IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 227

Originating Summons (Bankruptcy) No 59 of 2017 (Registrar's Appeal No 151 of 2018)

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

Aathar Ah Kong Andrew

… *Applicant*

GROUNDS OF DECISION

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

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Introduction

1 This was an appeal against the decision of an Assistant Registrar who dismissed the applicant's application for an extension of an interim order that had been granted under s 45(1) of the Bankruptcy Act (Cap 20, 2009 Rev Ed) (the "Act") ("the Registrar's Appeal"). After hearing arguments, I dismissed the Registrar's Appeal. The applicant has appealed against my decision. I now set out the grounds of my decision.

Facts

Background to the application

2 The background to this matter has been extensively set out in *Re Aathar Ah Kong Andrew* [2018] SGHC 124, a decision by Valerie Thean J where the

approval which the creditors of the applicant had given to a voluntary arrangement proposed by the applicant was revoked. I will only set out the facts insofar as they are relevant to the Registrar's Appeal that was heard by me.

3 The applicant described himself as an investor in several businesses and markets over many years. His primary investments were in private equity, bonds and listed stocks in sectors such as commodities and healthcare in Singapore and Indonesia.[1] He has been deep in debt since 2015, if not earlier, because of the decline in worldwide commodity prices and a plunge that year in the share prices of listed healthcare equities in which he had invested. Financial institutions from which he had obtained financing and to which he had provided guarantees pulled their lines of credit and called on him to fulfil his obligations. One of them, Citibank Singapore Limited ("Citibank"), filed a bankruptcy application against him in February 2016.

4 In May 2016, the applicant made an application under s 45(1) of the Bankruptcy Act for an interim order in connection with a proposal he wanted to make to his creditors for a voluntary arrangement which would have the effect of a compromise in satisfaction of debts amounting to approximately S$191m. He proposed to pay these creditors a total amount of S$1.5m in three tranches over 26 months. He had secured an interest free loan from a business associate to fund the payment.

5 The interim order was granted on 24 May 2016. The effect of an interim order is set out in s 45(3) of the Act, which provides that:

> (3) An interim order shall have the effect that, during the period for which it is in force –

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1 Affidavit of Aathar Ah Kong Andrew of 21 June 2017, p10

> (*a*) where the interim order is in respect of an individual debtor –
>
> (i) no bankruptcy application may be made or proceeded with against the debtor; and
>
> (ii) no other proceedings, execution or other legal process may be commenced or continued against the person or property of the debtor without the leave of the court …

6 The Act requires that proposals for voluntary arrangement include the appointment of a person called a "nominee", who has certain statutory duties such as to prepare a report on the debtor's proposal for submission to the court. The nominee for the applicant's voluntary arrangement was an accountant. He duly submitted his report on the applicant's proposal as required under the Act. The court permitted a creditors' meeting to be called. The creditors' meeting was chaired by the nominee but the applicant did not attend. This resulted in an another meeting where the applicant was asked to attend so that he could address issues raised by some creditors. At this adjourned creditors' meeting, the voluntary arrangement was approved by the requisite majority of the creditors.

7 Several creditors who had voted against the approval of the voluntary arrangement then applied to court for the approval to be set aside. Their applications were granted by an Assistant Registrar on 8 March 2017. His grounds of decision are reported in *Re Aathar Ah Kong Andrew* [2017] SGHCR 4.

8 The applicant appealed against this decision, but withdrew his appeal on the date scheduled for the hearing of the appeal. He then filed an application on 21 June 2017 for *another* interim order under s 45(1) of the Act on the basis that he was making a new proposal to his creditors for a voluntary arrangement. Under this new proposal, the applicant would now pay a total of S$3m, which

he would borrow, to his creditors in five tranches over 50 months. This proposal now covered creditors to whom the applicant owed a total amount of approximately S$317m. For this second proposal, the applicant appointed a senior lawyer as his nominee.

9 On 11 July 2017, the court granted the interim order. This was the interim order in question which the applicant was applying to extend in the Registrar's Appeal before me. But before I come to that application, it is important to recount what transpired in relation to this second proposal for a voluntary arrangement.

10 The nominee submitted his report in September 2017. The first creditors' meeting was held on 5 October 2017. This meeting was adjourned after questions were raised by creditors on various issues. The creditors voted on the proposal at the adjourned creditors' meeting on 19 October 2017. On 20 and 25 October 2017, the nominee wrote to the creditors to inform them that the voluntary arrangement had been approved by the requisite majority of creditors. In the process of ascertaining whether the threshold had been crossed, the nominee accorded no value to certain litigation claims and he admitted a creditor's claim of approximately S$20m which he had previously adjudicated as being unsupported by documents.

11 Four creditors, who had objected to the voluntary arrangement, then filed applications under s 54 of the Act to set aside the creditors' approval of the voluntary arrangement. These were (i) CIMB Securities (Singapore) Pte Ltd ("CIMB"); (ii) Citibank; (iii) KGI Securities (Singapore) Pte Ltd ("KGI"); and (iv) OUE Lippo Healthcare Limited ("OUELH"), formerly known as International Healthway Corporation Ltd.

12 The applications were heard in the first instance by Valerie Thean J on 14 March 2018. After hearing parties, Thean J held that s 54(1)(*b*) of the Act was satisfied in that there were material irregularities in the conduct of the creditors' meeting, arising from the nominee's decisions and the applicant's lack of disclosure. The judge accordingly set aside the approval for the voluntary arrangement at the hearing and directed that no further creditors' meetings be held. As mentioned earlier, the grounds of Thean J's decision are in *Re Aathar Ah Kong Andrew* [2018] SGHC 124.

13 The applicant appealed against Thean J's decision. He felt it necessary to file a total of four appeals – Civil Appeal Nos 60 to 63 of 2018 – because each of the creditors named at [11] above had filed a separate application to set aside the creditors' approval, all of which had been allowed. Following this, the applicant then filed the application seeking an extension of the interim order made on 11 July 2017 until the determination of his four appeals by the Court of Appeal. The extension sought was pursuant to s 45(4) of the Act.

The parties' cases

The hearing below

14 The application for an extension of the interim order was heard on 5 June 2018 by an Assistant Registrar. Before the Assistant Registrar, the applicant argued that his appeals to the Court of Appeal against the decision of Thean J would be rendered nugatory if the interim order was not extended. This was because he might be made a bankrupt before the appeals were heard. If so, the applicant would have to seek the leave of the Official Assignee (the "OA") before he could proceed with the appeals, and leave might not be forthcoming because the claims against him exceeded S$300m. Even if leave were granted by the OA, this might cause delays to the hearing of the appeals because it was

submitted by counsel for the applicant that "the OA does not work very fast". The applicant also argued that he would have to put up more security than the S$80,000 (S$20,000 for each appeal) he had already provided. This is because he would have to provide security for his counsel's costs as well. Finally, it was argued that the applicant might not be able to fully utilise his expertise in finance and his work experience if he were made a bankrupt as he would lose his credibility and might not be granted permission to leave Singapore for work.

15 CIMB and OUELH objected to the application, while Citibank and KGI took no position on the matter. The objecting creditors argued that the applicant had not shown any special circumstances for the court to grant an extension of the interim order. It was pointed out that there was no evidence to suggest that the OA would not grant leave for the applicant to proceed with his appeals if he were to be made bankrupt before the appeals were heard. It was also argued that there would be prejudice to the creditors if an extension of the interim order were granted because it had been more than two years since Citibank's bankruptcy application was filed, but the applicant had still not been made a bankrupt and his debts continued to increase. Worse, the applicant had been allowed to cause his creditors to incur more legal costs while at the same time refusing to pay all the outstanding costs orders arising from the two failed voluntary arrangements.

16 The Assistant Registrar dismissed the application for extension of the interim order. He was of the view that the applicant had not shown good reasons to justify its extension, and that the appeals would not be rendered nugatory if the applicant was made bankrupt. The Assistant Registrar also rejected the argument that the applicant would not be able to utilise his expertise in finance and his work experience because the OA could grant the applicant permission to travel for his work.

17 As for prejudice to the creditors, the Assistant Registrar accepted that such prejudice was real given that there had been a long delay since bankruptcy proceedings were first commenced against the applicant. Further, the applicant was refusing to satisfy the outstanding costs orders against him despite being prepared to furnish a not inconsiderable amount as security for his four appeals in relation to the second failed voluntary arrangement.

The Registrar's Appeal

18 Being dissatisfied with the decision of the Assistant Registrar, the applicant appealed.

19 The applicant made certain new arguments before me. First, it was pointed out that Part V of the Act dealing with voluntary arrangements did not apply to an individual debtor who is an undischarged bankrupt. Section 44 of the Act states in its material part:

> **This Part not applicable to undischarged bankrupts**
>
> 44. This Part shall not apply –
>
> (*a*) to any individual debtor who is an undischarged bankrupt; ...

According to the applicant, if he were made a bankrupt before the hearing of his appeals, the Court of Appeal would dismiss his appeals without going into their merits on the ground that, as an undischarged bankrupt, he could no longer avail himself of this scheme of voluntary arrangements provided under the Act.

20 Second, the applicant also argued that the Assistant Registrar erred in applying the principles relating to stay of execution pending appeals in deciding whether to extend the interim order under s 45(4) of the Act. The applicant had previously satisfied the conditions for making an interim order under s 48(1) of

the Act and the interim order had accordingly been granted on 11 July 2017. The applicant argued that nothing had changed since 11 July 2017 despite Thean J's decision to revoke the creditors' approval of the voluntary arrangement. This is because the Court of Appeal will conduct a rehearing of the matter when it hears the applicant's appeals. Accordingly, the purpose of the interim order, which is to facilitate consideration of the proposed voluntary arrangement, was still being met pending the appeals to the Court of Appeal. In short, the applicant argued that an interim order should *always* be extended pending an appeal against a decision by the court to revoke the creditors' approval of the voluntary arrangement proposal.

21 CIMB and OUELH opposed the application but there was a divergence in their arguments before me.

22 Counsel for CIMB continued to argue that the court could in its discretion grant an extension of the interim order under s 45(4) of the Act even after Thean J's decision and that the applicable principles which govern how this discretion was to be exercised were those relating to the grant of a stay of execution pending an appeal. The applicant had not shown that the facts justified an extension of the interim order. There were no special circumstances. Thus, the extension of the interim order should not be granted.

23 On the other hand, counsel for OUELH argued that the applicant's reliance on s 45(4) of the Act was misconceived because that provision only applies to a making of the interim order at the first instance when a debtor intends to make his proposal for the voluntary arrangement. Hence, the application should be dismissed on that basis that the court had no power under s 45(4) to extend the interim order at this stage of the matter. But, alternatively, even if the court could exercise a discretion under s 45(4) to extend the interim

order in question, it should not do so for various reasons, including that the applicant's proposal had already been found to be not serious or viable, and also that it would prejudice the creditors' right to proceed with execution or bankruptcy proceedings against the applicant. This is especially given the long delay since the applicant admitted to being insolvent.

Issues to be determined

24 The broad issues before me were thus as follows:

(a) Did the court have the power under s 45(4) to extend an interim order granted under s 45(1) of the Act at this stage of the proceedings?

(b) If the answer to (a) is the affirmative, what were the principles that apply to whether such an extension should be granted?

(c) On the facts of this case, should the interim order granted on 11 July 2017 be extended pending the determination of the applicant's appeals to the Court of Appeal?

The extension of interim orders under s 45(4) of the Act

25 In my view, the statutory provisions clearly delineate the court's role and powers in relation to the grant of interim orders in the context of voluntary arrangements. I thus begin by outlining the relevant statutory framework under the Act.

26 As already mentioned above, Part V of the Act deals with voluntary arrangements.

27 Section 45 of the Act gives the court the power to make an interim order

where an insolvent debtor intends to make a proposal for a voluntary arrangement to his creditors. While an interim order is in force, bankruptcy applications cannot be made or proceeded with against the debtor. Further, no other proceedings can be started or continued against the debtor or his property without leave of the court. However, s 45(4) makes clear that this moratorium is in place only for a fixed time:

> (4) An interim order shall cease to have effect 42 days after the making thereof unless the court otherwise directs.

28 The conditions which must be satisfied before the court will consider granting an interim order are set out in s 48(1). First, the debtor intends to make a proposal for a voluntary arrangement. Second, no previous application must have been made concerning the debtor in the preceding 12 months. Third, the nominee appointed by the debtor is qualified and willing to act. Section 48(2) sets out the court's discretion and the purpose of such an interim order. It states:

> (2) The Court may make an interim order if it thinks that it would be appropriate to do so for the purpose of facilitating the consideration and implementation of the debtor's proposal.

29 Thereafter, there are two main events that would normally follow—the preparation of a report by the nominee for submission to the court, and the convening of a creditor's meeting to consider the debtor's proposal.

30 The nominee must within the time before the interim order ceases to have effect, that is, 42 days from the granting of the order, submit his report to the court: s 49(1) of the Act and Rule 78(1) of the Bankruptcy Rules (Cap 20, R 1, 2006 Rev Ed) (the "Bankruptcy Rules"). In fact, when the court grants the interim order, it will also fix a date for the court's consideration of the nominee's report, which will be a date not later than when the interim order would cease

to have effect: Rules 73(1) and (2) of the Bankruptcy Rules. However, if the nominee requires more time to prepare his report, he may apply to the court to extend the interim order. This is provided for in s 49(4), which states:

> (4) The court may, on the application of the nominee, extend the period for which the interim order has effect so as to allow the nominee to have more time to prepare his report.

31 The court will, in the exercise of its discretion, assess the reasons put forward by the nominee as to why an extension is required and how long the extension should be. In this case, the nominee had applied to extend the interim order which would have ceased to have effect on 22 August 2017 for four weeks because he needed more time to review the documents provided to him by the applicant to support his statement of affairs. These documents were described as being "fairly voluminous". The court considered the reasons and ordered an extension of 4 weeks until 12 September 2017.

32 If the report is not submitted by the nominee within the time required, the court has a discretion to extend or renew the interim order for such period it thinks fit, on the application of the debtor: s 49(3) of the Act. Such an extension must obviously be for the purpose of giving more time for the nominee to complete and submit his report.

33 Next, on receipt of the nominee's report, if the court in its discretion is satisfied that a meeting of the debtor's creditors should be summoned to consider the proposal for the voluntary arrangement, the court "shall direct that the period for which the interim order has effect shall be extended for such further period as it may think fit, for the purpose of enabling the debtor's proposal to be considered by the debtor's creditors": s 49(5) of the Act. This is bearing in mind that Rule 81(1) of the Bankruptcy Rules requires the creditors' meeting to take place on a date not less than 14, nor more than 28, days from

the date on which the nominee's report is submitted to the court.

34 If, on the other hand, the court does not find that it would be appropriate for a meeting of the creditors to be summoned, it may discharge the interim order: s 49(6)*(b)* of the Act. This might happen, for example, if the court finds that there is no reasonable prospect of the proposal being approved by the creditors.

35 If a creditors' meeting is summoned, the creditors present may approve the proposed voluntary arrangement by a special resolution. Any adjournment of the creditors' meeting may only be for a maximum of 14 days from the date of the first meeting, and any such adjournment must be reported to the court: Rules 86(1) and (2) of the Bankruptcy Rules. Further, if upon expiry of 14 days from the date of the first meeting, the proposal has still not been approved by the requisite majority, it is deemed to be rejected: Rule 86(3) of the Bankruptcy Rules.

36 The nominee has the duty under s 52(1) of the Act to report the result of the voting to the court. He must do so within four days of the date of the meeting: Rule 88(1) of the Bankruptcy Rules. If the meeting has declined to approve the debtor's proposal, the court may discharge the interim order: s 52(2) of the Act.

37 However, if the creditors' meeting has approved the proposal, then the voluntary arrangement will take effect and bind all the creditors entitled to vote at the meeting: s 53(1) of the Act. In such a scenario, s 53(2) also provides that:

> (2) Subject to section 54, the interim order in force in relation to the debtor shall cease to have effect at the end of 28 days from the date the report was made to the court under section 52.

38 The story does not always end with the approval of the proposal by the creditors. Section 54 of the Act provides an avenue for any dissenting creditor (or even the debtor or his nominee) to apply for a review of the decision of the creditors' meeting on one of two grounds, either that (i) the voluntary arrangement unfairly prejudices the interests any of his creditors (or the debtor); or (ii) there has been some material irregularity at or in relation to the meeting. Dovetailing with the time frame set out at s 53(2), such an application for review must be made within 28 days from the date the report of the voting result was made to the court: s 54(3) of the Act.

39 Section 54(2) of the Act provides that the court, on hearing an application for a review of the decision of the creditors' meeting, may in its discretion (i) revoke or suspend the creditors' approval, and or (ii) direct a further meeting of the creditors to consider any revised proposal the debtor may make, or in the case of a material irregularity, to reconsider the debtor's original proposal. Critically, section 54(5) of the Act then states:

> Upon giving a direction under subsection (2)(*b*) [i.e., directing a further creditors' meeting to be called], the court may, if it thinks just, extend the validity of any interim order in relation to the debtor for such period as it may think fit.

40 My review of the statutory provisions described above led me to two key observations.

41 First, the interim order is intended to function as a *temporary* moratorium. Read together, ss 45(4) and 48(2) indicate that the purpose of the interim order is to allow the creditors some time to consider and, if thought fit, to approve the debtor's proposal. Indeed, when Parliament extended the period for which an interim order has effect from 28 days to 42 days by way of the Bankruptcy (Amendment) Act 1999, it was explained that this amendment was

to "allow more time for the debtor to put up a proposal and increase the chances of Voluntary Arrangements succeeding" (*Singapore Parliamentary Debates, Official Report* (18 August 1999) vol 70, col 2185. (Associate Professor Ho Peng Kee (Minister of State for Law)). In *In re A Debtor (No. 83 of 1988)* [1990] 1 WLR 708, Scott J too remarked, in relation to similar provisions found in the United Kingdom's Insolvency Act 1986, that "the general intention of [such] legislative provisions was to provide a *short period* during which the affairs of the debtor could be looked into by an independent insolvency practitioner, and to provide time for a voluntary arrangement regarding the affairs of the debtor to be considered by the debtor's creditors" [emphasis added] (at 710). It was thus clear to me that the interim order is intended to exist only for a limited purpose and to operate only for a limited period of time to achieve its purpose. This is actually unsurprising since the effect of an interim order is a serious incursion into the rights of creditors to proceed against a debtor to recover what is owed.

42 Second, it appeared to me that Parliament had intended for the entire process, from the making of the interim order until the time when the voluntary arrangement is either approved by the creditors and takes effect or where the creditors' approval is revoked by the court, to be expeditious and closely supervised by the court. This is clear from the tight time-frames and limiting of specific situations under which the interim order may be extended.

43 The first situation in which an extension of the interim order may be granted is where the nominee in the course of his work determines that he requires more time to prepare his report to the court: s 49(3) and s 49(4). The second situation is where the court is satisfied, on reviewing the nominee's report, that a creditors' meeting should be convened to consider the debtor's proposal: s 49(5). But, even then, the court exercises tight supervision by

determining the specific period for which the interim order should be extended. When exercising its discretion under s 49(5) to determine the period of extension of the interim order, the court will look at when it would be practicable for the creditors to have a meeting with the nominee. It is clear, therefore, that the protection afforded by the moratorium was not intended to stretch indefinitely into the future, but only to such an extent necessary to ensure that the creditors have a chance to properly consider the voluntary arrangement proposal. In this case, after reviewing the nominee's report, the court considered when the nominee would be able to hold the meeting with the applicant's creditors before deciding to extend the interim order to 24 October 2017.

44 I also add that a tight leash is kept right from the start. At the initial stage, when the court grants the interim order under s 45(1) of the Act, the default position is that the order will only have effect for a 42-day period: s 45(4) of the Act. This 42-day period is for the proposal for the voluntary arrangement to be prepared, if it has not already been done, and for the appointed nominee to then study the proposal and prepare his report to the court. To make the assessment in his report as to whether a creditors' meeting should be called, the nominee would need to carefully review the debtor's assets and liabilities, as well as the detailed terms of the proposed voluntary arrangement. Hence, s 49(2) of the Act requires the debtor to furnish to the nominee documents in relation to these matters.

45 However, *before* the order is made under s 45(1), if it already clear to the debtor that it is likely that more than 42 days is needed for all the above steps to be done, for example, in situations where the debtor has an extensive number of creditors, different classes of creditors or if the terms of the voluntary arrangement are particularly complicated, he may in his application for the

interim order ask that the interim order be effective for a period longer than 42 days: s 45(4) of the Act. If the court accepts the reasons provided by the debtor, it may accordingly determine that the interim order should have a lifespan of longer than 42 days. Thus, the court exercises a close supervision, even at the initial stage, over whether the interim order should have a longer effect than the default 42 days, and if so, for how long.

46 The court also has the power to lift the protection of the moratorium granted by the interim order if it finds that the debtor has not furnished required documents and information to the nominee or that the proposed voluntary arrangement is not a serious or viable one (see s 49(6)). This shows the level of supervision exercised by the court over the voluntary arrangement proceedings, and that Parliament must have been concerned about unnecessarily delaying the rights of creditors to proceed to enforce their legal rights in the case of a debtor's proposal which may, for example, lack any reasonable chance of being approved.

47 That this is the concern was made even clearer by the provision relating to revocation of creditors' approvals, where the third and final situation is set out as to when the interim order may be extended. If and when the court exercises its powers under s 54(2) of the Act to revoke the creditors' approval for the debtor's proposed voluntary arrangement, a specific provision exists for the court, if it thinks fit, to extend the validity of the interim order, *but only* when the court has directed a further creditors' meeting to be convened to consider a revised proposal from the debtor, or to reconsider the debtor's original proposal: s 54(2)(*b*). In this case, Thean J did not order a further creditors' meeting to be held. In fact, quite the opposite, she directed that no further creditors' meeting be held.

48 Given the statutory framework as I have described above, I found it quite impossible to accept the applicant's argument that he could simply invoke s 45(4) of the Act and obtain an extension of the interim order of 11 July 2017 *until his appeals to the Court of Appeal are determined*. In my judgment, the power of the court under s 45(4) to direct that the interim order continues in effect beyond the default of 42 days arises only when the court grants the interim order at the first instance. The purpose of the court granting a longer duration for the interim order is to permit the nominee to have more time for the preparation of his report to the court. The nominee's ability to apply to the court for an extension of the interim order under s 49(4) to submit his report does not detract from the applicant being able to make a similar application under s 49(3) if the nominee has failed to submit its report within the time given for him to do so. But, after the nominee's report is submitted to the court, the two subsequent occasions where there is a possible need to extend the interim order so as to continue the moratorium are governed by specific provisions in the Act: s 49(5), which is for a creditors' meeting to be called to consider the proposal for the voluntary arrangement, and s 54(5), which is for a further creditors' meeting to be called after the court's revocation of the creditors' approval obtained at the first meeting.

49 I was unable to accept the applicant's submission that s 45(4) of the Act is a *general* provision which allows the court to extend the effect of the interim order *at any stage*, including the present one when the court has already exercised its power to revoke the creditor's approval and declined to direct another creditors' meeting to be called. Such a position would be inconsistent with the statutory regime which sets out the life span of interim order at each stage of the voluntary arrangement proceedings.

50 For the above reasons, I found that the court does not have a general

power under s 45(4) of the Act to grant an extension of the interim order in a situation such as this, where the creditors' approval for the applicant's voluntary arrangement has been revoked by the court.

51 However, it does not follow from my conclusion above that, if Citibank were to restore its bankruptcy application against the applicant for hearing before the determination of his appeals to the Court of Appeal, the court would necessarily be required to make the bankruptcy order sought. As I pointed out to the applicant's counsel during the hearing of the Registrar's Appeal, it was open to him to bring the attention of the court hearing the bankruptcy application to the existence of the pending appeals, and ask that the court stay the proceedings until the appeals are determined. Such a possibility is provided for at s 64(1) of the Act, which provides that:

> (1) The court may at any time, for sufficient reason, make an order staying the proceedings on a bankruptcy application, either altogether or for a limited time, on such terms and conditions as the court may think just.

52 Of course, I was not faced with such a situation because there was no indication by Citibank at the hearing of the Registrar's Appeal before me that it had intended to restore its bankruptcy application for hearing pending the resolution of the appeals. If that were to happen, the applicant could attempt to persuade the court to grant a stay under s 64(1) of the Act. In considering whether to grant such a stay, the court will consider the reasons furnished by the applicant as to why a stay should be granted and exercise its discretion accordingly. Even if the court grants a stay, this may be subject to any conditions that the court deems just to impose.

53 Given my finding that s 45(4) of the Act did not give the court the general power to extend the interim order at this stage of the voluntary

arrangement proceedings, this was sufficient for me to dismiss the Registrar's Appeal and uphold the Assistant Registrar's decision to disallow the application for an extension of the interim order. But, given that both CIMB and the applicant had proceeded on the basis that s 45(4) of the Act allowed the court, if it thought fit, to extend the interim order even in a case where the court had revoked the creditors' approval and directed no further creditors' meetings to be called, I found it appropriate to consider whether I would have exercised my discretion under s 45(4) to extend the interim order, in the event that I was wrong to find that the court had no such general power to give such extensions.

Whether an extension of the interim order under s 45(4) of the Act should be made at this stage of the proceedings

54 The applicant's position was that the court should grant an extension of the interim order because the decision of Thean J was being challenged on appeal, and an appeal to the Court of Appeal operated as a rehearing of the matter. Thus, just as the interim order was in effect until Thean J could dispose of the applications to revoke the creditors' approval, it should continue until the disposal of the appeals against Thean J's decision.

55 I found this to be a rather facile position to take. It ignored the fact the High Court had fully considered the arguments from the parties before deciding to revoke the creditors' approval. It was tantamount to suggesting the High Court decision should be stayed as a matter of course just because the applicant had chosen to appeal the decision. Such an approach was inconsistent with the principle that any decision of the High Court is a final one and should be compiled with, even if there is an appeal, unless the court has granted a stay pending the appeal.

56 I took the view that the position taken by CIMB was one that is more

consistent with principle. According to counsel for CIMB, given that the extension of the interim order had the effect of suspending the effect of the decision of Thean J, the principles that should apply to the application to extend the interim order should be those applicable to the granting of a stay of execution of a judgment pending an appeal. The test is therefore whether there are special circumstances which would justify the extension of the interim order. I was prepared to accept that these were appropriate principles to apply if the court had the power under s 45(4) of the Act to extend the interim order at this stage of the voluntary arrangement proceedings.

57 It is well established that special circumstances will be shown if the applicant's appeals to the Court of Appeal will be rendered nugatory if the interim order is not extended. The applicant's argument is that, if he were made a bankrupt before his appeals are heard by the Court of Appeal, his appeals would be thrown out on the threshold point that the voluntary arrangement regime could no longer apply to him. Hence, it was argued that his appeals would be nugatory.

58 I rejected this argument. The question before the Court of Appeal in the four appeals will be whether the creditors' approval was rightly revoked by the judge below. If the Court of Appeal disagrees with the judge and finds that the creditors' approval should not have been revoked, it must follow that the Court of Appeal's view is that the voluntary arrangement should have been permitted to take effect. In such circumstances, the Court of Appeal can undoubtedly exercise its powers to revoke any bankruptcy order that has been made against the applicant. I was unconvinced by the applicant's argument that the Court of Appeal will be powerless to make any orders in relation to the voluntary arrangement in such circumstances.

59 The applicant also argued that he might not be able to proceed with his appeals should be made a bankrupt because he would need to obtain the OA's approval if he wished to proceed and that might not be forthcoming. However, there was no evidence to suggest to me that the OA's approval would not be granted in such circumstances. According to the applicant, the legal fees and expenses in relation of the voluntary arrangement proceedings and the applicant's appeals are being funded by a well-wisher. There was no indication that this funding arrangement would no longer be available to the applicant if he became a bankrupt but still wanted to proceed with his appeals. Further, were the appeals to be successful, any bankruptcy order against the applicant would be revoked. That must be a weighty consideration for the OA in deciding whether to permit the applicant to proceed with his appeals. For these reasons, I was not able to discern why the OA would withhold his approval to the appeals being proceeded with.

60 In my judgment, therefore, the applicant had not established that there were special circumstances that would justify the extension of the interim order until the determination of the appeals.

61 In any event, both CIMB and OUELH argued that I should take into account the applicant's conduct in continuing to prejudice his creditors by refusing to pay the outstanding costs orders made against him and yet continuing with legal proceedings which would cause his creditors to incur even more costs and expense.

62 OUELH pointed out that there was $12,000 of unpaid costs due to it under various court orders which the applicant had simply refused to pay. As for CIMB, the unpaid costs were in the amount of $25,000 stretching back to costs orders made in the proceedings relating to the first voluntary arrangement

which failed. Yet, the applicant was able to continue to fund his appeals, including the provision of $80,000 in security for the appeals. It was argued that the applicant was attempting to "game the system" by picking and choosing which rules of court and orders to comply with.

63 The applicant's answer was not that he could not find funding to pay these outstanding costs, but rather that making such payments to CIMB and OUELH would be to unfairly prefer them over his other creditors. This, in turn, would provide ammunition for another creditor to apply for a revocation of the creditors' approval under the principles stated in *Cadbury Schweppes plc v Somji* [2001] 1 WLR 615 ("*Cadbury Schweppes*").

64 *Cadbury Schweppes* was a decision of the English Court of Appeal. The petitioner in that case was a creditor who opposed an individual voluntary arrangement proposed by the debtor. The petitioner contended that majority approval for the arrangement had been obtained by secret collateral payments made with the debtor's knowledge to two other initially dissentient creditors. The petitioner thus applied under the provisions of the United Kingdom's Insolvency Act 1986 (the "1986 Act") for, *inter alia*, a bankruptcy order on the ground that the arrangement was void or that there was a material omission in the terms of the proposal to the creditors.

65 Anthony Boswood QC, sitting as a deputy judge of the Chancery Division, found that there had been a secret deal to influence the vote of two other creditors at the creditors' meeting and that, if that fact had been known, it would have changed the vote. He granted the bankruptcy order sought by the petitioner. The Court of Appeal upheld the judge's decision. It was of the view that the question of material omission had been correctly answered by considering whether, had the truth been told, it was objectively likely to have

made a material difference to the way in which the creditors considered and assessed the terms of the proposal at the creditors' meeting. Since some creditors had been induced to vote their approval to the proposal only by a secret collateral advantage not disclosed to others, the Court of Appeal agreed with the judge below that the information presented at the meeting was false, misleading or contained a material omission. This satisfied sections 264(1)*(c)* and 276(1)*(b)* of the 1986 Act which permitted a creditor otherwise bound by the individual voluntary arrangement to present a bankruptcy petition in the case of, *inter alia*, any materially false or misleading information, or material omissions in such information, made available to creditors at the meeting. There are no equivalent of these provisions in our bankruptcy legislation.

66 As would be already obvious from my recounting of the facts and ruling in *Cadbury Schweppes*, that case is of little relevance to the situation of the applicant insofar as the unpaid costs orders are concerned. It provided no justification for the applicant to withhold the payment of costs to his creditors under the outstanding costs orders. Any such payments could not form any basis for a creditor to subsequently apply to revoke the creditors' approval, if his appeals to the Court of Appeal were to succeed. The applicant would simply be complying with orders made by the court.

67 I found the applicant's conduct in relation to the unpaid costs orders to be relevant in determining whether the interim order should be extended. Effectively, the applicant was seeking the court's assistance to extend the protection of the moratorium afforded by the interim order so that he could continue with proceedings in relation to the voluntary arrangement, but yet he was thumbing his nose at the costs orders made in favour of his creditors in these same proceedings.

68 Even if one was to assume that the applicant cannot get funding to pay the outstanding costs orders, it is still a relevant fact that the creditors have not been paid. These creditors will suffer prejudice because they continue to incur costs in relation to the voluntary arrangement proceedings while at the same time being unable to enforce their rights by way of bankruptcy proceedings or other execution proceedings. Such a state of affairs should not be simply ignored by the court as the applicant appears to suggest that I do.

69 For the above reasons, even if I had a discretion under s 45(4) of the Act to extend the interim order, I would not have found it appropriate to exercise my discretion to do so.

70 I should add that, at the start of the hearing of the Registrar's Appeal before me, counsel for the applicant had applied for an adjournment of the hearing on the basis that Justice Hoo Sheau Peng was about deliver her decision in Originating Summons No 380 of 2017 ("OS 380/2017"), a claim brought by OUELH (then known as International Healthway Corporation Ltd) against (i) The Enterprise Fund III Ltd, (ii) VMF3 Ltd, and (iii) Value Monetization III Ltd for declarations that certain contracts and transactions entered into between those parties were voidable under s 76A(2) of the Companies Act (Cap 50, 2006 Rev Ed). According to the applicant, the decision in that case would have an impact on whether OUELH's claim against him was still valid and thus whether OUELH was still a creditor of his. This, in turn, was relevant to the merits of his appeals against Thean J's decision because one of the grounds for the judge's decision to revoke the creditors' approval of the voluntary arrangement was that the nominee had wrongly attributed a nil value to OUELH's unliquidated claim against the applicant.

71 The adjournment application was contested by both CIMB and OUELH.

Counsel for OUELH disputed the contention that the decision in OS 380/2017 would be determinative of OUELH's claim against the applicant by drawing my attention to yet another action, Suit 441 of 2016, where OUELH (then known as International Healthway Corporation Ltd) had brought a claim against the applicant for, *inter alia*, conspiracy and where the claim was quantified at S$35m. Counsel informed me that the suit was going ahead and proceeding to trial in 2019.

72 Significantly though, on the applicant's point that his adjournment application should be granted because the merits of his appeals would be a relevant factor in the exercise of the court's discretion to extend the interim order, both counsel for CIMB and OUELH informed me that they were not taking the position that the appeals were definitely futile and that, in any event, the strength of the appeals was not relevant to the question of whether the interim order was to be extended. Given the position taken by CIMB and OUELH, I refused the application to adjourn and proceeded with the hearing of the Registrar's Appeal.

73 OUELH's stand that the merits of the appeals were not relevant to the exercise of any discretion whether to extend the interim order, however, meant that I accorded no weight to several of OUELH's arguments in the Registrar's Appeal that touched on the merits of the appeals. These arguments were (i) that the voluntary arrangement proposed by the applicant was not serious or viable, (ii) that his proposal would not generate any real return for his unsecured creditors, (iii) that the proposed voluntary arrangement failed to comply with the prescribed requirements of the Act in that the applicant failed to provide sufficient information as to his source of funding and how these funders were to be repaid, and (iv) that the nominee had made serious errors in the calculations of the votes for the final approval of the voluntary arrangement. I

understood from counsel that these were all matters that will be raised as issues in the four appeals to the Court of Appeal.

Conclusion

74 For the above reasons, I dismissed the Registrar's Appeal. In summary, I found that the court did not have the power, as contended by the applicant, to extend the interim order of 11 July 2017 under the s 45(4) of the Act. But, if I am wrong and the court does have such power, I would nonetheless not have exercised my discretion to extend the interim order in the circumstances of this case.

Ang Cheng Hock
Judicial Commissioner

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Danitza Hon (Rajah & Tann Singapore LLP) for the 3rd Non-Party, OUE Lippo Healthcare Limited.