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# 17. INSOLVENCY LAW

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## Introduction

17.1 Year 2017 was momentous for Singapore insolvency law. The extensive changes to the Singapore insolvency legislative framework came into effect on 23 May 2017 by way of the Companies (Amendment) Act 2017.[1] As part of these changes, Singapore adopted the UNCITRAL Model Law on Cross-border Insolvency[2] ("Model Law"). Notably, we saw the first Singapore High Court decision which interpreted the newly enacted legislation on super-priority financing – *Re Attilan Group Ltd*.[3] Other significant decisions include *SK Engineering & Construction Co Ltd v Conchubar Aromatics Ltd*[4] ("*SK Engineering*"), which revisited the treatment of related creditors' votes in a scheme of arrangement, *Duncan, Cameron Lindsay v Diablo Fortune, Inc*[5] ("*Diablo Fortune*") (on the registrability of contractual liens in the maritime context) and *Re Croesus Retail Asset Management Pte Ltd*[6] ("*Re Croesus*"), the first reported decision on the restructuring of a business trust by a scheme of arrangement.

1 Act 15 of 2017.
2 United Nations Commission on International Trade Law, *UNCITRAL Model Law on Cross-Border Insolvency* (United Nations, 1997).
3 [2018] 3 SLR 898.
4 [2017] 2 SLR 898.
5 [2017] SGHC 172.
6 [2017] 5 SLR 811.

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## Winding up

### *Statutory demand – Disclosure of seized assets*

17.2 In *iTronic Holdings Pte Ltd v Tan Swee Leon*,[7] the High Court considered whether assets seized pursuant to a writ of seizure and sale ("WSS") had to be disclosed in a statutory demand for a bankruptcy application. The plaintiff, having obtained judgment against the defendant, issued and served a WSS on the defendant. Pursuant to the WSS, the sheriff seized the defendant's shares in five private companies. The plaintiff then filed a bankruptcy application based on the statutory demand. The defendant argued that the plaintiff failed to disclose or account for the seized shares in the statutory demand, in breach of r 94(5) of the Bankruptcy Rules.[8] The defendant also argued that the seized shares were not specified in the plaintiff's affidavit in support of the bankruptcy application as required under r 101(2) of the Bankruptcy Rules. As such, the statutory demand was defective and ought to be set aside, and the bankruptcy application should be dismissed.

17.3 The court rejected the defendant's arguments. In coming to its decision, the court considered that r 94(5) of the Bankruptcy Rules applies to property of the debtor that is held by the creditor issuing the statutory demand. Likewise, r 101(2) requires the creditor to account for property of the debtor held by the creditor in the affidavit in support of the bankruptcy application. However, the plaintiff did not "hold" the shares that had been seized under the WSS. This is because when a WSS is issued against specific property, the interest or property continues to reside in the judgment debtor pending sale. The execution of the WSS had not been completed and the seized shares were also not within the plaintiff's possession nor at its disposal. In any case, even upon the grant of the bankruptcy order, it was uncertain if the plaintiff would have an interest in the proceeds from the sale of the seized shares. For instance, it could be the case that debts held by other creditors of the defendant had to be satisfied in priority over the plaintiff's debt. Accordingly, the plaintiff had no certain interest over the seized shares nor their sale proceeds. The court further considered that "property of the debtor" in r 94(5) only refers to property of the debtor that the creditor is entitled to apply towards payment of the debt. If the creditor is not entitled to do so, there is no need to specify such property in the statutory demand. The same principle applies when it is uncertain whether a creditor may eventually be entitled to apply certain property or its proceeds towards payment of the debt.

7 [2017] SGHC 264.
8 Cap 20, R 1, 2006 Rev Ed.

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17.4 In any case, a failure to disclose such property would be an irregularity or defect that can be remedied by the court under s 158(1) of the Bankruptcy Act.[9] There was no significant difference whether the shares were specified in the statutory demand given that the value of the shares was unknown, and was estimated to only be a small percentage of the total debt owed. The defendant was also fully aware of the WSS and there was no risk of the defendant being misled as to the amount of debt owed. There was no risk of injustice to the defendant. The defendant's appeal against the bankruptcy order was therefore dismissed.

### *Statutory demand* – Bona fide *dispute*

17.5 The court may stay or dismiss winding-up proceedings if there is a *bona fide* dispute over the debt claimed under the statutory demand. However, where the debt is a tax assessment, the debtor should utilise the statutory review process under the Income Tax Act[10] ("ITA"). Without doing so, he should not challenge the assessment during the winding-up proceedings. This was the holding in *Comptroller of Income Tax v BLO*.[11]

17.6 The Comptroller of Income Tax had sent notices of additional assessment to the defendant. The defendant failed to make full payment of the outstanding tax and penalties, and the Comptroller subsequently issued a statutory demand.

17.7 The defendant failed to comply with the statutory demand, and the Comptroller filed an application to wind up the defendant. The defendant sought to stay the application, raising objections to the additional tax assessments, and indicating an intention to object or appeal under s 79(1)(*a*) of the ITA. The court dismissed the defendant's application, and granted the winding-up order.

17.8 After the service of a statutory demand, the debtor has three weeks under s 254(2)(*a*) of the Companies Act[12] to pay the sum, or to secure or compound it. Otherwise, a presumption that the debtor is insolvent arises, and the creditor may apply to wind up the debtor company.[13] Where there is a *bona fide* dispute over the debt claimed, the court should stay or dismiss the winding-up application.[14] However, the

9 Cap 20, 2009 Rev Ed.
10 Cap 134, 2014 Rev Ed.
11 [2017] 5 SLR 230.
12 Cap 50, 2006 Rev Ed.
13 See s 254(1)(*e*) of the Companies Act (Cap 50, 2006 Rev Ed).
14 See *De Montfort University v Stanford Training Systems Pte Ltd* [2006] 1 SLR(R) 218 at [26].

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debtor cannot merely allege the existence of a *bona fide* debt, and must raise triable issues in order to obtain a stay or dismissal.[15]

17.9 On the facts, the court held that there was no substantial or *bona fide* dispute over the underlying debt. Under s 85(1) of the ITA, tax assessed is payable regardless of the existence of an objection or appeal. Further, the ITA provides for a statutory process to review tax assessments. The defendant had not availed itself of the statutory review process, and should not be allowed to bypass such process and challenge the additional assessments in the winding-up proceedings.

17.10 The court was guided by authorities where the court had granted summary judgment against defendant companies for income tax due,[16] where it was held that income tax is payable regardless of objection or appeal, and that a taxpayer cannot bypass the statutory review process. Although these cases dealt with summary judgment applications, the court found that the principles were relevant to winding-up applications as well, as the applicable standard of proof in showing the existence of a substantial and *bona fide* dispute in winding-up proceedings is no more than that for resisting summary judgment.

### *Stay of winding-up application*

17.11 In *Strategic Construction Pte Ltd v JH Projects Pte Ltd*[17] ("*Strategic Construction*"), the High Court was asked to stay a winding-up application brought on the basis of an unsatisfied adjudication award. The company sought a stay on the basis that it had a genuine cross-claim against the applicant. The cross-claim had been advanced by the company in separate proceedings before the High Court against the applicant in relation to the same construction project which engendered the adjudication award which underpinned the winding-up application.

17.12 On the facts, the learned judge was satisfied that there was a genuine cross-claim and there was at least a triable issue as to whether the company's cross-claim exceeded the applicant's claim. Accordingly, the learned judge granted the company's application for a stay of the winding-up application. In arriving at this conclusion, the learned judge correctly applied the principles laid down in *Metalform Asia Pte Ltd v*

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15 See *Pacific Recreation Pte Ltd v S Y Technology, Inc* [2008] 2 SLR(R) 491.

16 See *Comptroller of Income Tax v A Co Ltd* [1965–1967] SLR(R) 322 and *Comptroller of Income Tax v Beaver Singapore Pte Ltd* [1979–1980] SLR(R) 75.

17 [2017] SGHC 238.

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*Holland Leedon Pte Ltd*[18] and *Denmark Skibstekniske Konsulenter A/S I Likvidation v Ultrapolis 3000 Investments Ltd*.[19]

17.13 The learned judge also noted that even though the winding-up application had been brought on the basis of an unsatisfied adjudication award, the standard of proof to be met in an application to stay the winding-up application was no different. In arriving at this conclusion, the learned judge referred to the parliamentary debates and noted that Parliament had expressly intended that the insolvency regime would prevail in the event of a conflict with the statutory payments regime under the Building and Construction Industry Security of Payment Act[20] ("SOPA"). Interestingly, the learned judge referred in the course of his judgment to the High Court decision in *Lim Poh Yeoh v TS Ong Construction Pte Ltd*,[21] which did not concern a winding-up application, instead of an earlier decision involving the same parties in *Lim Poh Yeoh v TS Ong Construction Pte Ltd*.[22] In that earlier case, the High Court considered the interplay between the SOPA and insolvency regimes (in the context of an application to set aside a statutory demand based on an unsatisfied adjudication award) and held, as the learned judge did in *Strategic Construction*, that the latter regime would prevail in the event of any conflict.

17.14 In the event, the learned judge ordered that the winding-up application be stayed on condition that the company pays into court the amount due under the adjudication award.

***Security interests in commingled assets***

17.15 Companies trading in commodities often have their assets in the form of stock-in-trade. A liquidator of such a company will then need to deal with issues of ownership and security interests in the often fungible or commingled assets, as was the case in *Pars Ram Brothers (Pte) Ltd v Australian & New Zealand Banking Group Ltd*[23] ("*Pars Ram Brothers*").

17.16 In *Pars Ram Brothers*, the liquidator of an insolvent company applied to the court to determine whether the sale proceeds of the company's pepper stock should be held for the general pool of creditors, or paid to creditors who could assert a security interest in the stock.

18 [2007] 2 SLR(R) 268.
19 [2011] 4 SLR 997.
20 Cap 30B, 2006 Rev Ed.
21 [2017] SGHC 11.
22 [2016] 5 SLR 272.
23 [2017] 4 SLR 264.

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17.17 The company had obtained trade financing facilities for its import of pepper stock. Eleven of the lenders had trust receipts issued in their favour ("secured lenders"). It was not disputed that the secured lenders had security interests in the sale proceeds of the stock. However, because stock financed by the secured lenders and the unsecured lenders had been commingled, the question was whether the commingling affected the secured lenders' security interests so as to preclude them from asserting their priority over the general pool of unsecured creditors.

17.18 The court correctly held that the security interests of a secured creditor would not be extinguished by the commingling of stock *per se*. The interest in the mixed bulk should be allocated to each secured creditor in proportion to the value of their respective collaterals.

17.19 The court was guided by authorities dealing with ownership interests in commingled stock, which suggested that the commingling of stocks in a mixed bulk does not extinguish the proprietary interests of the contributors: *Indian Oil Corp Ltd v Greenstone Shipping SA (The Ypatianna)*;[24] *Hill v Reglon Pty Ltd*;[25] and *Glencore International AG v Metro Trading International, Inc (No 2)*.[26] In these cases, the equitable solution was for the contributors to hold the mixed bulk as co-owners in proportion to their respective contributions.

17.20 The court also approved the proposition in Philip Wood's *Comparative Law of Security Interests and Title Finance*[27] that, where goods in which one secured party has a perfected security interest are commingled with goods in which another secured party has a perfected security interest, each secured party should be allocated a proportion of the mass in accordance with the value of their collateral.

17.21 Here, the secured lenders already possessed a perfected security interest prior to the mixture of the stock. In each case, the company had furnished the shipping documents for the financed stock to the lenders under a pledge as security for the loan. The trust receipt was then executed in consideration for the release of the shipping documents. The court held that each secured lender's security interest remained intact notwithstanding the mixture of the goods. The mixed stock would be divisible among the contributing secured lenders rateably in proportion to the value of their respective contributions.

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24 [1987] 3 All ER 393.
25 [2007] NSWCA 295.
26 [2001] 1 Lloyd's Rep 284.
27 Sweet & Maxwell, 2nd Ed, 2007.

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### *Avoidance of charges for non-registration – Registrability of contractual liens*

17.22 In *Diablo Fortune*, the High Court considered the novel issue of whether a contractual lien on sub-hires or sub-freights had to be registered under s 131 of the Companies Act. It was held that such a contractual lien falls within the meaning of a "charge" under s 131 and had to be registered to be valid against the liquidator.

17.23 A Singapore-incorporated company ("the Company") entered into an agreement ("the Bareboat Charter") with a shipowner ("Diablo"), under which Diablo chartered a vessel to the Company. The Bareboat Charter provided that Diablo would have a lien upon all cargoes, sub-hires, and sub-freights belonging or due to the Company for all claims under the Bareboat Charter, and that disputes are to be resolved by arbitration in London and in accordance with English law. The Company later entered into a pooling arrangement with another company ("V8"), whereby V8 would charter the vessel and pay the Company part of the actual earnings from the arrangement. The Company subsequently encountered financial difficulties and filed for winding-up in Singapore. Learning this, Diablo sent a notice to V8 purporting to exercise its lien under the Bareboat Charter. The Company was then wound up and Diablo sent a second lien notice to the consignee of the vessel, which had then been sub-chartered.

17.24 The liquidators of the Company applied to court for Diablo's liens to be declared void for lack of registration. Diablo sought to have the application stayed in favour of arbitration. The court had to determine (a) whether the Singapore court proceedings should be stayed in favour of arbitration, (b) whether Singapore law governed the registration of charges and priority in insolvency matters, (c) whether the lien over sub-hires or sub-freights must be registered, and (d) whether an extension of time should be granted for Diablo to register the charges.

17.25 The court held in favour of the liquidators. First, the court considered that the dispute did not fall within the scope of the arbitration clause. The dispute was whether the charge was void as against the liquidators under s 131 of the Companies Act, and it was unlikely that a company's pre-insolvency management would have contemplated avoidance claims to be within the scope of an arbitration agreement, as such claims can only be made by a liquidator or judicial manager. In any case, even if there had been express language in the arbitration clause stating otherwise, a dispute under s 131 would be

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non-arbitrable because of public policy considerations.[28] Public policy considerations applied for the protection of creditors of the insolvent company as a whole, and the insolvency regime takes precedence over the parties' private agreement.

17.26 The next issue was the governing law for the registration of charges. The court held that issues regarding the priority of interests and distribution of assets in the insolvency of a company would typically be resolved by the *lex fori concursus*, that is, the law of the State in which the insolvency proceedings are commenced. This was to be distinguished from issues relating to the validity or creation of that interest. The invalidity of a charge as against a liquidator due to non-registration, being an issue belonging to the former category, should be determined by the *lex fori concursus*. Singapore law applied since the Company was incorporated in Singapore and the winding-up proceedings were also commenced here.

17.27 The court then went on to decide that a lien on sub-freights or sub-hire ("the Contractual Liens") is registrable as a charge under s 131 of the Companies Act. In coming to this conclusion, the court considered that the Contractual Liens would either constitute a charge over book debts (s 131(3)(*f*)), or a floating charge (s 131(3)(*g*)). The court considered that although practical inconvenience may result from requiring registration of the Contractual Liens, it was for Parliament to decide whether they should be excluded from registration.

17.28 Finally, the court declined to grant an extension of time for Diablo to register the liens. The court considered that as the Company has already been wound up, an extension of time would prejudice the Company's unsecured creditors by giving priority to Diablo's claim.

17.29 The analysis and decision of the learned judge in *Diablo Fortune*, particularly, that the Contractual Liens are registrable under s 131 of the Companies Act, are correct and have been upheld on appeal. It remains to be seen how the Singapore shipping community will react to the implications of this decision.[29]

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28 See *Larsen Oil & Gas Pte Ltd v Petropod Ltd* [2011] 3 SLR 414.

29 For a discussion on the reasoning in the decision and practical considerations, see Ian Teo, "Liens on Sub Freight Revisited: Charge or Sui Generis Right of Interception" [2018] LMCLQ 14.

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### *Challenge to liquidator's decision*

17.30 Apart from *Ang Ai Tee v Resource Credit Pte Ltd*,[30] the High Court dealt with issues on the Moneylenders Act[31] in the insolvency context in *MWA Capital Pte Ltd v Ivy Lee Realty Pte Ltd*,[32] where two creditors of an insolvent company sought to challenge the liquidator's decision to affirm the interest rates charged by another creditor ("MWA", a licensed moneylender) in MWA's interest claim in its proof of debt. The opposing creditors sought to rely on the Moneylenders Act to assert that such interest was excessive.

17.31 When a licensed moneylender brings proceedings to enforce a loan, s 23(1) of the Moneylenders Act allows the court to re-open a transaction and take an account between the moneylender and the person being sued where it is satisfied that the interest or late interest charged in respect of the loan is excessive and that the transaction is unconscionable or substantially unfair.

17.32 The court first considered whether the opposing creditors had *locus standi* to object. The powers in s 23(1) of the Moneylenders Act could be exercised in relation to proceedings for relief brought by "a borrower, a surety or other person liable to repay a loan to a licensee",[33] and the opposing creditors did not claim to be the borrower, sureties or otherwise liable to repay the loan to MWA. However, since neither the liquidator nor MWA challenged the opposing creditors' standing, the court declined to decide whether the position was correct and proceeded to consider the merits.

17.33 The opposing creditors highlighted that the interest rate and default interest rate of MWA's loan were 60% and 96% per annum respectively, and that the effective interest rate and default interest rate were 79.59% and 151.82% respectively. The creditors submitted that such rates were excessive and that the transaction was unconscionable and substantially unfair within the meaning of s 23(1) of the Moneylenders Act.

17.34 The court recognised that the rates far exceeded that charged by banks, but focused on the question whether the transaction was unconscionable or substantially unfair having regard to all the circumstances of the case, considering the factors in favour of and against the liquidator's decision to affirm MWA's interest rates.

30 [2017] 5 SLR 402; see also paras 17.60–17.65 below.
31 Cap 188, 2010 Rev Ed.
32 [2017] SGHC 216.
33 Moneylenders Act (Cap 188, 2010 Rev Ed) s 23(4).

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17.35 The main factor in support of the liquidator's decision was that other lenders had also charged the company high interest rates. Further, the opposing creditors had each received some repayment from money which MWA had lent to the company. Finally, the opposing creditors did not seem to be the primary persons the Moneylenders Act was intended to protect – they were not the borrowers, nor were they sureties or otherwise liable to repay MWA's loan.

17.36 On the other hand, the court agreed that the liquidator should have given more weight to the fact that MWA's loan was secured by a deed of assignment over the company's interests in a condominium, an option to purchase a unit, and a personal guarantee, meaning the interest rates need not have been so high.

17.37 However, on an assessment of all the factors, the court held that the opposing creditors had not discharged their burden of proof to establish that relief should be granted because the MWA transaction was unconscionable or substantially unfair.

### *Removal of liquidators*

17.38 In *Petroships Investment Pte Ltd v Wealthplus Pte Ltd*[34] ("*Petroships*"), the High Court had to consider two applications by the minority shareholders of a company under members' voluntary liquidation. The first was a show cause application under s 302 of the Companies Act to remove the company's liquidators, and the second was one under s 254 of the Companies Act to convert the members' voluntary liquidation into a compulsory winding-up. These applications were brought in the wake of a series of failed applications by the minority shareholders relating to their investments in the company.

17.39 In considering the s 302 application, the learned judge had to balance the competing considerations of ensuring a liquidator carries out his duties competently and impartially, and to discourage unmeritorious applications of a liquidator's removal by disgruntled creditors or members. In this regard, the learned judged held that an applicant seeking to remove a liquidator on grounds of partiality must either show that the liquidator is actually biased in favour of any one or more of the members of the company, or that there is a reasonable perception of bias and a correspondingly reasonable and subjective belief of such bias on the part of the applicant. The learned judge emphasised that while proof of bias is a strong reason for allowing a

34 [2018] 3 SLR 687.

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s 302 application, it is not determinative and the interest and purpose of the liquidation remains the overarching focus of a s 302 inquiry.

17.40 A key contention raised by the minority shareholders was the liquidator's refusal to investigate a series of transactions entered into by the company prior to the winding-up. In analysing the reasons given by the liquidator for not doing so, the learned judge found that the minority shareholders' allegations of partiality were unfounded as the liquidators had proper reasons for refusing to investigate the transactions – *inter alia*, ongoing litigation on the same subject matter and the acceptance of the intervener's explanations. However, the learned judge highlighted that the liquidator's characterisation of the dispute on whether to investigate as merely a dispute between shareholders was wrong in principle. A liquidator bears the sole responsibility for the discharge of his duties and should not have left the decision to investigate contingent on the members' agreement *inter se*. In addition, the learned judge noted that in the context of a voluntary winding-up of a solvent company, the lack of funding is generally not a good reason for declining to investigate a matter, as opposed to an insolvent liquidation where funds may be lacking.

17.41 Nonetheless, in the circumstances, the learned judge found that while the liquidators had made a serious mistake in their approach to the investigations, it was an honest one and that there were therefore no adequate grounds for a reasonable loss of confidence in the liquidators. The learned judge further noted that it was not in the interest and purpose of the voluntary liquidation for the liquidators to be replaced given the advanced stage of the liquidation.

17.42 This case illustrates the balancing exercise carried out by a judge in applications of this nature. The courts generally would not scrutinise the liquidator's decision with the benefit of hindsight. The crux of the issue is whether there was, objectively speaking, a reasonable basis for the liquidator's decision at the material time. So long as there is some reasonable basis at the time of the decision, there should be little basis to remove him simply because there are differing views on what the liquidator should have decided.

### *Conversion of members' voluntary liquidation into compulsory winding-up*

17.43 The learned judge in *Petroships* also found that the member's application under s 254 of the Companies Act to convert the members' voluntary liquidation into a compulsory winding-up could not succeed given that it was premised on the same allegation of bias. As such, the applicant did not satisfy the court that the voluntary winding-up could

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not be continued with due regard to the interests of the creditors or contributories with the result that the legal threshold under s 253(2)(*d*) of the Companies Act was not met.

17.44 In coming to his decision, the learned judge considered the issue whether a contributory is required to meet a higher standard of proof to obtain an order for compulsory winding-up under s 253(2)(*d*), compared with a creditor. The learned judge observed that while s 253(2)(*d*) does not provide for a requisite standard of proof, where a voluntary winding-up is in place, it would be inherently more difficult for a contributory to satisfy the test in s 253(2)(*d*).

17.45 This is because where contributories have already formed a majority view to put a solvent company into a members' voluntary liquidation, the principle of majority rule will continue to apply and bind a contributory, unless there are suspicious circumstances suggestive of wrongdoing that warrant an investigation.

17.46 Similarly, where an insolvent company has been placed into a creditors' voluntary liquidation, a contributory will find it difficult to justify the need for the additional powers of investigation afforded to a liquidator in a compulsory liquidation, given that his capital in the company has been entirely wiped out.

17.47 On the other hand, a creditor will always have an interest in an insolvent company's estate and will generally be an outsider. The learned judge therefore noted that a creditor will be relatively better positioned to demand an investigation of the company's affairs to be augmented by the extended powers available to a liquidator in compulsory liquidation.

***Avoidance of antecedent transactions***

17.48 *Parakou Shipping Pte Ltd v Liu Cheng Chan*[35] involved an action brought by the liquidator of a company in creditors' voluntary liquidation against the company's former and existing directors for a breach of their directors' duties for, *inter alia*, causing the company to enter into a series of transactions or arrangements. These include disposal of assets at an undervalue, payments to employees and related creditors, set-off, and the continuation of certain legal proceedings. Both the High Court and the Court of Appeal[36] made a number of important observations in the context of avoidance of antecedent transactions.

35 [2017] SGHC 15.

36 See *Parakou Investment Holdings Pte Ltd v Parakou Shipping Pte Ltd* [2018] 1 SLR 271.

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17.49 The learned judge found that, on the facts, certain impugned transactions, specifically the disposal of assets, fell within the definition of undervalue transactions under s 329 of the Companies Act, read with s 98 of the Bankruptcy Act. A prerequisite to a claim to set aside an undervalue transaction is that the company was insolvent or became insolvent as a result of the transaction. The court considered arguments on the tests of insolvency (balance sheet and cash flow tests), and correctly held that there should not be an overly strict or technical approach in applying such tests of insolvency when dealing with the question of breach of directors' duties. The court should instead make a broad assessment of the surrounding circumstances.

17.50 Interestingly, the court considered the effect of letters of support provided by certain creditors to the debtor company. The court held that such letters do not assist the debtor on the issue of insolvency because, among other things, the providers of the letters did not in fact provide the financial support as stated in the letters. In practice, it is not uncommon for such letters to be procured and a company may try to rely on them to show that it is not insolvent. Such letters, by themselves, would be of limited utility if financial support was not in fact given to the debtor company.

17.51 In its defence, the company claimed that it made certain impugned payments pursuant to a restructuring plan. This defence was not established on the facts. Correspondingly, the learned judge found that in light of the company's financial health, it had been incumbent on the directors to take the interests of the creditors into account in their decisions relating to the impugned transactions. The court held that the directors had breached their duties by failing to do so.

17.52 The company had also made some payments to its creditors which could have been challenged as unfair preferences but they fell outside the statutory clawback period (six months for unrelated parties and two years for related parties). The learned judge held that even where certain transactions fell beyond the statutory clawback period under s 100(1) of the Bankruptcy Act, this would not prevent the court from finding that the directors were in breach of their fiduciary duties by causing or procuring the unfair preference, as they constitute distinct causes of actions.

17.53 It is correct that a claim for an unfair preference is distinct from one for breach of directors' duties. Steven Chong J remarked in *Living the Link Pte Ltd v Tan Lay Tin Tina*[37] that the courts should, however, be slow to allow liquidators to employ a claim for breach of duties to

37 [2016] 3 SLR 621 at [88].

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circumvent the statutory requirements for a claim for unfair preference. In other words, if such requirements cannot be met, the liquidator would likely fail in a claim against the directors for breach of their duties on the same grounds. Such requirements presumably refer to the substantive requirements, including insolvency and the desire to prefer, and not the statutory clawback period. A claim for breach of fiduciary duties would be subject to different limitation periods prescribed under the Limitation Act.[38]

17.54 In considering the appropriate remedies to be granted, the learned judge reiterated that the court has wide discretion under s 98(2) of the Bankruptcy Act, and that it was therefore open to the court to, in appropriate cases, allow a defendant to retain an asset in return for a payment of the difference between the full value and the value that was in fact received by the company, or to refrain from making an order where the company would have found itself in an even worse position had the transaction not been carried out.

17.55 Given that the liquidators were also seeking a multitude of overlapping reliefs for the breaches of the directors' fiduciary duties, including the statutory remedy provided in s 329 of the Companies Act, the learned judge also held that where alternative and inconsistent remedies are open to the applicant, the applicant is required to elect between them (account of profits or damages) where judgment has been granted in his favour. Of particular note is whether the remedy of an account of profits is available not only against the corporate vehicles which benefited from the impugned transactions, but also against the directors with a substantial interest in such vehicles. The High Court did not grant such a remedy against the directors. The appeal by the defendants and cross-appeal by the liquidator against the decision of the High Court was heard by the Court of Appeal in January 2018.[39] The Court of Appeal upheld the decision of the High Court save for three issues. First, the Court of Appeal allowed the defendants' appeal against the decision that certain vessels were sold at an undervalue. Second, the High Court had dismissed the liquidator's claim that the directors breached their duties by pursuing certain foreign arbitration and legal proceedings so as to delay the winding-up of the company until the expiry of the statutory clawback period. The Court of Appeal allowed the appeal on this point and held that the directors did breach their duties. Third, the Court of Appeal agreed with the liquidator that the remedy of an account of profits is also available against a fiduciary who

38 Cap 163, 1996 Rev Ed.
39 See *Parakou Investment Holdings Pte Ltd v Parakou Shipping Pte Ltd* [2018] 1 SLR 271.

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procured the unlawful benefit for a corporate vehicle in which he had a substantial interest.

## Bankruptcy

### *Stay of bankruptcy application pending appeal*

17.56 In *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua*,[40] the Court of Appeal considered whether it had jurisdiction to stay two bankruptcy applications which were based on a costs order made pursuant to a judgment under circumstances where (a) the judgment itself was under appeal, and (b) the High Court had dismissed an application for a stay of execution of the costs order pending appeal.

17.57 It was submitted on behalf of the judgment creditors that the Court of Appeal lacked jurisdiction to grant such a stay. Their arguments were based upon s 64 of the Bankruptcy Act which (when read with s 3 of the Bankruptcy Act) empowered the High Court to stay or dismiss proceedings on bankruptcy applications.

17.58 The Court of Appeal disagreed and held that it had general power pursuant to O 57 r 15 of the Rules of Court[41] ("RoC") to stay the bankruptcy applications. The Court of Appeal reasoned that if it were to grant a general stay pending the release of its decision in the appeals pursuant to O 57 r 15, the effect of the general stay would be to stay the bankruptcy applications. Since an application had been made to the High Court for a stay of execution of the costs order and were rejected, the Court of Appeal had concurrent jurisdiction to consider and grant the stay if it deemed this appropriate pursuant to O 57 r 15. In the circumstances, the Court of Appeal's jurisdiction to stay the bankruptcy applications as part of its general jurisdiction to stay execution pending appeals existed alongside the specific jurisdiction of the High Court to stay bankruptcy proceedings under s 64 of the Bankruptcy Act.

17.59 On the facts, the Court of Appeal considered that (a) the judgment debtors had offered to pay into court or the solicitors of the judgment creditors the full amount due under the costs order, (b) the Court of Appeal had already heard the appeals and its judgment would be released in due course, and (c) the least prospect for any possible injustice was secured by a stay in the circumstances and on the basis of payment being made into court given that the judgment creditors stood to get their money absolutely, almost immediately and without a risk of

40 [2017] 2 SLR 12.
41 Cap 322, R 5, 2014 Rev Ed.

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non-recovery if they succeeded in the appeals, while the judgment debtors would get their money back and almost immediately if they succeeded in the appeals. Accordingly, the stay was granted on condition that the sums due under the costs order was paid to the solicitors of the judgment creditors.

### *Statutory demands and Moneylenders Act*

17.60 When a debtor seeks to challenge a statutory demand, it is not uncommon for him to try to dispute the liability for the debt. It is less common for the debtor to allege that the loan contravenes legislation relating to money-lending. Such a challenge arose in *Ang Ai Tee*.

17.61 The plaintiff was a borrower who applied to set aside a statutory demand issued by the defendant, a licensed moneylender, in respect of a loan which was repeatedly refinanced. The court held that there was a genuine triable issue on the loan which formed the subject matter of the statutory demand because the defendant contravened r 12A of the Moneylenders (Amendment) Rules 2015[42] ("MLR 2015") and s 23 of the Moneylenders Act. The court found, *inter alia*, that the defendant had imposed "administrative fees" for "loan refinancing" that effectively amounted to excessive interest that was unconscionable and substantially unfair.

17.62 Section 23 of the Moneylenders Act provides as follows:

> **Re-opening of certain transactions**
>
> **23.**—(1) When proceedings are brought in any court by a licensee for the recovery of a loan or the enforcement of a contract for a loan or any guarantee or security given for a loan, and the court is satisfied that the interest or late interest charged in respect of the loan is excessive and that the transaction is unconscionable or substantially unfair, the court shall re-open the transaction and take an account between the licensee and the person sued.

17.63 Rule 12A of the MLR 2015 states as follows:

> [The] licensee must not recover from a borrower, on account of interest, late interest or any fee permitted under rule 12(1)(*a*) or (*b*), an aggregate amount exceeding the principal of the loan.

17.64 The loan in question was repeatedly "re-financed" from earlier loans and each time the loan was "re-financed", the defendant imposed an "administrative fee" of 10% on the principal amount. Most of the earlier loans were only given a tenor of approximately one month. Thus,

42 S 567 of 2015.

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the plaintiff asked the court to "re-open" these loans pursuant to s 23 of the Moneylenders Act.

17.65 The court found that the defendant's practice of granting short term loans of approximately one month and "re-financing" or "renewing" the loans with a 10% "administrative fee" was designed to deliberately circumvent the intent of the MLR 2015, which both restricted interest charges and late-payment charges to a maximum 4% per month. The MLR's allowance of a maximum administrative fee of 10% was meant to be a one-off payment on a given loan. In coming to this conclusion, the court took into account directions from the Registrar of Moneylenders (Registrar's Directions No 1 of 2016 and No 1 of 2017), which commented on this practice of "re-financing" loans. The court found that the loan refinancing scheme applied by the defendant against the plaintiff's loan was egregious, unconscionable and substantially unfair. There was therefore at least a genuine triable issue raised and the statutory demand was set aside.

### *Power to make bankruptcy order to be determined at time of bankruptcy application*

17.66 In *HSBC Bank (Singapore) Ltd v Shi Yuzhi*,[43] the High Court clarified that the relevant time to consider whether the grounds for a bankruptcy application under s 61 of the Bankruptcy Act have been established is the date of the bankruptcy application, and not the date of the bankruptcy order. In that case, the outstanding debt owed by the defendant was $22,469.05 at the time of the bankruptcy application. The defendant argued by the time the bankruptcy order was made, the remaining outstanding debt was only $3,519.99, and the order should therefore not have been granted. However, the court considered that since the debt exceeded the threshold amount of $15,000 *at the time the bankruptcy application was made*, the learned assistant registrar had the power to make a bankruptcy order.

17.67 However, the court has a statutory discretion and may dismiss or stay a bankruptcy application if it is satisfied that there is sufficient cause or reason that no order should be made.[44] The court considered that if the remaining debt is a relatively small sum at the date on which a bankruptcy order is to be made, the court may exercise such discretion.[45] However, this discretion was not exercised on the facts because the defendant neither attended any of the hearings before the court (prior to the filing of the appeal) nor informed the plaintiff or the

43 [2017] 5 SLR 859.
44 See ss 65(2)(*e*) and 64(1) of the Bankruptcy Act (Cap 20, 2009 Rev Ed).
45 *HSBC Bank (Singapore) Ltd v Shi Yuzhi* [2017] 5 SLR 859 at [41].

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court the reason for such failure to attend. The defendant also appeared to have other creditors who may be prejudiced if the appeal against the bankruptcy order was allowed. The appeal was therefore dismissed. The court further noted that the existence and scope of the court's discretion to dismiss or stay a bankruptcy application may require further examination in an appropriate case.

### *Bankruptcy orders and effect on directors*

17.68 In *TYC Investment Pte Ltd v Chan Siew Lew Jannie*,[46] the court had to consider the issue whether a director who had a bankruptcy order set aside on appeal needs to be reinstated to the company in the absence of a provision in the companies' articles to do so.

17.69 The plaintiff company, TYC Investment, argued that a director who was declared a bankrupt would automatically vacate his office by virtue of Art 72(*b*) of Table A to the Fourth Schedule of the Companies Act, which was incorporated into the company's articles of association. The court agreed that Art 72 stipulates that the office of a director would become automatically vacant upon the happening of events stipulated in that articles. On the facts, the court concluded that the defendant automatically vacated her office as a director when the bankruptcy order was made against her.

17.70 Relevant to this issue, the court also observed that while s 148 of the Companies Act makes it an offence for an undischarged bankrupt to act as a director or participate in management, it does not expressly provide for the removal of the director from office upon bankruptcy. The section is observed to be a penal provision and the court held that mere contravention of s 148, without more, would not lead to automatic vacation of office by a director.

17.71 Following the conclusion that the defendant had vacated her office of director when the bankruptcy order was made against her, the court had to consider the effect of the setting aside of the bankruptcy order. The court referred to cases of annulment and setting aside of bankruptcy orders, and held that the person subject to the order will be placed in a position where the bankruptcy is treated as not having occurred and is restored to a position that no bankruptcy order has been made against him, unwinding the effect of the bankruptcy order. The judge formed the view that the defendant should be restored to her original position upon the setting aside of the bankruptcy order and this includes her reinstatement as a director of the plaintiff company.

46 [2017] SGHC 202.

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17.72 The restoration of position upon the reversal of a bankruptcy order may be hindered in certain circumstances. One example would be where third parties have relied on the bankruptcy order before it was set aside. The court may refuse to restore the position of the previously bankrupt individual completely, if there may be prejudice to parties who had relied on the bankruptcy order.

17.73 The court also qualifies that while the general position is that an annulment of a bankruptcy order or setting aside of a bankruptcy order on appeal would restore the person subject to the order to his original position, the position may differ because of contractual arrangements and it would be a matter of construction of the relevant statutory and contractual provisions. If, on a proper construction of the company's articles, parties had intended that a director ceased to be a director even if the bankruptcy order is annulled, the court would generally give effect to that. On the facts, there was nothing in the company's articles which suggested a departure from the general principle and, accordingly, the defendant was to be reinstated as a director.

### *Voluntary arrangements – Applicant's and nominee's duties*

17.74 It is not common to see a reported decision on an application to set aside a voluntary arrangement on the ground that the process lacked *bona fides*. One such case arose in *Re Aathar Ah Kong Andrew*,[47] where the learned asst registrar granted an application by certain creditors under s 54(1)(*b*) of the Bankruptcy Act to revoke the approval of a voluntary arrangement proposed by the applicant debtor granted at a creditors' meeting. Given the facts, the decision is not surprising.

17.75 The learned asst registrar had to address two novel issues: first, the extent of an applicant debtor's duties in providing the statement of affairs; and second, the extent of a nominee's duties both before and during the creditors' meeting. In his decision, the learned asst registrar drew guidance from two English decisions, *Andrew Fender v The Commissioners of Inland Revenue*[48] and *Re a debtor (No 140 IO of 1995) sub nom Greystoke v Hamilton-Smith*,[49] which dealt with the similar s 262 of the UK Insolvency Act 1986.[50]

17.76 The learned asst registrar rightly highlighted that there is a duty of full and candid disclosure on the applicant debtor. This requires the debtor to, firstly, ensure that his proposal is completely transparent to

47 [2017] SGHCR 4.
48 [2003] EWHC 3543.
49 [1996] 2 BCLC 429.
50 c 45.

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the creditors, and secondly, provide the nominee with sufficient information to exercise his professional judgment. In this regard, a nominee acts not merely as a postbox or a rubber stamp for a proposed voluntary arrangement, but is duty-bound to exercise his professional independent judgment and cast a critical eye over a debtor's proposal and statement of affairs, especially where doubt has been cast on the fullness and candour of a debtor's information.

17.77 The learned asst registrar, in drawing reference to the predecessor regime in the UK Bankruptcy Act 1869, further highlighted that the candour and integrity on the part of the applicant debtor and the nominee is crucial to ensure the integrity of the voluntary arrangement regime in Singapore, and to prevent the risk of collusive arrangement between creditors and debtors to submit bogus or inflated claims.

17.78 On the facts, the learned asst registrar found that there had been a material irregularity in relation to the creditors' meeting given the applicant debtor's failure to substantiate the information provided in his statement of affairs and the nominee's blind dependence on it. A number of purported creditors who voted in favour of the voluntary arrangement had not provided credible evidence of their claim. Such creditors indicated they were taking part in the voluntary arrangement just to vote but were not making any claim to distribution. The nominee was content to simply rely on the debtor's assertion that he owed such debts to the creditors, without carrying out his own review of the claims.

17.79 Further, the learned asst registrar found that the nominee had acted wrongfully by refusing several creditors from participating in the creditor's meeting simply because the debtor had disputed their debts, without applying his mind to the merits of the disputes. This ran contrary to the purpose of the voluntary arrangement to help debtors come to a compromise with all its creditors to avoid bankruptcy; it should not be open to the applicant debtor or the nominee to pick and choose which creditors to include in the arrangement.

## Scheme of arrangement

### *Rescue financing*

17.80 *Re Attilan Group Ltd* is the first decision of the High Court on the new scheme of arrangement priority rescue funding regime provided for in s 211E of the Companies Act.[51]

51 Cap 50, 2006 Ed.

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17.81 In its application, the company sought orders: (a) convening a creditors' meeting to consider a proposed scheme of arrangement under s 210(1) of the Companies Act; and (b) granting priority status under s 211E(1) of the Companies Act to the rescue financing that the applicant company was seeking.

17.82 Following the principles laid down in *The Royal Bank of Scotland NV v TT International Ltd*[52] ("*TT International (No 1)*"), the court was satisfied that (a) there was no significant non-disclosure of material information that affects the court's consideration as to whether a meeting should be called under s 210(1) of the Companies Act, (b) there was (despite the opposition of a significant creditor) a realistic chance that the requisite 75% threshold may be met, and (c) it was not inappropriate to classify creditors of the company under various guarantees with the general body of unsecured creditors for purposes of the creditors' meeting.

17.83 Issues were also raised as to whether these guarantee creditors were in fact creditors of the company and, if so, whether the votes cast by these guarantee creditors ought to be discounted on the basis that they were related parties or contingent claims. The court rightly decided that the "quasi-judicial" task of adjudicating the claims of the guarantee creditors should be left to the chairman of the meeting whose decision could be appealed against. The court also correctly held that the discount (if any) to be applied to the votes of these guarantee creditors should be determined at the creditors' meeting or at the application to sanction the scheme; such an issue should not prevent one from being convened. Accordingly, the court granted the order convening the creditors' meeting.

17.84 The court, however, declined to grant super priority status to the proposed financing. In arriving at its decision, the learned judge drew guidance from various US authorities given that the super priority status concept is alien to companies legislation based on the English Companies Act and that the amendments to the Singapore Companies Act was at least inspired by the US Chapter 11 regime. In doing so, the learned judge emphasised that the US authorities and doctrine were referred to only as a guide while Singapore law continues to develop in this new area.

17.85 Super priority can be granted under s 211E if (a) the proposed financing constitutes "rescue financing" under s 211E(9) of the Companies Act, (b) the applicant satisfies the relevant condition under s 211E(1) prescribed for the degree of priority sought in the event of the

52 [2012] 2 SLR 213.

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company's liquidation, and (c) the court exercises its discretion to grant super priority.

*Rescue financing*

17.86 Under the proposed scheme of arrangement, the company would issue new shares, expand and diversify the group's business through funding to be obtained by a subscription of further equity-linked notes under an existing subscription agreement. Priority status was sought in relation to the additional funding to be obtained under the existing subscription agreement.

17.87 The opposing creditor argued that the proposed financing did not qualify as "rescue financing" as it was subject to preconditions and vague. The learned judge disagreed holding that there was nothing in s 211E(9) that precluded a rescue financier from stipulating conditions to the grant of rescue financing. Further, the decision as to whether rescue financing should be granted is ultimately a commercial matter.

17.88 The learned judge also found that there was nothing vague in the rescue financier's proposal which stated unequivocally that it would not terminate the existing subscription agreement and will continue subscribing for notes thereunder provided certain conditions were met.

17.89 On this point, a tangential issue arose as to whether rescue financing can be in the form of a proposed financing by an existing creditor with a present obligation to provide such financing. The learned judge held that, in principle, there is no need for the proposed financing to be entirely new. What matters is whether the obligation persists: if the existing creditor is already bound to inject funds, then the provision of funds pursuant to that pre-existing obligation is not financing that should be accorded additional protection and priority under s 211E. If, on the other hand, the provision of such financing is at the option of the creditor, its exercise of that option can be made contingent on its obtaining super priority status for these injected funds. This accords with the rationale expressed in Parliament that the laws on super priority are aimed at encouraging creditors to provide "additional financing" for troubled companies. On the facts, the learned judge was satisfied that, from a perusal of the existing subscription agreement, the subscriber was not obliged to make further payments under the existing arrangement.

*Conditions for super priority*

17.90 In considering this requirement, the learned judge noted that given that the applicant must satisfy the condition attached to the relevant degree of priority being sought, the applicant should specify

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which level of super priority it was seeking and the rationale for what was being sought. As for the standard of proof for satisfying the court that the relevant condition is met, the learned judge held that while the Companies Act is silent on the relevant standard of proof, the applicant must prove on a balance of probabilities.

17.91 In this case, the applicant relied on s 211E(1)(*a*) and 211E(1)(*b*), that is, it was seeking super priority to treat the rescue financing as either part of the expenses of winding up (pursuant to s 211E(1)(*a*)) or priority over all of the applicant's preferential and unsecured debts (pursuant to s 211E(1)(*b*)).

17.92 The Companies Act does not specify any condition for s 211E(1)(*a*). Nevertheless, the learned judge held that as a matter of policy, the applicant should have provided evidence of any efforts being expended to secure financing without any super priority. This is because super priority disrupts the expected order of priority of the various creditors of the company. As such, the learned judge reasoned, the grant of super priority should not be ordinarily resorted to and the court will be slow to do so unless it is strictly needed. For this reason, while the court does not have to be satisfied that rescue financing could not be obtained without the grant of super priority, this does not absolve the applicant of the need to show evidence (a) of reasonable attempts at obtaining rescue financing without any super priority, or (b) that the applicant's financial difficulties were such that alternative sources of financing would be unavailable. Such an approach, the learned judge noted, accords with the practice under the US Chapter 11 regime.

17.93 For s 211E(1)(*b*), the Companies Act provides that the court may order in the winding-up of the company that the debt arising from any rescue financing obtained will have priority over all preferential debts specified in the Act and all other unsecured debts, provided that the company "would not have been able to obtain the rescue financing from any person unless the debt arising from the rescue financing is given the priority mentioned in [s 211E(1)(*b*)]".

17.94 The learned judge held that an applicant for super priority under s 211E(1)(*b*) must demonstrate that reasonable efforts have been undertaken to explore other types of financing that did not entail such a priority (that is, financing that did not entail priority over all preferential debts specified in the Companies Act and all other unsecured debts). The undertaking of reasonable efforts does not, however, mean that the applicant must show that he had sought credit from "every possible source". Ultimately, whether reasonable efforts have been expended is a matter for the court to assess.

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17.95 On the facts, the learned judge held that the applicant did not undertake reasonable efforts to source for financing without the type of super priority sought. In this regard, evidence that the applicant had approached and discussed with several other parties for financing without indication whether these related to financing with or without super priority sought was insufficient. Further, the applicant failed to provide credible evidence that the terms stipulated by the proposed rescue financier was the best possible that the applicant could have obtained. Specifically, the learned judge held that the company should have produced correspondence relating to rejection or negotiation with other financial institutions to substantiate this point.

### *Votes of related creditors in a scheme of arrangement*

17.96 After *TT International (No 1)*, the Court of Appeal had the opportunity to revisit the issue of related creditors' votes in schemes of arrangement in *SK Engineering*.

17.97 The appeal pertains to two companies (collectively "the Scheme Companies"), UVM Investment Corporation ("UVM") and Conchubar Aromatics Ltd ("Conchubar"), which were both attempting to implement scheme of arrangements. While the schemes for both companies were approved by more than 80% of the creditors in value, a dissenting creditor for both companies, SKEC, objected to the court's sanction of the scheme on the basis that the creditors which voted in favour of the schemes were related to the Scheme Companies and argued that these votes should be wholly discounted. Additionally, SKEC argued that the Scheme Companies had procured, through creditors related to them, assignment of part of their debts to parties that would support the scheme for the purposes of securing the requisite statutory majority.

17.98 In the High Court, though the judge found that there were related creditors and a discount on their votes should be applied, the discount failed to negate the statutory majority required for the sanction of a scheme. Accordingly, the schemes were sanctioned in the High Court.

17.99 On appeal, the Court of Appeal disagreed with the High Court's finding and held that none of the creditors voting in favour of the scheme was related to the respective Scheme Companies. In considering the question as to whether a creditor should be considered a related creditor, the court did not provide a definitive statement as to what would constitute a related creditor. Instead, the court opined that this can only be answered by a fact-sensitive and fact-intensive analysis.

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However, several factors may go towards establishing a relationship between a creditor and a scheme company such as where:

(a) the scheme company controls the creditor or *vice versa*;

(b) the creditor and the scheme company have common shareholders who hold a less than 50% but more than *de minimis* stake in both companies;

(c) the creditor and the scheme company have common directors, in particular, directors who propose or support the scheme;

(d) where the scheme company and creditor do not have any common shareholders, the controlling shareholders are either related by blood, adoption or marriage, or where the controlling shareholders are corporate entities, controlled by individuals who are related by blood, adoption or marriage; or

(e) the creditor is related by blood, adoption or marriage to the controlling shareholder or director of the scheme company.

17.100 The factors listed would justify a court's finding that a creditor had an interest to support the scheme and hence would constitute a related creditor. On the facts of the case, none of the creditors in support of the scheme were found to be related creditors.

17.101 Nevertheless, the Court of Appeal proceeded to consider whether a discount ought to have been applied had it been established that some of the supporting creditors were related to the company applicant. The Court of Appeal proceeded to consider the appropriate discount to be applied to votes of related creditors and expressed their disapproval with the partial discount method in *TT International (No 1)*. The court commented that a partial discount on the votes of related creditors which are not wholly owned subsidiaries, based on the value of a related creditor's shareholding, is arbitrary and subjective due to the wide array of factors which could create a relationship between the scheme company and the creditor. The Court of Appeal held that to wholly discount the votes of related creditors would be a more principled and certain approach.

17.102 The Court of Appeal then considered SKEC's allegation that the scheme company procured assignments of their debts to companies which support the scheme for the purpose of circumventing the headcount test to obtain the statutory majority. While assignments of debts are not unlawful and are routine commercial transactions, there should be sufficient information to show that these assignments were genuine and made at arm's length as opposed to transactions for the purposes of vote-splitting. Vote-splitting arrangements for the purpose

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of obtaining a majority in number of creditors would lead to concerns that the creditors attending the scheme meeting were not representative of the class of creditors. In this particular aspect, the court commented that it should not undertake a rigorous fact-finding process to determine if there was vote manipulation. Instead, the court should focus on satisfying itself that:

(a) the statutory requirement has been satisfied;

(b) the statutory majority have voted in a manner that is representative of the interest of the class concerned; and

(c) the scheme is reasonable.

17.103 On the facts, the court found that the assignments of debts were questionable and there was an absence of proof as to the authenticity of the alleged debts to the assignee forming the basis for the assignment. Accordingly, the court allowed the appeal on this basis.

17.104 The question is whether it is an absolute and immutable rule that votes of related creditors must *always* be wholly discounted for purposes of voting in a scheme of arrangement. It is respectfully suggested that it should not be, and that the court should ultimately review all the circumstances in deciding the key issue – is the related company in fact under the control or influence of the scheme company in such a way that its votes should be discounted for purposes of voting in the scheme? One cannot entirely discount the possibility that a related company may be in a position to exercise independent judgment in the way it votes. For example, if shares in a subsidiary or related company are charged to a creditor, or if such company is in liquidation, judicial management or receivership, the rationale for discounting the votes of such company may not apply with equal force, notwithstanding the legal relationship between the scheme company and the creditor.

### *Scheme restructuring for business trusts*

17.105 In the first reported decision of its kind, the Singapore High Court in *Re Croesus* endorsed the applicability of principles from a s 210 scheme of arrangement to a restructuring of a business trust via a trust scheme.

17.106 Restructuring of a company through a scheme of arrangement is statutorily provided for under s 210 of the Companies Act, which does not, however, apply to business trusts. Instead, the restructuring of business trusts is possible through the implementation of a trust scheme

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based on The Singapore Code on Take-Overs and Mergers[53] ("Take-Over Code"). Notably, the Take-Over Code provides that the Securities Industry Council ("SIC") may grant exemptions of certain rules under the Take-Over Code if certain conditions are met. One condition involves obtaining court approval of the trust scheme under O 80 of the RoC.

17.107 In *Re Croesus*, an agreement was made between Croesus Retail Trust ("Croesus"), a business trust, and Cyrus Bidco Pte Ltd ("Cyrus") for the acquisition of all the units in Croesus by way of a trust scheme. As part of the scheme, all units of Croesus were to be transferred to Cyrus in return for payment to each existing unit holder. For the purposes of fulfilling conditions stipulated by SIC, Croesus made an application for the court's approval of the scheme. Specifically, Croesus sought orders that it be at liberty to convene a meeting of the unit holders within two months to obtain approval of the amendments to the trust deed and the trust scheme, and it be at liberty to apply for the court's approval for the trust scheme at a further hearing of the court should the amendment to the trust deed and the trust scheme be approved at the meeting of unit holders.

17.108 The court held that Croesus, as a business trust, falls within the scope of O 80 of the RoC. This was despite the fact that beneficiaries of the trust did not have equitable proprietary interest in the trust property but only had a right to compel due performance by the trustee.

17.109 The court held that it has the power to determine questions in relation to a trust pursuant to O 80 of the RoC. Observing that the proposed trust scheme bear similarities to a scheme of arrangement under s 210 of the Companies Act, the court opined that the adoption of safeguards applicable to a scheme of arrangement would justify the imposition of the will of the majority on the minority. Specifically, the rights of any affected person will be secured through voting at a meeting and the subsequent opportunity for an aggrieved individual to contest the decisions of the super majority.

17.110 While the court was prepared to adopt a s 210-like mechanism for the restructuring of a business trust, the court cautioned that the complete importation of the entire s 210 regime would not always be necessary. There may well be other measures which could be imposed which could protect the interest of unit holders of a business trust and this would depend on factors such as the terms of the trust deed, the composition of the beneficiaries or unit holders, and the objectives of

53 Monetary Authority of Singapore, "The Singapore Code on Take-Overs and Mergers" (25 March 2016).

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the trust arrangement. Ultimately, the court's key consideration is whether the proposed scheme reasonably addresses the interests of the unit holders as beneficiaries of the trust, bearing in mind that they have become beneficiaries of the trust for the purposes of investment.

17.111 Upon examination of the trust scheme, the court, apart from ancillary issues of adequate notice and the use of proxies, found there was nothing questionable as to the meetings proposed. An order was granted that scheme meetings be called and a further hearing be held for the trust scheme to be approved.

17.112 The decision in *Re Croesus* highlights the flexibility and adaptability of the scheme of arrangement process under the Companies Act. In adopting key features of a scheme process for a business trust, the focus, ultimately, is to uphold the tenets of transparency, procedural fairness and certainty.

### *Cross-border insolvency*

17.113 An interesting issue of whether a defendant can rely on a foreign insolvency stay order to restrain Singapore proceedings arose in *Arris Solutions, Inc v Asian Broadcasting Network (M) Sdn Bhd*,[54] which was decided before Singapore adopted the Model Law in May 2017.

17.114 The plaintiffs had commenced legal proceedings against the defendant in Singapore based on contracts governed by Singapore law. While the Singapore proceedings were ongoing, the defendants obtained an interim restraining order in Malaysia for, *inter alia*, a stay of all present proceedings and enforcement proceedings in order for the defendant's various creditors to consider a proposed scheme of arrangement in Malaysia. None of the defendant's assets were within Singapore and any execution against the defendant's assets would have had to take place in Malaysia. The plaintiffs were listed as creditors in the Malaysian proceedings. Relying on *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd*[55] and *Re Taisoo Suk*,[56] the defendant applied to the Singapore International Commercial Court ("SICC") to exercise its discretion to stay the Singapore proceedings.

17.115 SICC refused to stay the Singapore proceedings. SICC observed that the defendant had taken inconsistent positions in proceedings in Malaysia and Singapore. In the Singapore proceedings, the defendant did not accept that the sums owing were due to the plaintiffs, but in

54 [2017] 4 SLR 1.
55 [2014] 2 SLR 815.
56 [2016] 5 SLR 787.

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Malaysia the defendant was prepared to accept that these sums were owing. SICC stated that this was not satisfactory. SICC also observed that parties had chosen to litigate in Singapore, had submitted to the jurisdiction of the Singapore courts, and there was also a clear and unambiguous governing law clause in favour of the Singapore courts.

17.116 SICC considered that the outcome of the Singapore proceedings would assist the Malaysian proceedings, in answering the question: are the plaintiffs creditors of the defendant, entitled to participate in the proposed scheme of arrangement? Even if the Singapore court had found there was a serious issue to be tried, this would have been something the Malaysian court could take account of in the Malaysian proceedings.

17.117 SICC proceeded to hear the summary judgment application, and summary judgment was entered. SICC exercised its discretion to stay execution of the judgment pending the outcome of the Malaysian proceedings, and granted liberty to apply generally, particularly if the scheme of arrangement did not materialise.

17.118 On similar facts, an applicant for a scheme of arrangement in a foreign jurisdiction seeking relief in Singapore may now consider an application under Art 15 of the Model Law to seek an interim stay. Arguably, an interim stay granted by a foreign court pursuant to a scheme of arrangement process falls within the definition of "foreign proceeding".[57] The relief granted by the Singapore courts would depend, *inter alia*, on whether the foreign scheme of arrangement will be regarded as a foreign main or non-main proceeding.[58]

### *Remuneration of insolvency practitioners*

17.119 The High Court in the case of *nTan Corporate Advisory Pte Ltd v TT International Ltd*[59] addressed the issue of remuneration for insolvency consultant nTan Corporate Advisory Pte Ltd ("nTan"). Under a fee agreement, nTan was to be paid time costs based on hourly rates set out in the letter of engagement, disbursements and a "Value-Added Fee" which was a fee paid on the occurrence of stipulated events and was based on a percentage of the total amount of debt owed to creditors which were waived or converted into equity in the scheme company.

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57 United Nations Commission on International Trade Law, *UNCITRAL Model Law on Cross-Border Insolvency* (United Nations, 1997) Art 2*(a)*.

58 United Nations Commission on International Trade Law, *UNCITRAL Model Law on Cross-Border Insolvency* (United Nations, 1997) Arts 19 and 20.

59 [2017] SGHC 207.

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17.120 Typically, fee arrangements between the scheme manager and the company would be given effect in a scheme. However, this is premised on the fee arrangement being appropriately disclosed to the scheme management committee prior to the implementation of the scheme. The court reiterated that where appropriate disclosure of the scheme manager's remuneration is made, the contract for fee arrangement would, in the absence of anything untoward, be given effect. The court found that the fee arrangement should not be the controlling or determinative factor as to the scheme manager's remuneration as this arrangement was not disclosed to the scheme management committee prior to the implementation of the scheme.

17.121 In such a case, the court will apply the guidelines in *Re Econ Corp Ltd*[60] to arrive at a remuneration which is fair, reasonable and adequate. The contract, albeit not being determinative, would still be a relevant factor to derive the quantum of reasonable remuneration as it would provide an indication of the value to be ascribed to the work done by nTan. The court will also consider whether the contractual fee was arrived on a reasonable basis. This would require an examination of factors such as the presence of pre-contractual negotiations, market value of comparable services, and the relative bargaining powers of the party.

17.122 Applying *Re Econ Corp Ltd (No 2)*, the High Court did not allow nTan to claim the full amount sought under the fee arrangement after considering the actual value created from the work done. Further, the court found that insufficient evidence was adduced in support of the claim for time costs incurred. Specifically for time costs which are unbilled, cogent evidence must be given to show at least *prima facie* substantiation of the amounts claimed. This evidence must link the time spent to specific categories of work done which are related to the scope of the engagement.

17.123 In conclusion, the court, after considering the value of the work done, time costs and other relevant factors and applying a broad brush approach, found that a fair, reasonable and adequate compensation to be awarded to nTan would be an uplift of the actual time costs incurred.

60 [2004] 2 SLR(R) 264.

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