a list of specified third parties and various causes of action relating to these assigned receivables. The Agreement also provided that the Funder would pay an initial price of S$50,000 followed by 40% to 50% of sums recovered, and that the company could repurchase the assigned property at a nominal sum if the Funder was insufficiently expeditious at recovery.

17.66 One of the company's creditors objected to the application, submitting that the Agreement was a contravention of the policy against maintenance and champerty, and that the Liquidators were not acting with sufficient transparency. It also submitted that the Agreement prejudiced the company's creditors in favour of the Funder, and that the Funder stood to make a grossly excessive profit.

17.67 Section 272(2)(*c*) of the Companies Act permits a liquidator of a company to:

> … sell the immovable and movable property and things in action of the company by public auction, public tender or private contract with power to transfer the whole thereof to any person or company.

The court held that the meaning of "property" under s 272(2)(*c*) includes the sale of proceeds from a company's causes of action as well as the sale of the causes of action themselves. The assigned property under the Agreement thus fell within this provision.

17.68 However, the court clarified that the subject matter being sold under s 272(2)(*c*) must be sufficiently identifiable. Where causes of action are being sold, the liquidator must identify them with reference to extant proceedings, the parties being claimed against, the offending conduct, *etc*. Here, while the first draft of the Agreement included all of the company's causes of action, the revised version limited the assigned causes of action to those pertaining to receivables owed by a defined list of third parties. This was found to be sufficiently identifiable.

17.69 The court rejected the submission that the Agreement was a contravention of the policy against maintenance and champerty. Relying on *Re Vanguard Energy Pte Ltd*[54] ("*Re Vanguard*"), the court held that s 272(2)(*c*) is a statutory exception to the doctrine of maintenance and champerty – if the sale or assignment falls within the liquidator's statutory power of sale, then the sale must be authorised by statute despite the rules of maintenance and champerty.

54 [2015] 4 SLR 597.

17.70 The court also cited *Re Vanguard* and held that, for the purposes of s 272(2)(*c*), it does not matter if the assignee stands to make a profit from the sale of a company's property. It would be commercially unrealistic to expect liquidation funders not to seek a profit, and it would stifle the ability of insolvent companies to pursue meritorious claims.

17.71 In any event, the liquidator's power of sale under s 272(2)(*c*) is subject to the court's control under s 272(3). In considering whether to intervene, the court's overarching consideration should be whether the liquidator is acting *bona fide* or in good faith.

17.72 While the court will not readily do so, there are situations where the court will intervene. The court set out a list of non-exhaustive and non-determinative factors to be taken into account in ascertaining whether the liquidator is acting *bona fide* or in good faith, including the nature and complexity of the matter and the risks involved in pursuing the claim, the prospects of success, the amount of costs likely to be incurred and the extent to which the funder is willing to contribute (including contribution to the opponent's costs). The court will also consider the circumstances surrounding the making of the contract, including the ability of the funder to meet its obligations, the level of the funder's premium, and the extent to which the liquidators have canvassed other funding options. The interests of the creditors and the effects of the agreement on such interests, whether there is possible oppression to another party in proceedings, and the extent to which the liquidators maintain control of proceedings, are relevant as well.

17.73 On the facts, the court was satisfied that the Liquidators had acted *bona fide*. The Funder would bear all costs incurred, including adverse costs orders. The Liquidators had conducted negotiations at arm's length and kept the creditors informed. Any concern over the Funder's ability to conduct recovery actions was tempered by the fact that the company could buy back the assigned property. The Funder did not stand to make a grossly excessive profit at the company's expense, as 40% to 50% of the sums recovered would go to the company. The Liquidators were entitled to relinquish control over the assigned proceedings as it was a permissible corollary of assigning the cause of action to the Funders.

17.74 The court thus allowed the Liquidators' application, while also ensuring that a number of safeguards were put in place in the Agreement to address the creditors' concerns. The decision in *Solvadis*[55] is to be welcomed. It continues the trend of decisions which adopt a

55 See para 17.63 above.

sensible and pragmatic approach in view of the evolving litigation funding landscape. The pragmatism is rightly balanced with reasonable safeguards against abuse.

Prohibition against assignment and mutuality in insolvency set-off

17.75 The High Court decision in *Jurong Aromatics Corp Pte Ltd v BP Singapore Pte Ltd*[56] addressed two key issues – whether the prohibition against assignment of receivables in a debenture precludes the grant of charges over receivables, and whether the mutuality requirement for insolvency set-off was satisfied where one of the debts was the subject of a prior charge.

17.76 As security for loans, Jurong Aromatics Corp Pte Ltd ("JAC") had granted in favour of certain lenders a first fixed charge over JAC's present and future book debts and a first floating charge over all of JAC's present and future assets. JAC also entered into agreements with its suppliers BP and Glencore, and such agreements prohibited JAC from assigning its receivables.

17.77 The receivers appointed over JAC's assets then claimed against BP and Glencore for debts owed to JAC. BP and Glencore resisted and claimed to be able to set off the receivers' claims against their claims against JAC.

17.78 BP and Glencore argued that the prohibitions against assignment should be given effect. The court disagreed. Such prohibition against assignment did not, by its terms, prohibit the creation of charges. Even if they did, the charges were created before the agreements with BP and Glencore which contained the prohibition against assignment. The prohibition only affects encumbrances created after the prohibition, and not those already operating against the assets. On the facts, the charges were already effective when the prohibition was imposed.

17.79 On the set-off argument, BP and Glencore sought to rely on insolvency set-off. Without going into whether insolvency set-off is applicable, the court addressed its mind to whether the mutuality requirement for insolvency set-off was met. The court answered "no".

17.80 The mutuality requirement was not met as the debt owed to JAC had been charged to the secured lenders. BP and Glencore did not have a right to set off against the charged assets. The claims by BP and

56 [2018] SGHC 215.

Glencore were against JAC, but the equitable interest of the charged assets, against which the claims by BP and Glencore were to be set off, resided with the senior lenders as chargees.

Judicial management

Bondholder voting

17.81 In *Re Swiber Holdings Ltd*,[57] the High Court dealt with the novel issue of whether bondholders can participate and vote in restructuring proceedings as creditors in their own right.

17.82 In this case, the debtor company issued bonds under a global custodian arrangement. Under this arrangement, bondholders owned beneficial interests in the proceeds of bonds, which were held through layers of nominees, custodians and trust accounts and administered through a central clearing system. The bond instruments also provided that the debtor company's obligations to pay were owed solely to a bond trustee, unless certain contingencies occurred. The debtor company was subsequently placed into judicial management.

17.83 The global custodian structure posed a problem for the debtor's restructuring, because the common law traditionally did not treat beneficiaries as creditors in their own right. If bondholders could not vote directly as creditors, they could be shut out from participating altogether if the bond trustee was, for any reason, unable or unwilling to act on behalf of bondholders.

17.84 To pierce through this practical issue, the High Court applied English and Australian authorities and held that the bondholders were contingent creditors. This was because the specific terms of the bond instruments gave them direct rights of enforcement against the debtor company, if certain contingencies crystallised. Bondholders could therefore vote as contingent creditors for schemes of arrangements presented under s 210 of the Companies Act. However, in the context of judicial management, reg 73 of the Companies Regulations[58] still restricted contingent creditors from voting at meetings under s 227M of the Companies Act to approve of a judicial manager's statement of proposals. This meant that only the bond trustee could vote at such meetings.

57 [2018] 5 SLR 1358.
58 Cap 50, R1, 1990 Ed.

17.85 The High Court then considered how the trustee's vote should be treated, to meet headcount and value requirements. After surveying authorities from England, Hong Kong, the Cayman Islands and Jersey, the High Court held that the trustee should cast one vote "for" and one vote "against" in terms of headcount. As for value, the trustee would attribute the respective values to the "for" and "against" votes in accordance with instructions received from ultimate bondholders. In doing so, the High Court considered that this "split vote" approach would best reflect the positions of ultimate bondholders.

17.86 The High Court further held that the trustees' expenses incurred for representing bondholders could not be charged against the debtor companies' assets or paid in priority over unsecured debt under ss 227J(3)(*a*) and 227J(3)(*b*) of the Companies Act. These provisions only created statutory charges to secure payment of liabilities arising from contracts entered into by judicial managers, and expenses incurred by the judicial managers themselves. The liquidation expenses principle in *Re Atlantic Computer Systems plc*[59] also could not be extended to cover the trustees' expenses, as the principle only applied to create a charge over property used by liquidators or administrators for the debtor's benefit.

17.87 In the spate of recent high-profile bond defaults, retail bondholders are increasingly coming to realise that the global notes structure, which allows for anonymity and swift trading in dematerialised book-entry form, may not be sufficiently responsive when the bond issuer seeks to restructure its debt. The High Court's judgment is therefore noteworthy for its sensitivity to the interests of retail bondholders, who would otherwise be left with no voice if they were unable to procure their trustees to vote in a meeting held under s 227M of the Companies Act. The High Court's approach has since been applied by debtor companies seeking to restructure bonds through schemes of arrangement, such as Hyflux Ltd.

17.88 However, practical obstacles remain. For example, bond instruments typically contemplate that trustees will serve a largely administrative and ministerial role in the notes structure. Accordingly, bond instruments often leave it to bondholders to agree to fund or indemnify the trustees at a later stage, if bondholders require the trustee to collectively represent them. This is instead of having such costs built upfront into the fee structure. If so, it is always possible that bondholders will be unable to organise themselves, or come to an agreement on funding or indemnifying their trustees. If the trustee declines to act without funds or an indemnity, bondholders' interests

59 [1992] Ch 505.

may well be unrepresented in a s 227M meeting due to the strict wording of reg 73 of the Companies Regulations.

Third-party securities

17.89 In *Re Swiber Holdings Ltd*,[60] the High Court held that in a judicial management scenario, creditors filing proofs against the debtor company are not required to deduct the value of securities held by the creditor, if those securities are over assets owned by third parties (such as the debtor company's subsidiaries). Such creditors are therefore entitled to vote for the full value of their claims under reg 74 of the Companies Regulations, at meetings called to approve of the judicial managers' statement of proposals.

17.90 The High Court observed that if the position were otherwise, reg 74 would require third-party securities to be surrendered to the debtor's estate if the creditor votes for the full value of its claim. This cannot be correct, as it could not have been intended for reg 74 to interfere with assets owned by third parties. The High Court's judgment confirms that the position in judicial management is in line with that applied in corporate insolvency as well as in personal bankruptcy under rr 164(3) and 164(4) of the Bankruptcy Rules.[61]

17.91 The High Court also considered and departed from the English case of *Re Amalgamated Investment and Property Co Ltd*[62] ("*Re Amalgamated*"). In *Re Amalgamated*, Vinelott J held that where a creditor had a claim against an insolvent guarantor, the creditor was not required to give credit to the guarantor if he had filed a proof of debt against the guarantor, and subsequently realised a security over an asset owned by a principal debtor. The High Court observed that *Re Amalgamated* is inconsistent with the principle that a guarantor's liability is co-extensive with that of the principal debtor, and if applied, would result in the creditor having disproportionate voting power even after his principal claim has been reduced. Accordingly, if a creditor has realised his third-party securities after filing a proof against an insolvent guarantor, the creditor is obliged to update his proofs up to the date before the payment of dividends (if any).

17.92 The High Court's departure from *Re Amalgamated* does not affect the approach where a creditor has lodged a proof against an insolvent principal debtor, and subsequently receives part-payment from a guarantor. To give effect to the rule against double proofs in

60 [2018] 5 SLR 1130.
61 Cap 20, R 1, 2006 Rev Ed.
62 [1985] Ch 349.

Barclays Bank Ltd v TOSG Trust Fund Ltd,[63] the creditor is still entitled to maintain his proof for the full value of his debt, unless the guarantor has made full payment for the entire debt or such part of the debt that is guaranteed.

Schemes of arrangement

Creditors with third-party claims in schemes of arrangement

17.93 In *Re Empire Capital Resources Pte Ltd*[64] ("*Empire Capital*"), the High Court considered issues relating to the release of claims against third parties in the context of a scheme of arrangement.

17.94 Each of the companies, BCR and BCE, issued notes under separate note programmes. The applicant ("the Applicant") was a guarantor of both notes. BCR and BCE failed to pay under their respective notes.

17.95 The Applicant applied for leave to convene a meeting of creditors to consider a proposed scheme of arrangement under s 210 of the Companies Act. Under the proposed scheme, the liabilities of the Applicant and related entities including BCR and BCE under the existing notes would be discharged. In exchange, new notes would be issued to the existing noteholders.

17.96 Certain noteholders objected to the application on a number of grounds. They asserted that the proposed scheme fell outside the ambit of s 210 as it involved the improper release of claims against third parties which were not ancillary to or contingent on the release of primary claims against the scheme company. They also argued that the BCR noteholders and the BCE noteholders should be placed in different classes for voting.

17.97 In considering the scope of s 210, the court examined English, Australian and Singapore authorities to determine whether claims held by the creditors against third parties can be discharged in a scheme of arrangement, and whether it would bind dissentient creditors.

17.98 The court held[65] that s 210 is broad enough to cover the release of claims against third parties. To address concerns that s 210 should not

63 [1984] AC 626.

64 See para 17.1 above.

65 Citing the Court of Appeal decision in *Daewoo Singapore Pte Ltd v CEL Tractors* [2001] 2 SLR(R) 791.

be used for collateral purposes, the court qualified that there must be a demonstrable connection or nexus between the applicant company's debt and the third party's debt. The court approved of the test in the Australian case of *Re Opes Prime Stockbroking Ltd*[66] which requires "a sufficient nexus between a release and the relationship between the creditor and the scheme company".[67] As to what amounts to a sufficient nexus or connection, the court was of the view that this cannot be laid down with any definitiveness, but held that a wholly unconnected third-party debt would clearly fail, and that a connection would generally be made out where one debt is a guarantee for the other.

17.99 Here, the Applicant's debts arose because of a guarantee of BCR's and BCE's debts under the notes, and there was sufficient connection between the creditors and the Applicant. As such, the proposed scheme fell within the scope of s 210.

17.100 Regarding the classes for voting, the court held that the noteholders under BCR's and BCE's note programmes should be separated into two different classes of creditors for the purposes of the meeting to consider the proposed scheme. The court adopted the approach in *Re UDL Holdings Ltd*,[68] which considered the essential question to be whether the creditors have rights that are so dissimilar that they cannot sensibly consult together with a view to their common interest and must be given separate meetings.

17.101 The court noted that it may be possible for two sets of noteholders to consult together even if the notes were issued by different companies, or if there is some difference in levels of recovery. The main issue that needs to be determined is whether that difference in rights or returns is such that they cannot reasonably deliberate as a group.[69]

17.102 In this case, the court noted that the creditors were being asked to consider third party releases in respect of each issuer. While the creditors had other commonalities, the fact that the creditors had other rights exercisable against different entities on its own called for separation of the creditors into different classes. The considerations that may come into play in deciding whether to grant any release and what should be the price of such release could attract different results.

66 [2009] FCA 813.
67 *Re Opes Prime Stockbroking Ltd* [2009] FCA 813 at [55].
68 [2002] 1 HKC 172.
69 *Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd* [2003] 3 SLR(R) 629.

17.103 An appeal was filed against the High Court decision in *Empire Capital*[70] and the Court of Appeal gave its judgment in *Pathfinder Strategic Credit LLC v Empire Capital Resources Pte Ltd*.[71] Interestingly, the Grand Court of the Cayman Islands in *Re Ocean Rig UDW Inc*[72] ("*Ocean Rig*") appears to have formed a different view from the High Court on the classification of creditors. In *Ocean Rig*, certain creditors in proposed schemes of arrangement had secured claims against subsidiaries in the Ocean Rig group, as well as guarantee claims against the parent guarantor company. The opposing creditor only had a claim against the parent company, and argued that it should be placed in a different class from creditors with claims against different entities. The court held that it was appropriate to place all creditors in a single class.

17.104 The court reasoned, *inter alia*, that the test of classification is as to rights against the scheme company, not against third parties. The *Ocean Rig* decision does not seem to have been brought to the attention of the High Court in *Empire Capital*. In any event, it would seem difficult to lay down a rule that creditors with claims against third parties should invariably be classed together with creditors with claims only against the scheme company. The key inquiry is whether it would be realistic to expect the creditors to consult together in the circumstances. The starting presumption, as a practical matter, should be the approach espoused in *Empire Capital*, and the burden then falls on the party asserting otherwise to demonstrate that the creditors should be classed together.

Requirements for interim moratorium

17.105 In *Re IM Skaugen SE*,[73] the High Court provided important guidance on the requirements for obtaining a moratorium under the new ss 211B and 211C of the Companies Act. The High Court also considered the relevance of creditors' support for schemes proposed by the debtor's related companies, in the context of a broader group restructuring.

17.106 In this case, three related companies applied for moratorium relief as part of a broader restructuring of a shipping group's debts. While two of the applicants had already proposed compromises, IMSPL Pte Ltd ("IMSPL") had only intended to propose a compromise at the

70 See para 17.1 above.
71 [2019] SGCA 29. This decision will be covered in the Ann Rev for 2019.
72 Financial Services Division Cause Nos FSD0057/2017, FSD0059/2017, FSD0056/2017 and FSD0058/2017 (Grand Court of the Cayman Islands) (unreported).
73 See para 17.1 above.

time of application. MAN Energy Solutions SE ("MAN"), a creditor of IMSPL, opposed IMSPL's application. Apart from MAN, other majority creditors of the applicants either supported the applications or were neutral.

17.107 The High Court clarified that if IMSPL had not proposed a compromise but intended to do so, ss 211B(4)(*a*) and 211B(4)(*b*) of the Companies Act applied conjunctively. Accordingly, IMSPL had to show, *inter alia*, evidence of creditor support, an explanation of how such support would be important for the success of the compromise, and a brief description of the intended compromise. Since IMSPL had yet to propose a compromise, IMSPL had to show evidence of creditor support for the *moratorium* itself.

17.108 On the facts, the applicants' largest creditors were broadly supportive of moratorium relief for all three companies, including IMSPL. In turn, this indicated that the restructuring efforts had a reasonable prospect of working, and of being acceptable to the general run of creditors. IMSPL had therefore satisfied its requirement to show creditor support.

17.109 Significantly, the High Court observed that in a group restructuring scenario, each group company's proposals may be interdependent and contingent on the approval of each plan. If so, the court would also have regard to support from the group's principal creditors for the overall group restructuring.

17.110 The High Court's treatment of creditor support in a group restructuring warrants closer examination. The High Court did not go so far as to say that IMSPL would have satisfied the requirement of creditor support, as long as creditors of other group entities supported those entities' applications. After all, IMSPL applied for relief under s 211B(1), and s 211B(4)(*a*) requires evidence of support from "the company's creditors". Accordingly, an applicant for s 211B relief must still show that its own creditors are supportive.

17.111 On the facts of this case, the High Court was also not required to examine why a creditor supported moratorium relief for group entities. For example, it is conceivable that a group of companies could, for purely tactical reasons, propose an all-or-nothing compromise which would not proceed unless creditors collectively approved of all schemes proposed by group entities. The obvious advantage is that an entity with a weaker proposal could ride on the coattails of a group restructuring proposal even if its proposal was patently unattractive or, if rejected independently, would not even have substantially affected the group's overall restructuring plan.

17.112 In such cases, the group's major creditors may have no real interest in supporting a moratorium for that entity, but may go along solely to preserve their interests in the broader group restructuring. If so, there is some potential for prejudice to opposing creditors of that entity who have no claims against other group entities, and who have no interest in the group restructuring efforts.

17.113 One possible way to prevent abuse could be for the court to assess if there were good commercial reasons for structuring a particular entity's proposal as being integral to a broader scheme. For example, the weaker the commercial rationale and the less impact it would have on a group restructuring if rejected independently, the greater the possibility that that entity had sought a moratorium in bad faith.

17.114 Having regard to such opposing creditors' interests would be consistent with the approach applied if a related company applied for a moratorium under s 211C(1) of the Companies Act. Among others, the court must be satisfied that the related company plays a necessary and integral role in its group company's proposed or intended compromise under s 211B(1), and that the related company's creditors will not be unfairly prejudiced by a moratorium order to support a broader group restructuring.[74]

17.115 Even if there was no bad faith involved in structuring a group proposal in such an interdependent manner, creditors with claims against only one group entity would have very different motivations from creditors with claims against multiple group entities when it comes to voting. If so, it remains open for a future court to decide whether such disparate creditors can sensibly consult in the same class on their common interests, when a scheme of arrangement is later proposed.

Bankruptcy

Setting aside of statutory demand in bankruptcy

17.116 Rules 94(3) and 98(2)(*d*) of the Bankruptcy Rules provide certain grounds for the setting aside of a statutory demand. In *Wheeler, Mark v Standard Chartered Bank (Singapore) Ltd*,[75] the High Court considered whether these provisions establish a mandatory ground for setting aside, or whether the court maintains the discretion to uphold proceedings.

74 See ss 211C(2)(*c*) and 211C(2)(*e*) of the Companies Act (Cap 50, 2006 Rev Ed).
75 *Wheeler, Mark v Standard Chartered Bank (Singapore) Ltd* [2018] SGHC 205.

17.117 Rule 94(3) states that if the amount claimed in the statutory demand includes interest, penalties, charges or any pecuniary consideration in lieu of interest, it shall separately identify the actual amount that has accrued as at the date of the demand and the rate at which and the period for which it was calculated. Rule 98(2)(*d*) provides that the court shall set aside the statutory demand if r 94 has not been complied with.

17.118 The court recognised that the language of the rules appears mandatory and suggests that the court has no discretion but to set aside the statutory demand once r 94 has not been complied with, regardless of whether the debtor has suffered any prejudice by the non-compliance.

17.119 However, the court stated that the effect of r 98(2)(*d*) may not be as severe as the literal reading. In particular, the court considered the following provisions and principles. Rule 278 of the Bankruptcy Rules provides that non-compliance with any of these rules or with any rule of practice shall not render any proceeding void unless the court so directs. Further, s 158(1) of the Bankruptcy Act[76] states:

> No proceedings in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court … is of the opinion that substantial injustice has been caused by the defect or irregularity.

The court also observed that Singapore courts generally adopt an approach that suggests that a statutory demand will not be set aside if no substantial injustice to the debtor has been caused by a defect in the statutory demand.

17.120 The court recognised that lay people and even lawyers may be led to believe that r 98(2)(*d*) has a mandatory effect. The court thus questioned the mandatory language of r 98(2)(*d*). The court suggested that the Bankruptcy Rules be amended to clarify if r 98(2)(*d*) is subject to r 278, as well as the interaction between s 158(1) of the Bankruptcy Act and r 98(2)(*d*).

17.121 On the operation of r 94(3), the court clarified that a statutory demand, if the amount claimed includes interest, must separately identify the actual amount that has accrued by way of interest as at the date of demand, and the rate and period which the interest was calculated. Therefore, if interest is included as part of the principal due and owing at monthly intervals at the end of each calendar month, it would seem sufficient if a statutory demand sent at the end of the

76 Cap 20, 2009 Rev Ed.

calendar month states only the aggregate sum since the interest has already been included as part of the principal.

17.122 In this case, the bank had issued a statutory demand to the debtor arising from sums owed under a credit card. The interest was compounded on a monthly rest basis and was added to the principal on the 20th of each calendar month. The statutory demand was dated 24 April 2017, but the sum stated to be due was the same figure as the sum shown to be outstanding on 20 April 2017. The bank did not make it clear whether it was waiving the interest for the period between 21 and 24 April 2017. The statutory demand also gave the impression that the monthly rest interest was calculated from the 25th of each month instead of the 21st.

17.123 The court further considered that, under r 94(3), it appears insufficient for a creditor to say that the interest rate was already stated in the statement of accounts regularly sent to the debtor. The information must be stated in the statutory demand.

17.124 *Lim Lee Lee v United Overseas Bank*[77] was another case where the debtor sought to set aside a bankruptcy statutory demand. The plaintiff debtor had unsuccessfully tried to argue that the statutory demand ought to be set aside on the alleged ground of undue influence.

17.125 The plaintiff was a housewife and joint-owner of a house with her husband. They mortgaged their jointly-owned property to the defendant bank. The mortgage documents were signed by both husband and wife, with both contractually agreeing to pay all sums due by the husband's company. The husband's company defaulted under the loan. After the defendant exercised its right over the mortgaged property and sold it, there was a sum still owed to the defendant. The defendant served a statutory demand against the plaintiff for the amount owed by the husband's company, and thereafter commenced bankruptcy proceedings against her.

17.126 More than three months after the commencement of bankruptcy proceedings, the plaintiff objected to the bankruptcy application, notwithstanding that in five previous hearings during which she was represented by solicitors, no objection was raised in respect of the defendant bank's bankruptcy application and its statutory demand. The assistant registrar granted the plaintiff an extension of time to apply to set aside the statutory demand, as the time limit to do so had expired some five months prior to the plaintiff's application. The assistant

77 [2018] SGHC 79.

registrar also granted the plaintiff's application to set aside the statutory demand on the ground that there were triable issues.

17.127 On appeal, the High Court found in favour of the defendant bank, setting aside the assistant registrar's orders. The court found no reason for the grant of an extension of time for the plaintiff to apply to set aside the statutory demand. There would have to be strong grounds to justify such an extension of time, but none was shown.

17.128 The court, nonetheless, considered the merits of the plaintiff's case. Her main contention was that, in signing the mortgage documents, she had been misled by her husband, who exercised undue influence on her. The court acknowledged the need to protect vulnerable individuals from undue influence, but clarified that this must be balanced against the protection of innocent third parties such as the defendant bank. Therefore, an agreement with a bank will only be vitiated if the bank is put on inquiry as to the undue influence, and fails to take reasonable steps to satisfy itself that there is no undue influence. The court highlighted that the mere allegation of undue influence by one's spouse is insufficient. On the facts, the plaintiff failed to prove her case even at the threshold for setting aside statutory demands. Among other things, the mortgage documents had been explained to the plaintiff by the defendant bank's solicitor, who later followed up with a confirmation in writing the next day.

17.129 The court's decision is correct on the facts. The court's approach is consistent with that in summary judgment applications where the court would not give leave to defend simply because of assertions on affidavit. Such assertions should be assessed to see whether there is, in the round, a real or *bona fide* defence.

17.130 The plaintiff's appeal to the Court of Appeal was dismissed in 2019 with no written grounds.

Voluntary arrangement

17.131 The series of cases involving the proposed voluntary arrangement by Aathar Ah Kong Andrew continued in *Re Aathar Ah Kong Andrew*[78] ("*Aathar*") where the High Court set aside the approval obtained at a creditors' meeting for the debtor's voluntary arrangement for material irregularities.[79]

78 [2018] SGHC 124.

79 This was the second attempt by the debtor for a voluntary arrangement after his earlier voluntary arrangement was set aside in *Re Aathar Ah Kong Andrew* [2017] SGHCR 4.

17.132 The debtor appealed against the High Court decision and sought an extension of the interim stay order pending the determination of his appeal by the Court of Appeal. In *Re Aathar Ah Kong Andrew*[80] ("*Aathar Extension*"), the High Court dismissed the application, holding that it did not have the power to grant such an extension, and in any event would not have exercised its discretion to do so.

17.133 The debtor in this case was an investor who was heavily in debt towards creditors and financial institutions for purported debts in excess of $300m. In 2017, the debtor sought to make a new voluntary arrangement proposal and appointed a senior legal practitioner as his new nominee. The debtor also obtained an interim order under s 45(1) of the Bankruptcy Act (the "Interim Order"), which stayed bankruptcy and other proceedings against him.

17.134 Under this new arrangement, the debtor proposed to pay a total of $3m, which he would borrow, to his creditors over 50 months, in satisfaction of debts of approximately $317m. At the creditors' meeting, the debtor obtained the approval of the requisite majority. Four of the creditors then applied to revoke the approval obtained at the creditors' meeting, submitting that there had been multiple material irregularities.

17.135 The High Court in *Aathar*[81] affirmed the guiding principles laid down by the English High Court in *Andrew Fender v The Commissioner of Inland Revenue*[82] for voluntary arrangements and emphasised two points that were crucial to the efficacy of any voluntary arrangement.

17.136 First, the debtor's full disclosure is fundamental as it is an independent principle of law that creditors should be put in possession of such information as is necessary to make a meaningful choice in the scheme. The second relates to the importance placed upon the role and conduct of the nominee, who facilitates the meeting and later administers the arrangement.

17.137 The High Court held that there had been material irregularities in the proposed voluntary arrangement process. First, the nominee, in his final adjudication, did not assign any value to the litigation claims for the purposes of voting, even though he had, during the creditors' meeting, agreed to allow the plaintiffs in those claims to vote on an "objected to" basis. The nominee (as chairman of the meeting) could agree to ascribe to an unliquidated debt an estimated minimum value for the purpose of voting. Having agreed to set such a minimum sum for

80 [2019] 3 SLR 1242.
81 See para 17.131 above.
82 [2003] EWHC 3543 (Ch).

voting on an "objected to" basis, it was not for the nominee to then declare such votes invalid.

17.138 Secondly, the nominee had wrongfully included the claims of 24 Indonesian creditors who made up 74.2% of the total declared debt. The circumstances surrounding their alleged claims warranted greater scrutiny, but the nominee had not done so, and had only reviewed the supporting documents on a cursory basis.

17.139 Finally, the nominee had made an error in admitting a $20m claim in the creditors' meeting report when he had previously decided at the meeting to only adjudicate the claim at $3m.

17.140 Seen in totality, these irregularities led to the conclusion that the proposal would have been rejected had the creditors' meeting been properly conducted. The court set aside the approval for the voluntary arrangement.

17.141 The debtor appealed against this decision. After he filed his appeal, he sought an extension of the Interim Order pending the determination of his appeals. This application was rejected by the High Court.[83] The High Court held that it did not have the power to grant an extension at this stage of proceedings.

17.142 Under the Bankruptcy Act, the court may grant an interim order as a temporary moratorium. It is intended to operate for a limited period of time to achieve the purpose of allowing the creditors time to consider the debtor's proposal. Parliament had intended for the process to be expeditious and closely supervised by the court, providing tight time frames and limited situations in which an extension could be granted.

17.143 The debtor sought to rely on s 45(4) of the Bankruptcy Act, which only allows the court to extend the interim order beyond the default of 42 days to give the nominee more time to prepare his report. In light of the purpose of the statutory framework, the court rejected the submission that s 45(4) is a general provision which allows the extension of the interim order at any stage. Such power could not be exercised in the present situation where the creditors' approval for the voluntary arrangement has already been revoked by the court.

17.144 Even if the court did have such power, the High Court held that it would not have exercised its discretion to extend the interim order. It was insufficient reason that the decision to revoke the creditors'

83 *Re Aathar Ah Kong Andrew* [2019] 3 SLR 1242.

approval was going on appeal; there would have to be special circumstances to justify the extension of the interim order. The court found that the debtor had failed to show there were special circumstances. The court also took into account the debtor's conduct in continuing to prejudice the creditors by refusing to pay the outstanding costs orders against him.

Cross-border insolvency

17.145 The High Court decision in *Re Zetta Jet Pte Ltd*[84] ("*Re Zetta Jet*") is significant not only because it is the first local reported court decision on an application for recognition of foreign insolvency proceedings under the UNCITRAL Model Law, but also because it considered the public policy exception to recognition.

17.146 The High Court declined to grant full recognition of US insolvency proceedings and the US foreign insolvency representative due to public policy, as the US proceedings were continued in breach of a Singapore court injunction. However, Aedit Abdullah J granted the foreign insolvency representative limited recognition to set aside or appeal against the Singapore injunction.

17.147 Zetta Jet Pte Ltd ("Zetta Singapore") and Zetta Jet USA Inc ("Zetta US") were incorporated in Singapore and the US respectively. The shareholders of Zetta Singapore included Asia Aviation Holdings Pte Ltd ("AAH"). The relationship between the shareholders was governed by a shareholders' agreement. On 15 September 2017, Zetta Singapore and Zetta US filed voluntary Chapter 11 bankruptcy proceedings in the US.

17.148 On 18 September 2017, AAH (and another shareholder) commenced legal proceedings in Singapore against Zetta Singapore and its other shareholders for commencing the US Chapter 11 proceedings. AAH, among other things, alleged that Zetta Singapore and its other shareholders had breached the shareholders' agreement. AAH then obtained an injunction order issued by the Singapore High Court prohibiting further steps in and relating to the US bankruptcy proceedings of Zetta Singapore and Zetta US.

17.149 The US bankruptcy proceedings continued in breach of the Singapore injunction. Subsequently, the US Chapter 11 proceedings were converted to US Chapter 7 proceedings, and Jonathan King was appointed the US Chapter 7 trustee of the Zetta entities. The Zetta

84 See para 17.1 above.

entities and King then applied for recognition of the US Chapter 7 proceedings in Singapore under the Model Law.

17.150 Under Art 15 of the Model Law (adopted as the Tenth Schedule to the Singapore Companies Act), a foreign insolvency representative may apply for recognition of the foreign insolvency proceedings, and for the foreign representative to function as the insolvency representative in Singapore. Article 17 states that the Singapore court must grant recognition if certain requirements are met. However, Art 6 of the Model Law allows the court to refuse recognition if it would be "contrary" to the public policy of Singapore. The Model Law as adopted by Singapore is different from the Model Law in its original form, which allows the domestic court to refuse recognition if it would be "manifestly contrary" to public policy. The word "manifestly" in missing in Art 6 of the Model Law as adopted by Singapore.

17.151 The court in *Re Zetta Jet* first determined the issue of the centre of main interests ("COMI") of the Zetta entities. If an entity has its COMI in the place where the foreign proceedings are commenced, then the foreign proceedings would be recognised as the foreign main proceedings. Under Art 16 of the Model Law, the presumption is that an entity's COMI is the place of registration. Zetta US had its COMI in the US.

17.152 If an entity only had a place of establishment (and not COMI) in the jurisdiction where the foreign proceedings are commenced, such foreign proceedings are regarded as foreign non-main proceedings and recognition would be limited and subject to the discretion of the Singapore court. On the facts, the court found that Zetta Singapore had an establishment in the US.

17.153 The next issue was whether recognition should be granted to King as the foreign insolvency representative. As the Zetta entities had their COMI or an establishment in the US, recognition would be granted unless it would be contrary to public policy.

17.154 The judge observed that the omission of the word "manifestly" from Art 6 of the Model Law adopted by Singapore was deliberate, and meant that the standard of exclusion on public policy grounds was lower than in jurisdictions where the Model Law had been enacted unmodified.

17.155 The judge did not, however, state specifically what would be contrary to public policy in Singapore so as to preclude recognition. In any event, the standard would at least require the denial of an application for recognition of foreign proceedings by a foreign insolvency representative appointed under proceedings restrained by

the Singapore court. King was appointed in US proceedings in breach of the Singapore injunction. It would be against Singapore public policy to grant recognition. To do so would undermine the administration of justice in Singapore. Nevertheless, the judge granted King limited recognition only for the purposes of applying to set aside or appeal the Singapore injunction.

17.156 The decision in *Re Zetta Jet* is significant as it is the first time the Singapore court analysed the public policy exception under the Model Law. The issue of public policy often involves an assessment of values and mores of the domestic jurisdiction, and it would be difficult to set out a specific definition or test. It is perhaps not surprising that judicial precedents serve as a useful guide. The judge in *Re Zetta Jet* referred to the US decision in *Re Gold and Honey Ltd*,[85] where the US Bankruptcy Court of the Eastern District of New York denied recognition of an Israeli receiver appointed in contravention of a US Chapter 11 stay. Notwithstanding modifications to the Model Law as adopted, it is possible to discern a common denominator in public policy even amongst different jurisdictions. By any objective and reasonable standard, breach of a properly-obtained court order issued by a particular jurisdiction is likely to be regarded as contrary to its public policy.

85 410 BR 357 (2009).