

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 173

Originating Summons Bankruptcy No 8 of 2019
Registrar's Appeal No 310 of 2019

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

And

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

AATHAR AH KONG ANDREW

... Applicant

JUDGMENT

[Insolvency Law] – [Bankruptcy] – [Voluntary arrangement] – [Whether voluntary arrangement should be revoked] – [Whether materials adduced after a creditors' meeting may be used to justify the nominee's adjudication of claims for the purposes of the creditors' meeting] – [Whether a creditor's quantum of claim for purposes of voting can be recalculated after voting at creditors' meeting]

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Re Aathar Ah Kong Andrew

[2020] SGHC 173

High Court — Originating Summons No 8 of 2019 (Registrar's Appeal No 310 of 2019)

Audrey Lim J
14 January 2020; 21 February; 18, 19 June 2020

17 August 2020

Judgment reserved.

Audrey Lim J:

Introduction

1 This is the appeal of Aathar Ah Kong Andrew (“Aathar”) against the decision of an assistant registrar (“AR”) to revoke his proposed third voluntary arrangement (“3rd VA”) under s 54(1) of the Bankruptcy Act (Cap 20, 2009 Rev Ed) (“BA”). The creditor opposing the proposed 3rd VA is OUE Lippo Healthcare Limited (“OUELH”). The nominee is Mr Andre Arul, a lawyer from Arul Chew & Partners (“the Nominee”). This appeal concerns whether the Nominee had rightly admitted and adjudicated the claims of three Indonesian creditors (“the Indon Entities”) and the evidence that can be relied on for this purpose.

Background

2 In 2016, Aathar applied for the first voluntary arrangement (“1st VA”). The 1st VA was approved at a creditors’ meeting, but it was revoked by an AR on the application of various creditors who were dissatisfied with the outcome of the meeting. The AR found no evidence of the huge debts that were purportedly owed to the creditors and found material irregularities arising from Aathar’s lack of candour in his statement of affairs and the nominee’s failure to scrutinise it. The AR then decided that no further meeting should be sanctioned.

3 Aathar then filed a second application for voluntary arrangement (“VA”) in September 2017 (“2nd VA”). Again, the approval for the 2nd VA was revoked by the High Court for material irregularities. In relation to the Indon Entities, namely “Berkah”, “Fajar” and “Entete”, the court found as follows. The manner of review of their claims by the nominee left much to be desired. The supporting documents which the nominee claimed were given to him for these claims were neither explained nor exhibited in any affidavit, and the nominee had reviewed the supporting documents cursorily. Also, in light of the large sums claimed by the Indon Entities, and the circumstances surrounding the previous proposal for a VA, the nominee should have scrutinised the claims more closely in his independent and quasi-judicial role. Aathar’s appeal to the Court of Appeal on the 2nd VA was dismissed (see *Aathar Ah Kong Andrew v CIMB Securities (Singapore) Pte Ltd and other appeals and another matter* [2019] 2 SLR 164 (“*Aathar CA*”).

4 Before the Court of Appeal heard Aathar’s appeal on the 2nd VA, Aathar filed his third VA application on 24 January 2019 (“3rd VA”) and proposed that some \$2.5 million, funded by one PT Cahaya, be distributed among his

purported liabilities of over \$596 million.¹ This was substantially the same proposal as the 1st and 2nd VAs.

5 Essentially, the matter before the AR concerned: (a) various Indonesian creditors including the Indon Entities; (b) Golden Cliff International Ltd (“Golden Cliff”); (c) the “Crest Entities” (comprising Crest Capital Asia Pte Ltd, Crest Capital Asia Fund Management Ltd, The Enterprise Fund III Ltd, VMF3 Ltd and Value Monetization III Ltd), OUELH and Low See Cheng (“Litigation Claims”); and (d) the Enterprise Fund II. The dispute in the present appeal concerns whether the Indon Entities’ claims, premised on Share Charge and Guarantee Deeds (“SCG Deeds”), were rightly admitted and adjudicated by the Nominee.

Share Charge and Guarantee Deeds

6 Aathar and Real Empire International Limited (“REL”), a company wholly-owned by Aathar, entered into three separate SCG Deeds with Berkah dated 28 March 2014; Fajar dated 19 February 2014; and Entete dated 10 March 2014.² The contents of the SCG Deeds are, save for the identity of the respective Indon Entities and limit on the guaranteed amount, essentially the same, and they are governed by Singapore law. They stipulate that REL will provide guarantees to the creditors of the Indon Entities in respect of the Indon Entities’ liabilities to their creditors, and that Aathar would guarantee to the Indon Entities the performance of REL in accordance with the SCG Deeds.

¹ Aathar’s 1st affidavit dated 24 Jan 2019 (“Aathar’s 1st Affidavit”), Tab 1 (at para 1.16); Chairman’s Report dated 12 June 2019 (“Chairman’s Report”) at p 92.

² Bundle of documents evidencing third party creditor claims dated 21 January 2020 (“BD”) at pp 12–20, 52–70, and 121–128.

7 Yet Kum Meng, the CEO of OUELH, claims that the Indon Entities share the same address.³ Ade Darmawan (“Darmawan”), Fajar’s director, rebuts this and states that Fajar’s postal address was different, and that Fajar was not related to Berkah or Entete.⁴ The SCG Deeds show that Fajar has a different address from Berkah and Entete (the latter two having the same building address albeit on different floors).

3rd VA application and Creditors’ Meeting

8 On 26 February 2019, Aathar was granted an interim voluntary arrangement by an AR. After the creditors submitted their notices of claim, the Nominee recommended that a creditors’ meeting be called to consider Aathar’s proposed 3rd VA. The Nominee had adjudicated OUELH’s claim at one third of its claimed sum (\$19.3 million instead of \$58 million).⁵ OUELH’s claim against Aathar was a contingent claim based on its suit (Suit 441/2016) against, among others, Aathar for loss and damages relating to a Standby Facility extended by investment funds (the Crest Entities).

9 In April 2019, the AR allowed the creditors’ meeting to be called. On 8 May 2019, the Nominee issued a notice of creditors’ meeting – to be held on 29 May 2019 (“Creditors’ Meeting”) – and requested that parties to the intended meeting give notice of any issues they wished to raise to the chairman ahead of the meeting.⁶ On 9 May 2019, OUELH’s lawyers provided an updated notice of claim to the Nominee of about S\$64.339 million in respect of its claim against

³ See Yet Kum Meng’s 1st affidavit dated 22 July 2019 (“Yet’s 1st Affidavit”) at [61].

⁴ Ade Darmawan’s 2nd affidavit dated 8 August 2019 (“Darmawan’s 2nd Affidavit”) at [10]–[11].

⁵ Nominee’s Report dated 22 April 2019, at [106].

⁶ Yet’s 1st affidavit at [43]; Chairman’s Report at pp 83–85.

Aathar in Suit 441/2016. On 24 May 2019, they informed the Nominee of OUElh’s concerns on the veracity of Golden Cliff’s and the Indonesian creditors’ claims. In particular, they stated that: (a) the material irregularities raised by the courts in the previous two proposed VAs needed to be fully and adequately addressed; (b) Golden Cliff’s claim should be excluded in full; and (c) the Indonesian creditors’ claims should be excluded as the Indonesian creditors’ *bona fides* had been seriously questioned by the courts in the previous decisions.⁷

10 On 28 May 2019, a day before the Creditors’ Meeting, the Nominee sent OUElh’s counsel an excel spreadsheet setting out the final adjudication of all claims (“Final Adjudication”), which included the following.

(a) The Nominee reduced the interest component under the Standby Facility to 15% per annum as the Standby Facility contractual interest of 3.5% per month with default interest of 2.0% per month was too high. He adjudicated the total amount claimable by OUElh at \$28.76 million, before discounting OUElh’s claim to 10% of its adjudicated value, or \$2.876 million. He also marked OUElh’s claim as “objected to”.⁸

(b) The Nominee adjudicated claims by over 20 Indonesian creditors – the same creditors involved in the previous two VAs – at over \$159 million, which comprised about 65% of Aathar’s overall adjudicated liabilities of around \$245 million. Of this \$159 million, around \$113

⁷ Yet’s 1st Affidavit at [41] and [44]; Chairman’s Report at [217].

⁸ Yet’s 1st Affidavit at [45]–[46].

million of the claims belonged to Fajar (\$51.5 million), Berkah (\$36.8 million) and Entete (\$25 million).⁹

11 The Nominee stated in his Chairman’s Report dated 12 June 2019 of the Creditors’ Meeting (“Chairman’s Report”) that he “ha[d] not seen clear evidence” that third party creditors had triggered the Indon Entities’ liabilities under their respective SCG Deeds. Nevertheless, he admitted the Indon Entities’ claims on an “objected to” basis and set the value of their respective claims at the maximum limit specified in the SCG Deeds (*ie*, \$20 million each for Fajar and Berkah, and \$25 million for Entete).¹⁰

12 Aathar’s proposed 3rd VA was approved by a majority in numbers at 74.36% (*ie*, 29 out of 39 creditors present) and a majority in value of 81.07% of the creditors present and voting.¹¹ The Indon Entities and Golden Cliff had voted in support of the proposed 3rd VA, whilst OUELH had voted against it.

Decision below

13 OUELH applied to revoke the 3rd VA pursuant to s 54(1) of the BA on the basis that there were material irregularities which occurred at or in relation to the Creditors’ Meeting. The AR found that the Nominee’s inclusion of the Indon Entities’ claims under the SCG Deeds of \$65 million on an “objected to” basis was a material irregularity. The Nominee had relied on documents adduced *after* the Creditors’ Meeting to justify his admission and adjudication of the Indon Entities’ claims. There was insufficient evidence, whether before

⁹ Yet’s 1st Affidavit at pp 781–787 (exhibit YKM-9).

¹⁰ Chairman’s Report at [105] and [113].

¹¹ Chairman’s Report at [250].

or after the Creditors' Meeting, for these claims to be included in the adjudication. This is because REL's guarantee obligation under the SCG Deeds was a secondary liability, in that, if an Indon Entity defaulted on the primary obligation to its creditor ("Creditor" or "Creditors" as the case may be), REL may be called upon to pay the sum. While the documents subsequently disclosed showed that liabilities were incurred and paid by the Indon Entities, there were no documents to show that a Creditor had called upon the guarantees given by REL. Since exclusion of the Indon Entities' claims would reduce support for the proposed 3rd VA to about 74%, inclusion of these claims was a material irregularity.

14 However, the AR found no material irregularities in relation to the Nominee's inclusion of Golden Cliff's claim; the Nominee applying a 90% discount to the Litigation Claims; and the Nominee including one-third, instead of the full, claim by Enterprise Fund II.

15 The AR thus revoked the approval given at the Creditors' Meeting as the votes pertaining to the \$65 million should not have been counted. Aathar appealed against the AR's decision pertaining to the Indon Entities' claims.

Appellant's (Aathar's) submissions

16 Aathar submits that the inclusion of the Indon Entities' claims was not an irregularity because they were genuine claims against him which were supported by evidence, and the Nominee's decision to include these claims could not be said to be one which no reasonable insolvency practitioner could have come to.

17 The Nominee had some evidence of the liabilities under the SCG Deeds and had acted properly in ascribing estimated values to the Indon Entities'

claims whilst marking them as “objected to”.¹² There was no need for the Creditors to call upon the SCG Deeds for Aathar’s liability to the Indon Entities to be triggered. The Creditors were not parties to the SCG Deeds and could not have legally called on them. Moreover, there were invoices and demands from the Creditors to the Indon Entities, and the Indon Entities had sent demand letters to REL to fulfil its obligations under the SCG Deeds, which REL failed to do. Thus, the Indon Entities were entitled to call on the guarantee given by Aathar. Next, the Nominee was entitled to rely on evidence adduced by the Indon Entities after the Creditors’ Meeting to determine the disputes concerning his adjudication of their claims.¹³

18 Even if the inclusion of the Indon Entities’ claims was an irregularity, it was not material as it did not and would not have changed the manner in which the creditors voted, since they had received the Final Adjudication prior to the Creditors Meeting. Alternatively, the court should exercise its discretion to direct the Nominee to summon a further creditors’ meeting. First, only OUELH has sought to set aside the result of the Creditors’ Meeting. Second, even attributing no value to the Indon Entities’ claims would give rise to a 74.12% vote in favour of the proposed 3rd VA. Third, the Crest Entities’ Litigation Claims no longer stand, because the Court of Appeal has dismissed their claim (see [91] below).¹⁴

¹² Aathar’s written submissions dated 7 January 2020 (“AWS”) at [45].

¹³ AWS at [50]–[54].

¹⁴ AWS at [61]–[62]; 18/9/19 Notes of Evidence (“NE”) at p 8; 14/1/20 NE at p 2.

Nominee’s submissions

19 The Nominee submits that the inclusion of the Indon Entities’ claims was not a material irregularity as the said debts were supported by evidence and, in any event, would not have changed the manner in which the creditors voted as they had “full cognisance” of the Final Adjudication. Further, the documents provided after the Creditors’ Meeting could be used to justify or substantiate a previous adjudication to show that it was reasonable or correct. Contrary to the AR’s finding, the documents disclosed in several affidavits, albeit filed after the Creditors’ Meeting, showed demands by the Indon Entities against Aathar.¹⁵

20 Next, the Nominee claims that it is “factually incorrect” to state that he had relied on documents adduced after the Creditors’ Meeting to justify the adjudication. The Nominee had marked the Indon Entities’ claims as “objected to” precisely because the “evidence available then was not as clear and conclusive or corroborative as [the Nominee had] desired”. He allowed the Indon Entities to vote on the maximum limit in the SCG Deeds although their claims *prima facie* exceeded the same. There was also evidence that the respective Indon Entities had called upon the guarantee given by Aathar. The Creditors did not have to, and could not, call upon the guarantees given by REL, as the guarantees were obligations owed by Aathar or REL to the Indon Entities and the Creditors were not privy to the SCG Deeds.¹⁶

21 Finally, even if the inclusion of the Indon Entities’ claims was a material irregularity, the AR should have exercised her discretion to not set aside the

¹⁵ Nominee’s submissions dated 6 January 2020 (“Nominee’s Submissions”), at [57] and [65]–[78].

¹⁶ Nominee’s affidavit dated 7 August 2019 (“Nominee’s Affidavit”) at [77]; Nominee’s Submissions at [60]–[64]; 1/10/19 NE at p 2.

creditors' approval of the proposed 3rd VA. Even attributing no value to the Indon Entities' claims would yield 74.12% of votes in favour of the proposed 3rd VA, just short of the requisite 75%. The AR should have attributed some value to the Indon Entities' claims, such that the 75% requirement would be crossed and the proposed 3rd VA could stand.¹⁷ Alternatively, the AR could have directed the Nominee to summon a further creditors' meeting, even if no value were to be attributed to the Indon Entities' claims, since the vote margin was so close.

Respondent's (OUELH's) submissions

22 OUELH submits that the appeal should be dismissed. The Nominee should have exercised a greater degree of scrutiny and care in assessing the proposed 3rd VA, given the two prior failed attempted VAs and the serious doubts over the *bona fides* of the Indonesian creditors. Instead, the Nominee accepted "bare affidavit assertions" from some of the Indonesian creditors and even allowed the Indon Entities to vote on their contingent claims despite the lack of clear evidence for such claims at the time of the Creditors' Meeting. It was also improper for the Nominee to rely on evidence adduced after the meeting to justify his adjudication. In any event, all the evidence do not support the Nominee's adjudication. There remains no evidence to show that any Creditor had called upon the guarantees from REL or Aathar under the SCG Deeds, which Aathar's counsel conceded at the hearing before the AR.¹⁸ If no Creditor had called upon the guarantees, Aathar's liability would not be triggered. Thus, the Nominee's failure to exercise the requisite degree of scrutiny over the Indon Entities' claims is a material irregularity.

¹⁷ Nominee's Submissions at [88]–[89].

¹⁸ Respondent's submissions dated 7 January 2020 at [81]; 18/9/19 NE at p 16.

The applicable legal principles

23 Under section 54(1)(b) of the BA, the court may review the decision of a creditors’ meeting on the ground that there has been some material irregularity at or in relation to the meeting. A material irregularity can occur at several stages in a proposed VA, and the court is concerned to look at the whole process: *Aathar CA* ([3] *supra*) at [40]. An irregularity is “material” if it would likely have made a material difference in the way the creditors would have considered and assessed the terms of the proposed VA if, objectively assessed, the procedure had been carried out correctly (or certain facts truthfully told): *Aathar CA* at [41]. An irregularity may still be “material” even if the numbers in respect of the irregularity do not at first blush appear capable of changing the outcome of the creditors’ meeting. This depends on the nature of the irregularity and the circumstances of the meeting. A creditor may well be capable of bringing forth “strong evidence to establish that [he] would have had a reasonable prospect of persuading other creditors to change their minds”: *Aathar CA* at [71].

24 The Court of Appeal’s decision in *Aathar CA* shows that there are at least three primary ways by which a material irregularity may arise, namely: (a) a breach of the procedural requirements for the creditors’ meeting; (b) a breach by the debtor of his duty of candour and full disclosure; and (c) a breach by the nominee of his duty of objectivity and scrutiny (see *Aathar CA* at [71] and [85]–[86]).

Issues

25 In determining whether there was any material irregularity at or in relation to the Creditors’ Meeting, I consider the following issues.

- (a) How the SCG Deeds are to be interpreted.

- (b) Whether the Nominee can rely on evidence produced to him after the Creditors' Meeting and, if so, for what purpose.
- (c) The veracity of the Indon Entities' claims or proofs of debts, and whether the claims should have been admitted for the purposes of voting.
- (d) Whether the Nominee discharged his duty of independence and scrutiny.
- (e) Whether Aathar discharged his duty of candour and full disclosure.

Degree of scrutiny required of the Nominee and evidence in support

26 The "objected to" procedure under r 84(6) of the Bankruptcy Rules (Cap 20, R 1, 2006 Rev Ed) ("the Rules") is a fallback position where the nominee is in real doubt as to what decision to make; but he "should *consider the merits of the debt first* as there is no reason for [him] to abdicate his responsibility to make a decision as to admissibility" [emphasis added] (*Aathar CA* at [53]). Given Aathar's two prior failed attempted VAs, it was incumbent on the Nominee to exercise a greater degree of scrutiny and care in assessing the proposed 3rd VA. As the Court of Appeal in *Aathar CA* stated (at [86]), in relation to Aathar's proposed 2nd VA, it was *already* incumbent on the nominee to be "circumspect" about "the veracity of the explanations put forth" by Aathar and the creditors. Therefore, in *Aathar CA*, it was insufficient that the nominee queried multiple aspects of Aathar's proposed 2nd VA and sought details of the same from him.

27 The Nominee is well aware of the courts’ decisions in the previous proposed VAs.¹⁹ In the present case, his duty of scrutiny of Aathar’s proposed 3rd VA was heightened. Thus, I disagree that the Nominee can accept the documents “at face value without undue investigation” as supporting evidence of Aathar’s debt to the Indon Entities.²⁰ It was incumbent on him to satisfy himself that the Indon Entities’ claims were duly supported by objective evidence. This is especially when *the Indon Entities have claimed to be creditors since the proposed 1st VA*, and the irregularities highlighted in the previous VAs may continue to persist. In fact, the veracity of the Indon Entities’ claims in the proposed 2nd VA had been questioned by both the High Court and Court of Appeal.

28 Given that the Nominee’s degree of scrutiny is heightened and that he has to consider the merits of the debts, I turn first to examine the SCG Deeds on which the Indon Entities’ claims are premised and how they are to be interpreted, before examining the veracity of their claims.

REL’s and Aathar’s obligations under the SCG Deeds

29 The pertinent terms of each of the SCG Deeds are as follows.²¹

(a) Parties to the Deed: There are three parties – the Indon Entity (Fajar, Berkah or Entete), REL and Aathar.

(b) REL’s obligation: In the preamble, REL “agrees to provide certain level of guarantees and security to the creditors of [the Indon

¹⁹ 14/1/20 NE at p 10.

²⁰ Nominee’s Affidavit at [48].

²¹ Chairman’s Report at pp 1257–1261; BD at pp 12, 54 and 122.

Entity] to assist [the Indon Entity] in its business operations on terms and conditions as set out in this Deed”. In the SCG Deed with Entete, the preamble further states that “[Aathar] shall provide personal guarantees for due performance of this [agreement] by [REL]”. Clause 2.1, pertaining to the “limit of guarantee”, stipulates that REL “agrees to guarantee on a joint and several basis with [the Indon Entity] in respect of “all Liabilities”. “Liabilities” is defined as “all present and future obligations and liabilities (whether actual or contingent and whether owed jointly or severally or in any other capacity whatsoever) of the [Indon Entity] to its Creditors of an amount not exceeding” \$20 million each for Fajar and Berkah and \$25 million for Entete.

(c) REL’s charged shares as security: Clause 2.2 states that REL “charges in favour of [the Indon Entity] ... title and interest in and to the Charged Shares”, which are REL’s shares in International Healthway Corporation Limited, as a “continuing security for the payment of part of the Liabilities”. Clause 2.5 stipulates that the Charged Shares “shall not be sold and or transferred to any Creditor unless: (a) part or whole of the Liabilities are due for more than 120 days and [the Indon Entity] is unable to settle such liabilities; (b) [the Indon Entity] first provides his proportionate value of security assets to be sold or transferred for the repayment of such part of whole of the Liabilities; and (c) [the Indon Entity] first sells its assets ... to satisfy any liabilities of the Creditors.”

(d) Aathar’s guarantee: Clause 4.1 states that Aathar “irrevocably and unconditionally guarantee” to the Indon Entity “the performance of [REL] in accordance to [the SCG Deed]”.

30 OUEHL, the Nominee and Aathar agree that: (a) the Indon Entities are contractually liable to their respective Creditors; (b) REL’s obligation under the SCG Deed is a guarantee (and not an indemnity); (c) Aathar’s obligation is also a guarantee; (d) REL’s obligation as a guarantor is triggered only if an Indon Entity’s liability to its Creditor is first triggered; and (e) Aathar’s obligation is triggered when REL has defaulted on its obligation or failed to pay.²²

31 The points of contention are: (a) whether REL’s guarantee is to be given to the Indon Entities (which is the Nominee’s and Aathar’s position) or to the Creditors (which is OUEHL’s position); and (b) what Aathar’s obligation as a guarantor is.²³

32 As a preliminary point, there was some dispute as to who the principal debtor to a Creditor is. OUEHL submits that it is the Indon Entity, whilst the Nominee and Aathar claim that *REL and Aathar* are the primary obligors under the SCG Deeds.²⁴ It is clear from the SCG Deeds that the principal debtor or primary obligor to the Creditors are the Indon Entities. The preamble to the SCG Deeds states that the Creditors are “creditors to” Berkah, Fajar or Entete (as the case may be). The term “creditors” is defined as a party “which [an Indon Entity] owes” liabilities, with “liabilities” defined in clause 1 (see [29(b)] above). Further, clause 2.5 of the SCG Deeds states that REL’s shares charged to an Indon Entity cannot be transferred to a Creditor until the Indon Entity uses its own assets to repay the Creditor. It is also inconsistent for Aathar and the Nominee to claim that REL and Aathar are the principal debtors to the Creditors whilst also maintaining that it is the Indon Entities who are contractually liable

²² 14/1/20 NE at pp 5–8; 18/6/20 NE at pp 15–18.

²³ 14/1/20 NE at p 5; 18/6/20 NE at pp 2 and 15.

²⁴ 18/6/20 NE at p 10.

to their Creditors, that REL and Aathar are guarantors, and that REL and Aathar's guarantee obligations are triggered only if an Indon Entity's liability to its Creditor is first triggered. The fact that REL and Aathar are only guarantors is also acknowledged by the Indon Entities.²⁵

33 Next, the preamble to the SCG Deed states that REL's obligation is "to provide certain level of guarantees and security to *[the Creditors]*" [emphasis added]. Thus, REL's obligation is not as a guarantor to the Indon Entities, but as a guarantor of the Indon Entities' liabilities by providing a guarantee to the Creditors that the Creditors may enforce. As the Indon Entity is the principal debtor to its Creditor, this would accord with how a guarantee operates. Further, clause 2.1 of the SCG Deed states that REL agrees to guarantee the Indon Entity's liabilities to the Creditors (up to \$20 million each for Fajar and Berkah and \$25 million for Entete). This supports the interpretation that REL is to provide a guarantee to the Creditors, and the clause sets the "Limit of Guarantee" of REL on a "joint and several basis" with the Indon Entity.

34 I turn to the evidence of the Indon Entities and the Creditors – in particular, the subsequent agreements executed between them which involved REL as a guarantor. I note that the Court of Appeal has not provided a definitive ruling on the admissibility and relevance of evidence of subsequent conduct in contractual interpretation. While there is no absolute prohibition against admitting evidence of subsequent conduct in interpreting a contract, such evidence, if it were to be admitted, must be relevant, reasonably available to all the contracting parties, and relate to a clear and obvious context. The principle

²⁵ Handi Gunawan's 2nd affidavit dated 11 June 2019 ("Gunawan's 2nd Affidavit") at [4]; Jo Candra's 1st affidavit dated 8 August 2019 ("Candra's 1st Affidavit") at [3], [7] and [12]; Darmawan's 2nd Affidavit at [17].

of objectively ascertaining contractual intention remains paramount, so the subsequent conduct must go toward proof of what the parties, from an objective viewpoint, ultimately agreed upon. However, where the evidence of subsequent conduct “does no more than echo what were the objectively ascertained intentions of the parties illuminated by the contextual evidence at the time of the contract”, the evidence of subsequent conduct would be “superfluous”: *MCH International Pte Ltd and others v YG Group Pte Ltd and others and other appeals* [2019] 2 SLR 837 at [18]–[22].

35 As the text of the SCG Deeds clearly stipulates that REL’s obligation is to “provide” guarantees “to” the Creditors, recourse to extraneous evidence to interpret the SCG Deeds is unnecessary. Nevertheless, the subsequent agreements between the Indon Entities and their Creditors provide cogent evidence of the parties’ agreement at the time when the SCG Deeds were executed (*Centre for Laser and Aesthetic Medicine Pte Ltd v GPK Clinic (Orchard) Pte Ltd and others and another appeal* [2018] 1 SLR 180 at [51]) and would confirm this interpretation of the SCG Deeds.

(a) Jo Candra (“Candra”), Entete’s general manager, explained REL’s role *vis-à-vis* Entete, where Entete secured contracts with its Creditors. Candra stated that REL’s obligation was to “contribute in a timely manner the necessary assets and or its guarantees to secure financing facilities for payment of the contractual obligations [of Entete] and or *provide guarantees to contracting parties with [Entete]* in relation to the mining concession operations” [emphasis added].²⁶ Although Candra had attested on this after the execution of the SCG

²⁶ Jo Candra’s 2nd affidavit dated 8 August 2019 at [6].

Deed, he was attesting to how REL's guarantee (as subsequently embodied in the SCG Deed) would come about. Indeed, in a subsequent contract between Entete and PT Batubara Kalimantan ("BBK") (which Entete claims is its Creditor and relies on this contract for its claim against REL and Aathar under the SCG Deed – see further [56] to [59] below), Entete was to obtain a guarantee from REL and the guarantee is to be satisfactory to BBK (pursuant to article 4.4 of that contract). Following from that contract, *BBK* had notified Entete that Entete *and REL* had failed to fulfil their contractual obligation.²⁷

(b) In a cooperation agreement dated 21 August 2014 between Fajar and its Creditor (one PT Indokal or "Indokal") pertaining to coal mining ("Cooperation Agreement"), REL was a party to the Cooperation Agreement as guarantor (see [52] and [54] below). The Cooperation Agreement was relied on by Aathar and the Nominee to support Fajar's claims under the SCG Deed and showed that Fajar and Indokal had intended to treat REL as a guarantor to Indokal (the Creditor).

36 Hence, REL's obligation as a guarantor is to *pay the Creditor*. It would not make sense if REL's guarantee obligation is to be discharged by paying the Indon Entities, as this would amount to REL indemnifying the Indon Entities for their liabilities to the Creditors. A guarantor has a right to be indemnified or reimbursed by the principal debtor after the guarantor makes payment to the creditor: see Poh Chu Chai, *Guarantees and Performance Bonds* (LexisNexis, 3rd Ed, 2017) ("Poh Chu Chai") at [11.1.5]; *Anson v Anson* [1953] 1 WLR 573; and *Autocal Holdings Ltd v Jeffery* [2017] EWHC 807 (Ch) at [54]. As such, it

²⁷ BD at pp 144, 165.

would be odd if REL's obligation as guarantor is to pay the Indon Entity, given that REL would be entitled to seek reimbursement from it.

37 Additionally, REL's guarantee would be triggered only when an Indon Entity has defaulted on its obligation to pay its Creditor. If the principal debtor has paid its debt to the creditor, the guarantor's obligation – which is secondary and contingent on the principal debtor's default – is discharged (Geraldine Andrews and Richard Millett, *Law of Guarantees* (Sweet and Maxwell, 7th Ed, 2015) at 9-002), and the principal debtor cannot seek contribution from the guarantor for the paid debt (Poh Chu Chai at [12.2.3], citing *Craythorne v Swinburne* (1807) 14 Ves Jun 160). There is no liability on the guarantor's part if the underlying obligation ceases to exist (*American Home Assurance Co v Hong Lam Marine Pte Ltd* [1999] 2 SLR(R) 992 at [40]).

38 I turn then to consider Aathar's role as a guarantor. Aathar's obligation under the SCG Deed is to guarantee "to" the Indon Entity (who is the principal debtor of the Creditor) the "performance of [REL] in accordance to [the SCG Deed]". REL's "performance" is to provide guarantees to the Creditors and pay a Creditor where an Indon Entity is in default. Hence, if REL defaults on its guarantee obligation, the Indon Entity can look to Aathar to fulfil his guarantee obligation by Aathar paying the Creditor, or, assuming that Aathar's obligation is to pay the Indon Entity (which is Aathar's and the Nominee's position), by Aathar compensating the Indon Entity for any loss or damage that it has suffered because of REL's default to pay the Creditor. As will be seen later, regardless of which position is adopted, it would not make a difference to my findings in relation to the veracity of the Indon Entities' claims and the underlying debts and whether the Nominee has discharged his duty of independence and scrutiny.

39 The question is what scrutiny the Nominee should have carried out in coming to his decision to mark the Indon Entities' votes as "objected to" and to the value of \$65 million purportedly owed by Aathar to them. In my view, it was incumbent on the Nominee to seek supporting evidence to show that: (a) an Indon Entity owed an outstanding debt or liability to its Creditor (which the Indon Entity had defaulted payment on) and the amount of it; (b) REL was called on (by the Creditor) to satisfy its guarantee to *pay the Creditor* for the outstanding debt; and (c) the Indon Entity had called on Aathar to fulfil his guarantee obligation because REL had failed to perform its guarantee obligation – and this is for Aathar to either pay the Creditor, or (as per Aathar's and the Nominee's case) to compensate the Indon Entity for loss and damage to it as a result of REL's failure to perform ("the requisite degree of proof" or "chain of demands"). Aathar's obligation would be triggered only if the Creditor *has not been paid* (see [37] above). Hence, if an Indon Entity or REL has discharged the debt owed to the Creditor, the Indon Entity cannot seek contribution from Aathar in respect of that debt. In relation to the requisite degree of proof, where a claim is marked "objected to", the court may determine, on a balance of probabilities, whether the claim is established and the amount of such claim: *Re a Company (No 4539 of 1993)* [1995] 1 BCLC 459 ("*Re a Company*") at 466.²⁸

Documents the Nominee had sight of before the Chairman's Report

40 I first examine the documents (pertaining to the Indon Entities' claims) that the Nominee had obtained prior to the Creditors' Meeting on 29 May 2019, and as exhibited in the Chairman's Report (dated 12 June 2019).²⁹ In letters dated 28 March 2019 and 5 April 2019 from Central Chambers Law

²⁸ 21/2/20 NE at p 22.

²⁹ Chairman's Report at [94]–[113].

Corporation (“CCLC”)³⁰ (the Indon Entities’ lawyers), the Nominee was given the Indon Entities’ notices of claims and the SCG Deeds. He was also given the following documents: (a) a letter dated 16 December 2015 from Fajar to REL and Aathar, demanding payment from REL for the Indon Entities; (b) a letter dated 16 December 2015 from Berkah to Aathar demanding payment from Aathar for Berkah, Entete and Fajar of about \$21.2 million, \$23.5 million and \$31.5 million respectively, owing as at 31 December 2015; (c) a letter dated 29 September 2017 from Entete to Aathar, which referred to its demand letter of 16 December 2015, and to “confirm” the amount owed under the SCG Deed as \$28 million; (d) a letter dated 7 March 2016 from Fajar to Aathar “confirming” the amount owed under the SCG Deed as at 19 February 2014 to be \$31 million; and (e) a demand letter dated 27 September 2017 from Fajar to Aathar that reiterated Fajar’s demand of \$31 million owing to it under the SCG Deed.³¹

41 I find that the Nominee has failed to discharge his duty of scrutiny. The documents do not satisfy the requisite degree of proof. The SCG Deeds do not show *ipso facto* that Aathar’s liability as a guarantor has been triggered or the quantum of liability triggered. The above documents are bare assertions by the Indon Entities of their claims against Aathar. They do not show a Creditor seeking payment from REL before Aathar was pursued. The Nominee *himself* conceded that he had not seen any clear evidence of the fact that the Creditors have triggered the Indon Entities’ liabilities under the respective SCG Deeds.³²

³⁰ Chairman’s Report at pp 983, 997–998.

³¹ Chairman’s Report at pp 1039, 1041–1043, 1045–1051, 1059–1061, 1075–1077, and 1267–1269.

³² Chairman’s Report at [105]; 21/2/20 NE at p 14.

42 On 9 May 2019, the Nominee requested CCLC for a breakdown of the amount owed in the SCG Deeds. CCLC replied that the Indon Entities' claims were for Aathar's failure to pay the guaranteed amount under the SCG Deeds.³³ On 24 May 2019, the Nominee requested CCLC to identify the Creditors in order to trigger clause 4.1 of the SCG Deeds; to clarify the amount they were claiming for; and to enclose documents supporting their claims. The Nominee also stated that, whilst the Indon Entities had applied interest rates to their claims, he was unable to locate any clause in the SCG Deeds that provided for interest. CCLC's reply of 24 May 2019 merely stated that the Indon Entities had claimed interest using the same rate as in another agreement and "agreed between parties", without providing any supporting documents.³⁴ The Nominee sent an email on the same day to reiterate his queries, but CCLC never replied.³⁵

43 As can be seen, the Nominee was well aware that, for Aathar's liability as a guarantor to be triggered, the Indon Entities had to show who their Creditors were and the amount of the claims owing to the Creditors which the Indon Entities had defaulted on, and that any claim for interest had to be supported by evidence. Despite these not being forthcoming, he nevertheless marked the Indon Entities' claims on an "objected to" basis and allowed them to vote at the Creditors' Meeting. I reiterate – the Nominee had a duty to consider the merits of the debt in deciding whether to allow a creditor to vote on it, and a greater degree of scrutiny and care was required as this was Aathar's third attempt at a VA. These were already the remarks of the Court of Appeal in *Aathar CA* ([3] *supra*) in relation to the 2nd VA, which the Nominee was aware of.

³³ Chairman's Report at [98] and pp 1193 and 1313–1320.

³⁴ Chairman's Report at [101]–[102]; and pp 1323 and 1387.

³⁵ Chairman's Report at [103] and p 1391.

44 I turn then to what the Nominee did *after* the Creditors' Meeting but *before* preparing the Chairman's Report. First, on 9 June 2019, he flew to Indonesia and met Handi Gunawan ("Gunawan"), director of Berkah, who showed him the original signed copies of the SCG Deeds.³⁶ But this did not assist the Nominee, for the same reasons at [41] above.

45 Second, the Nominee referred to Gunawan's affidavit dated 11 June 2019 and supporting documents attached therein.³⁷ Gunawan's affidavit and documents were sparse and do not show the requisite chain of demands, or show how the quantum of its claimed sum was owed by Berkah to its Creditors such that REL's and subsequently Aathar's liability as guarantors were triggered. Whilst Gunawan exhibited two letters from BCA Bank (in Indonesia) showing credit facilities to Berkah of US\$5.815 million in 2013 and US\$2.899 million in 2015,³⁸ the letters were in Bahasa Indonesia and not translated, and in any event there is no evidence that the facilities had been drawn down on, or that BCA Bank had demanded any payment from Berkah, much less that REL's or Aathar's guarantee had been called on.

Documents adduced after the Chairman's Report

46 Next, I consider the evidence adduced *after* the Chairman's Report, as the Nominee and Aathar are relying on them to show that the claims against Aathar were genuine and that the Nominee's adjudication of the Indon Entities' claims for the purposes of the Creditors' Meeting was reasonable and correct. I

³⁶ Chairman's Report at [107].

³⁷ Chairman's Report at [108]; Gunawan's 2nd Affidavit.

³⁸ Gunawan's 2nd Affidavit at exhibit HG-6.

find that the documents filed after the Chairman’s Report do not satisfy the requisite degree of proof or show the chain of demands.

Berkah

47 I turn first to documents related to Berkah. Aathar claimed that PT Windu (“Windu”), PT Marine Multi Trade (“MMT”) and BCA Bank are Berkah’s Creditors under the SCG Deeds.³⁹

48 Windu’s claim against Berkah centred on a “coal buy sell contract” (“Coal Contract”) dated 12 May 2014 between Windu (as seller) and Berkah (as buyer) for Rp 450,000 per metric ton. The following evidence was adduced pertaining to the Coal Contract.⁴⁰

(a) On 7 December 2015, Berkah’s letter to REL informed Aathar that REL had failed to perform its obligations under the SCG Deed, and that “[Berkah] together with [Fajar] ... and [Entete] will be writing to [Aathar] on the failure to perform the [SCG Deed]”.⁴¹ Even though the Indon Entities are separate entities, Berkah’s letter expressed all three entities’ collective position against Aathar.

(b) On 16 December 2015, Berkah wrote to Aathar enclosing a breakdown of the amounts owed to *all three Indon Entities*, seeking payment of the same.⁴²

³⁹ 18/6/20 NE at pp 13–14.

⁴⁰ BD at p 25; 18/6/2020 NE at pp 3–4.

⁴¹ BD at p 35.

⁴² BD at pp 36–38.

(c) On 5 April 2016, Windu sent a demand letter to Berkah for a “settlement” payment within 14 days, failing which Windu would “look for your personal guarantee and the guarantee offered from [REL]”.⁴³

(d) Around 19 April and 18 August 2016, Berkah issued two cheques of Rp 4,639,100,000 and Rp 38,500,000,000 respectively to Windu. These coincided with the sums claimed in the 5 April 2016 demand letter. On 18 August 2016, Berkah wrote to Windu confirming that a cheque of Rp 38,500,000,000 had been paid to Windu “for compensation as agreed in our settlement for the [SCG Deeds]”.⁴⁴

49 The above documents cast doubts on the veracity of Berkah’s claim *vis-à-vis* Aathar. First, Berkah’s 7 December 2015 letter is unclear as to what obligation REL had failed to perform. Second, Windu’s demand to Berkah was dated 5 April 2016, *after* Berkah wrote to Aathar (in December 2015) seeking his performance of the guarantee. There are *no prior letters* showing what Berkah owed Windu and defaulted payment on, before Berkah wrote to REL/Aathar in December 2015 to demand payment. Also, in the 16 December 2015 letter to Aathar, Berkah claimed that the outstanding amount owed as at 31 December 2015 was \$29,549,108, but separately, its breakdown showed a figure of \$21,226,381.64. Fourth, Rp 38,500,000,000 and Rp 4,639,100,000 *had already been paid* by Berkah to Windu (see [48(d)] above), and this was after Berkah’s demand letters to REL/Aathar in December 2015. There would thus be no performance left for REL, much less Aathar, to guarantee pertaining to those sums. Finally, there is no evidence of Berkah having followed up with

⁴³ BD at p 41.

⁴⁴ BD at pp 42 and 46–48.

Aathar, after 18 August 2016 (when Berkah had made payments to Windu), as to the amount Berkah still owed Windu and had not discharged.

50 In relation to MMT, its claim against Berkah centred on a 24 May 2014 contract to supply barges to Berkah for Berkah’s mining project (“Vessel Contract”). The following evidence was adduced for the Vessel Contract: (a) an invoice dated 13 June 2016 from MMT claiming Rp 3.5 billion from Berkah for the cancellation of barges; and (b) Berkah’s payment on the same day of Rp 3.5 billion to MMT.⁴⁵ As the Rp 3.5 billion had *already been paid* by Berkah to MMT, there is similarly no basis to demand payment from REL as guarantor, much less from Aathar, pertaining to that sum.

51 Finally, the documents produced in relation to BCA Bank (which were in Bahasa Indonesia and untranslated) were what seemed to be “time loans” from BCA Bank to Berkah dated 3 January 2013 and 29 January 2015.⁴⁶ However, it is unclear whether the loans were drawn down by Berkah and, if so, when and for how much. In any event, as there are no demand letters to REL on the loans (much less the quantum of the demand), it is unclear how Aathar’s liability under the SCG Deed had been triggered.

Fajar

52 The only purported Creditor in relation to Fajar is Indokal, and this pertains to the Cooperation Agreement between Indokal and Fajar with REL as guarantor (“Cooperation Agreement”). On 20 March 2015, Fajar informed REL to prepare “joint funding” for the Cooperation Agreement. On 25 April 2015,

⁴⁵ 18/6/20 NE at p 4; BD at pp 30–31, 43–45.

⁴⁶ BD at pp 8 and 32.

Indokal issued an invoice of US\$3 million to Fajar, and Fajar then paid US\$3 million to Indokal (as confirmed by Indokal on 4 May 2015).⁴⁷

53 The following then ensued.⁴⁸ On 13 July 2015, Indokal wrote to Fajar to confirm that Fajar would pay a balance of US\$9 million in instalments from 30 June 2015 to 31 January 2016. Then, on 2 December 2015, Indokal demanded from Fajar payment within 7 days of US\$6 million in mining costs and US\$36 million as “minimum TFF” costs. On 3 December 2015, Indokal issued an invoice of US\$6 million to Fajar, and on 4 December 2015, Indokal wrote to Fajar setting out a revised claim for the TFF costs (which was reduced to US\$23,760,000), and for a further sum of US\$3.96 million. On 5 December 2015, Fajar informed REL of the default notice from Indokal. On 16 December 2015, Fajar wrote to REL (addressing Aathar) to demand payment for all three Indon Entities – in particular, Fajar stated that the amount owing to it (as at 31 December 2015) was \$31 million. On 21 December 2015, Indokal confirmed receipt of payment of US\$6 million from Fajar. On 5 January 2016, Indokal sent an invoice of US\$6 million to Fajar, and on 20 January 2016 it wrote to Fajar setting out a payment of another \$6 million. On 4 February 2016, Indokal wrote to Fajar confirming receipt of US\$6 million. Finally, on 7 March 2016, Fajar informed Aathar that he owed Fajar \$31 million under the SCG Deed, and reiterated the claim in its letter on 27 September 2017 to Aathar.

54 Likewise, I find the documents cast doubts on the veracity of Fajar’s claim against Aathar. Again, it is odd that Fajar demanded payment from REL for all three Indon Entities. Pertinently, REL was a party to the Cooperation

⁴⁷ BD at pp 80–88, 90 and 92.

⁴⁸ BD at pp 95, 97, 99, 101, 102, 104, 108, 110, 112, 114–120; 21/2/20 NE at p 2.

Agreement and by article 2.4 of that agreement, REL was to guarantee “the performance of [Fajar] and will pay all money owed by [Fajar] to [Indokal] if [Fajar] does not pay the amount owed to [Indokal]”. Hence, REL’s obligation was to pay *Indokal* what Fajar owed and failed to pay Indokal. If so, a demand to REL should have been a demand to pay Indokal, of which there was none.

55 In any event, it is unclear how much Fajar owed Indokal in total, particularly after it had paid Indokal US\$15 million. Fajar’s letters to REL and Aathar in December 2015 to demand \$31 million preceded Fajar’s two payments of US\$6 million each in December 2015 and February 2016. After Indokal’s letter of 4 February 2016 to Fajar to confirm receipt of US\$6 million from Fajar, there was no evidence of the outstanding amount that Fajar still owed Indokal, before Fajar sent its 7 March 2016 letter to Aathar to state his liability was \$31 million. There was also no evidence that anyone had asked REL to discharge the guarantee, which REL failed to do, before Aathar was called upon to pay \$31 million. Indeed, Fajar’s demand from Aathar in March 2016 of \$31 million was the same amount that it demanded from REL/Aathar in December 2015, although Fajar had paid Indokal US\$12 million in the interim.

Entete

56 Entete’s only purported Creditor is BBK, and this pertains to a 5 September 2014 agreement for management and distribution of business results between BBK and Entete (“Management Agreement”).⁴⁹

⁴⁹ 18/6/2020 NE at p 5; BD at pp 144–154.

57 On 16 December 2015, Fajar wrote to REL and Aathar to demand payment for all three Indon Entities, including \$28 million for Entete owing as at 31 December 2015. On 7 April 2016, BBK wrote to Entete demanding payment of US\$21,500,000. Then, on 22 May 2016, BBK wrote to Entete to “warn” Entete that it and REL “failed in contract and did not pay obligations in full other than five payments of USD 1,000,000 each” and requested Entete to “make the required payments”.⁵⁰

58 Again, Fajar’s demand letter to Aathar was sent on 16 December 2015 *before* BBK even called upon Entete (or REL) to satisfy the debts (on 7 April and 22 May 2016). Also, it was odd that *Fajar* was chasing REL/Aathar for moneys purportedly owing to *Entete* – there is no evidence that Fajar was Entete’s agent for this purpose. Next, BBK’s letter of 22 May 2016 showed that Entete had paid BBK US\$5 million but did not state the outstanding sum that Entete owed to it. It is thus unclear what BBK’s outstanding claim against Entete was (and which triggered the amount which Entete claimed REL and Aathar owed, being \$30.8 million based on its notice of claim to the Nominee dated 26 March 2019⁵¹). Then, on 29 September 2017, Entete informed Aathar that the amount he owed as at 30 June 2017 under the SCG Deed was \$28 million. Again, no details were provided on how this quantum was derived.

59 Aathar then sought to rely on a table (“the Table”) exhibited by Candra to show the liabilities that Entete incurred to its Creditors as a result of REL’s failure to meet these liabilities and to support Entete’s claims against Aathar in the 3rd VA.⁵² A perusal of the Table revealed inconsistencies in the Nominee’s

⁵⁰ BD at pp 157–159, 161 and 165.

⁵¹ Chairman’s Report at [95].

⁵² 21/2/20 NE at pp 6–7; Candra’s 1st Affidavit at [8] and exhibit JC-1.

and Aathar's positions in relation to Entete's liability to its Creditors. First, Entete claimed \$83 million under the SCG Deed which comprised moneys owed to BBK "as a result of failure of [REL's] performance" and "other 3rd party claims". This is inconsistent with Aathar's position before me that Entete had only one Creditor, namely BBK.⁵³ If the "other 3rd party claims" were disregarded, the amount purportedly owing to BBK pursuant to the Table was some \$42,713,472. Second, the Table showed Entete claiming against REL 50% of the \$83 million, on the basis that REL's liability was "joint and several", presumably with Entete. If that were the case, 50% of the amount owing to BBK would be about \$21,356,736, which is lower than Entete's claim submitted to the Nominee of about \$30.8 million and also lower than the maximum guaranteed limit of \$25 million that the Nominee had placed on its claim for the purposes of voting (see [11] above). When queried on all these figures that did not tally, the Nominee agreed that he did not know the basis for the figures and how Entete arrived at its claim of about \$30.8 million submitted to him.⁵⁴ The Table was merely one page with no explanation of how the figures were derived.

60 Hence, I find the veracity of Entete's claim against Aathar to be doubtful.

Conclusion

61 In the round, the documents which the Nominee had sight of before the Creditors' Meeting, and even after the meeting but before the Chairman's Report was prepared, did not show how REL's and Aathar's obligations had been triggered or how the quantum of each of the Indon Entities' claims had

⁵³ 18/6/20 NE at p 13.

⁵⁴ 18/6/20 NE at pp 6–7.

been derived. The documents adduced after the Chairman’s Report also cast doubt on the Indon Entities’ outstanding liabilities to their Creditors, particularly when they had made payments to their Creditors.

62 Pertinently, a demand by an Indon Entity against REL to pay *the Indon Entity* would have been inconsistent with REL’s obligation as a guarantor to the Creditor. I agree with the AR that there were no documents to show that a Creditor had called upon the guarantees given by REL. As for Aathar’s obligation, assuming the underlying debts were genuine, there was no evidence that Aathar was asked to pay the Creditor or what loss or damage the Indon Entity had suffered as a result of REL’s default to pay the Creditor and for which the Indon Entity had demanded that Aathar make good (see [38] and [39] above).

Whether materials adduced after a creditors’ meeting may be used to justify a nominee’s adjudication of claims

63 The next issue is whether the evidence obtained by the Nominee after the Creditors’ Meeting (“post-meeting evidence”) can be used to justify his adjudication or decision for the purposes of voting at the Creditors’ Meeting, as Aathar and the Nominee submitted.

64 Rule 84(2) of the Rules states that creditors’ votes shall be calculated according to the amount of debt as “at the date of the meeting”. Thus, that date is a reference point for a creditor’s *quantum* of debt, and not for the *evidence* to prove that quantum. There is nothing in the BA or the Rules to suggest that post-meeting evidence as to the quantum of debt *vis-à-vis* a creditor cannot be considered by the court.

65 In *Re a Company* ([39] *supra*), the issue was whether the official receiver, who had presided over a creditors’ meeting, was right in admitting SBP Ltd’s claim as “objected to” and allowing it to vote at the meeting. The court held that the task of the court on an appeal under r 4.70(4) of the Insolvency Rules 1986 (UK) (substantially similar to r 84(7) of the Rules) is “simply to examine the evidence placed before it on the matter and come to a conclusion whether, on balance, the claim against the company is established and, if so, in what amount” and that, in considering the matter, “the court is not confined to the evidence that was before the chairman at the time that he made his decision but is entitled to consider whatever admissible evidence on the issue the parties to the appeal choose to place before the court”. The court found that the evidence before him showed that SBP Ltd – whose claim was for damages against the debtor company – had abandoned that claim prior to the company being wound up. Thus, it was not entitled to be admitted to vote at the creditors’ meeting. Consequently, while the official receiver’s decision to admit SBP Ltd’s claim was correct on the information then available to him, that decision was no longer correct and was reversed by the court.

66 In *Re a debtor (No 574 of 1995)* [1998] BCLC 124 (“*Re A Debtor*”) the issue was whether approval for a VA entered into by Mr Scher should be revoked, *inter alia*, on the ground of material irregularity. NWB, the applicant creditor, submitted that the votes of certain creditors were counted in favour of the proposal when the existence and enforceability of their debts were not established, whether on the material available to the chairman of the meeting or to the court. The court held that *Re a Company* was applicable to a challenge to a chairman’s decision under r 5.17 of the Insolvency Rules 1986 (UK) (substantially the same as r 84(6) of the Rules). The court was thus not confined to the evidence that was before the chairman but was entitled to consider further admissible evidence placed before it. The court took into account documents

and an affirmation by Mr Scher made after the creditors' meeting and found that the debts were incurred as genuine obligations of Mr Scher, and that they were thus "properly to be considered as debts for the purpose of voting".

67 Likewise, in *Revenue and Customs Commissioners v Maxwell* [2010] EWCA Civ 1379 at [61], relating to a creditors' meeting in administration proceedings, the Court of Appeal held that whilst the quantification and characterization of a debt is to be assessed at the date of administration (based on the interpretation of the Insolvency Rules 1986 (UK)), the court was not restricted to the evidence that was available as at that date for the purposes of ascertaining the figures of the debt.

68 Thus, evidence that comes to the attention of a nominee or the court after the nominee had adjudicated on the debt and even after the creditors' meeting held for the purposes of voting (whether or not such evidence was available before or after that time) may be considered by the court for the purposes of determining, on balance, if the claim is established and the quantum of the claim for the purposes of the claimant's entitlement to vote at the meeting.

69 However, the authorities do not stand for the broad proposition that evidence adduced subsequent to a creditors' meeting can always be considered by the court in determining whether a material irregularity existed at or in relation to the creditors' meeting. The relevance of post-meeting evidence would depend on the nature of the evidence and the purpose for adducing it. Where the issue is whether the nominee has discharged his duty of independence and scrutiny in determining whether a claim should be admitted for the purposes of voting, it is the nominee's state of mind and conduct at or before the creditors' meeting (for the purposes of voting) which is material, and hence one must look at what was actually presented to the nominee at or before

the creditors’ meeting. Likewise, whether a debtor has discharged his duty of full disclosure and candour must be based on his conduct (*eg*, what he had disclosed or revealed) at the time he should have made the disclosure.

Whether there were any material irregularities

70 I turn then to examine the central issue of whether there were material irregularities at or in relation to the Creditors’ Meeting and in relation to the adjudication of the Indon Entities’ claims (*ie*, the veracity and amount of debt). I am satisfied that there were.

Adjudication of the Indon Entities’ claims for the purposes of voting

71 The Nominee had admitted the Indon Entities’ claims on an “objected to” basis and adjudicated the quantum of the claims at the respective maximum guaranteed values. The “objected to” procedure is not an excuse for a nominee to admit all alleged claims by a creditor. A nominee must discharge his duty of independence and scrutiny and *satisfy himself* that a creditor’s alleged claim is credible. As the Court of Appeal in *Aathar CA* ([3] *supra*) stated at [53]:

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

72 The Nominee had to scrutinise the Indon Entities’ claims to see if they were supported by objective evidence, before admitting the claims for the purposes of voting. He had to satisfy himself that he had “received adequate information that goes to the veracity of the debts” and to cast a “critical eye” on the debtor’s statement of assets and liabilities (*Aathar CA* at [89]). This is especially when serious doubts had been raised as to the veracity of the Indon

Entities' claims in the previous VAs, of which the Nominee was aware. The Nominee therefore had a heightened duty of scrutiny in the present case. It is no excuse for him to say that OUELH could have inspected the documents before the Creditors' Meeting (see *Aathar CA* at [88]).⁵⁵

73 In order to consider if the Indon Entities' debts are genuine and of the value claimed against Aathar, the court can look at the post-meeting evidence. Prior to the Creditors' Meeting, the Nominee did not have sight of supporting documents to show the requisite chain of demands. Likewise, the post-meeting evidence did not on balance establish the Indon Entities' claims against Aathar and the amount thereof. There were doubts on the veracity and quantum of the outstanding claims of the Creditors *vis-à-vis* the respective Indon Entity; any demand against REL should have been a demand to pay a Creditor; and any debt owed by Aathar is owed to a Creditor or, if owed to an Indon Entity, the Indon Entity had to show the loss or damage to it because of REL's failure to discharge its guarantee to pay a Creditor. I repeat the analysis and findings at [32]–[62] above. The Nominee should have rejected the Indon Entities' claims, instead of marking them as “objected to”, and disallowed them from voting.

74 Allowing a person who is not entitled to vote to do so amounts to a material irregularity at or in relation to the creditors' meeting (*Re A Debtor* ([66] *supra*) at 127). The case of *Andrew Fender v The Commissioners of Inland Revenue* [2003] EWHC 3543 (Ch) (“*Andrew Fender*”) is instructive. The debtor seeking a VA was one Lloyd. The nominee and chairman of the creditors' meeting was Fender. The vote of one Greville, a key creditor, was challenged. Lloyd's debt to Greville had allegedly come about through a guarantee for rugby

⁵⁵ 21/2/20 NE at p 15.

tickets that “the Debtor” had bought. Fender had admitted Greville to vote for £141,000 based on a personal guarantee in respect of tickets Greville sold to ALP (Lloyd’s creditor) and a draft balance sheet produced by Lloyd’s accountants. The guarantee did not identify the party whose obligation was being guaranteed, there was no supporting invoice in respect of any supply by Greville to anyone, and the balance sheet did not show any liability to Greville.

75 The English High Court held that the original approval for Lloyd’s VA was obtained by the wrongful admission of Greville’s vote. The Court highlighted the principle that “[l]iability does not arise under a guarantee *until the principal obligor has made default*” [emphasis added]. Lloyd’s liability was not dependent on the making of a demand on him by Greville, but dependent on the principal obligor’s (ALP’s) failure to perform. The liability under the guarantee was a contingent liability for an unascertained sum. Hence, Fender “should have excluded the Greville vote unless he agreed to put an estimated *minimum* value on the debt”, but there was “no basis on which he could properly put a *minimum* value of £141,000”. The draft balance sheet did not show that Greville claimed that sum from ALP, and ALP’s financial statements showed that it might not have received any rugby tickets and hence there was no evidence that the primary obligation had arisen. Thus, to say that the minimum value of Greville’s claim was £141,000 demonstrated “a serious falling short of the standards to be expected of a competent insolvency practitioner”. The Court upheld the decision of the District Judge to revoke the approval given of the VA and ordered that no further creditors’ meeting should be convened.

76 In the present case, I am not satisfied that, on balance, the Indon Entities’ claims against Aathar were established. As in *Andrew Fender*, it was incumbent on the Nominee to check and ask for the supporting documents to prove the chain of demands, particularly as this is Aathar’s *third* attempt at a VA. As the

Indon Entities were also part of the previous proposed VAs, there is simply no excuse for them to *still* be unable to provide the underlying supporting documents to the Nominee at or before the Creditors’ Meeting. This is particularly when all the documents (including the post-meeting documents) would have been in existence since *2017 and before, many of them even in existence since the proposed 1st and 2nd VAs and well before Aathar filed his third VA application in 2019*. As such, I find that there is a material irregularity in admitting the Indon Entities’ claims and at the maximum guaranteed value under the SCG Deeds (even if marked as “objected” to) and allowing the Indon Entities to vote on that basis.

Nominee’s duty of independence and scrutiny

77 I also find that the Nominee has failed to discharge his duty of independence and scrutiny, which amounted to a material irregularity. In this regard, the post-meeting evidence could not, in my view, be taken into account (see [63]–[69] above).

78 First, the Nominee admitted the Indon Entities’ claims and allowed them to vote up to the maximum guaranteed value under the SCG Deeds, even though he did not see any supporting documents to prove the requisite chain of demands. This is despite the fact that the Nominee was well aware of the decision in *Aathar CA* ([3] *supra*) that it was *already* incumbent on the nominee in the proposed 2nd VA to be “circumspect” about “the veracity of the explanations put forth” by Aathar and the creditors, given the various doubts that had already arisen during his proposed 1st VA.

79 Next, the Nominee then informed the creditors, at the start of the Creditors’ Meeting, that the purpose of the meeting was “not to discuss the adjudication of debts or details of the same” but to discuss the amended

proposal.⁵⁶ As the Final Adjudication was circulated to the creditors only one day before the Creditors' Meeting, it would not be unreasonable for the creditors to raise objections, regarding the Nominee's adjudication of the debts, only at that meeting. Yet, the Nominee had forbade the creditors from doing so. This suggests that he was not acting objectively or independently from the get-go. Indeed, the Nominee had previously represented to the AR on 30 April 2019 (at a hearing pertaining to the application for a creditors' meeting to be called) that he would adjudicate the specific quantum of the debts, and *hear representations on the proper values to be attributed to the claims* at the creditors' meeting if the court were to approve it to be called.⁵⁷

80 In these circumstances, I find that the Nominee was bending over backwards for Aathar to enable the proposed 3rd VA to succeed. This can also be seen from the way the Nominee conducted the process and his manner of adjudication. The Nominee's approach towards the Indon Entities' claims was inconsistent with his approach to the Litigation Claims. He had applied a 90% discount to the Litigation Claims, on the basis that they were contingent claims dependent on the outcome of the litigation and that they had not crystallised at the time of the Creditors' Meeting.⁵⁸ However, despite stating that the Indon Entities' claims were also contingent claims,⁵⁹ the Nominee did not discount them at all but allowed them to be admitted up to the *maximum* value under the SCG Deeds. This is even though, at the time of adjudicating the claims for the purposes of voting, he was content with the SCG Deeds and documents which

⁵⁶ Chairman's Report at p 2266.

⁵⁷ 30/4/19 NE at p 6.

⁵⁸ Nominee's Affidavit at [115].

⁵⁹ Nominee's Report (dated 22 April 2019) at pp 349–351 (s/n 14, 16 and 38 pertaining to the Indon Entities).

merely showed the Indon Entities having made claims to REL or Aathar and no more. Then, after the Creditors' Meeting and before preparing the Chairman's Report, he attempted to obtain more evidence to shore up his adjudication of the Indon Entities' claims (see [45] above). All these raise questions about the Nominee's judgment and independence in adjudicating the creditors' claims (particularly the treatment of the Indon Entities' claims).

81 Then, at the appeal before me, the Nominee argued that REL and Aathar were the primary obligors under the SCG Deeds, which is clearly inconsistent with his position when he had marked the Indon Entities' claims as "objected to" (see [11] above). The Nominee also argued before me that claims by the Crest Entities, which he had discounted by 90% for the Creditors' Meeting,⁶⁰ should now be given a nil or nominal value, as they have been substantially reduced as a result of the Court of Appeal's decision pertaining to some of these claims. As such, the proposed 3rd VA would nevertheless succeed (even assuming that the Indon Entities' claims should be excluded) as the 75% requisite threshold in value would still be crossed.⁶¹ This submission further called into question the Nominee's objectivity in the entire process. This is especially given that no one, including the Nominee, had appealed against the AR's decision on the Crest Entities' claims. Also, the Crest Entities were not notified of these proceedings even though the Nominee agrees that they should be given an opportunity to be heard pertaining to any consideration of the merits of their claims (particularly where the Nominee is arguing for a downward revision of those claims).⁶² Nevertheless, as to whether the Crest Entities' claims

⁶⁰ Chairman's Report at [185]–[207].

⁶¹ Nominee's Submissions at [114] and [117]–[120].

⁶² 18/6/20 NE at pp 6–7.

should be reduced, I will return to this cursorily (as I do not think it is appropriate to deal with it), to show that the Nominee's argument (and Aathar's argument in the same vein) would fail (see [90] to [93] below).

82 I also add that, in relation to the Golden Cliff claim, Litigation Claims and Enterprise Fund II claim which the Nominee had adjudicated and included for the Creditors' Meeting, the AR had found no material irregularities in the adjudication or inclusion and the AR's decision pertaining to these claims were not appealed against. Aathar's appeal before me is only in respect of the AR's decision that there was a material irregularity in including the Indon Entities' claims of \$65 million and the revocation of the approval given at the Creditors' Meeting.⁶³ Hence, whilst OUELH submitted on these claims in its written submissions on the appeal, I will not deal with whether these claims were properly adjudicated or included (save for the limited purpose relating to the Crest Entities' claims as stated at [81] above).

Aathar's duty of candour and full disclosure

83 I find that Aathar has also failed to discharge his duty of candour and full disclosure. A debtor who puts forward a proposed voluntary arrangement should not only be honest, but should also take care to put all relevant facts before the creditors, and the onus is on him to be forthcoming to his creditors (*Aathar CA* ([3] *supra*) at [76]). Aathar had failed to provide full and frank disclosure of the Indon Entities' claims, by failing to provide supporting documents to prove the chain of demands at or before the Creditors' Meeting. This is despite the fact that this is his third attempt at a VA, the Indon Creditors have been claiming the debts since the proposed 1st VA, and the documents

⁶³ See Notice of Appeal in RA 310 of 2019 (filed on 15 October 2019).

which could have shown the chain of demands would have been available since 2017 if not earlier. Any documents to show a Creditor calling on REL to discharge its obligation to the Creditor, if it existed, would have been within the ability of Aathar (who owned REL) to provide, well before the Nominee had adjudicated the Indon Entities' claims and before the Creditors' Meeting.

84 Further, the slow and piecemeal manner in which the evidence and documents came about (including those mentioned at [35] above produced only after the Chairman's Report) suggests that the Indon Entities and Aathar/REL have been slow to give a complete picture in relation to the SCG Deeds, the Creditors and the outstanding amounts owed to them by the Indon Entities.

85 I also find that Aathar has been less than honest in relation to the funding provided by PT Cahaya for the proposed 3rd VA. In Aathar's amended proposal for the 3rd VA dated 5 April 2019 prepared for the purpose of recommending a creditors' meeting to be called, he proposed that \$2.5 million be set aside to pay the creditors over four years from the approval of the VA, and that, out of this sum, the Nominee's remuneration would be paid in priority. The \$2.5 million to be provided by PT Cahaya would be in exchange for Aathar's services as an "exclusive consultant" to it for five years.⁶⁴ Herman (PT Cahaya's representative) had attested, shortly before the Creditors' Meeting (and whose affidavit was placed before the creditors only on the day of the Creditors' Meeting), that PT Cahaya had agreed to contribute the \$2.5 million "to be paid via the Nominee to [Aathar's] creditors" in instalments with the first instalment to be paid within two months after approval under s 51(1) of the BA is obtained. Interestingly, Herman further attested that PT Cahaya had "already advanced

⁶⁴ Nominee's Report dated 22 April 2019 at p 70 (paras 1.16A–1.17A of the amended VA proposal dated 5 April 2019).

S\$100,000 out of the S\$2,500,000 to help [Aathar] in his IVA legal fees”.⁶⁵ This was contrary to Aathar’s proposal that the \$2.5 million would be used to pay his creditors (and the Nominee). Strangely, at the hearing before me, and in response to a query *from Aathar’s counsel* as to whether the first \$200,000 instalment had been paid, the Nominee claimed that *no payment has yet to be made by PT Cahaya*.⁶⁶ All these cast doubts on whether Aathar has been fully honest about the funding from PT Cahaya.

Miscellaneous issues

86 Based on all the above, I find that there were material irregularities at or in relation to the Creditors’ Meeting. For completeness, I consider some of the other submissions raised by Aathar and the Nominee.

Whether the creditors voted with their eyes open

87 The Nominee submitted that there was no material irregularity as the creditors voted with “full knowledge” of the facts of the Indon Entities’ claims. The creditors were invited to inspect the underlying supporting documents but they chose not to, and the Final Adjudication was circulated to them.⁶⁷

88 The same submission was made in *Aathar CA* ([3] *supra*) at [88]. The Court of Appeal (at [89]) rejected this and held that a nominee’s duty of diligence and scrutiny “cannot be abdicated to the creditors, no matter how savvy or well represented”, and the nominee must satisfy himself that he has

⁶⁵ Chairman’s Report at [230]; Herman’s 1st affidavit (dated 24 May 2019) (“Herman’s 1st Affidavit”) at [4] and [21].

⁶⁶ 18/6/20 NE at p 19.

⁶⁷ Nominee’s Submissions at [52]–[53]; 21/2/20 NE at p 15.

received adequate information that goes to the veracity of the debts. Hence, the Nominee cannot discharge his duties of independence and scrutiny by merely inviting the creditors to inspect the supporting documents and preparing the Final Adjudication which, in any event, the creditors had sight of only one day before the Creditors' Meeting.

89 In any event, the Nominee was unable to show that he had given notice to the creditors to inspect the supporting documents pertaining to the creditors' claims, and the first time he informed the creditors of the identity of all the creditors for the proposed 3rd VA and their respective proofs of debts including his adjudication was on 28 May 2018, a day before the Creditors' Meeting.⁶⁸ This cast doubts on the Nominee's claim that he had invited the creditors to inspect the supporting documents.

Crest Entities' claims

90 Finally, I deal briefly with the Crest Entities' claims totalling S\$66,620,107.12 in the proposed 3rd VA.⁶⁹ This claim includes components for principal and interest allegedly owed to the Crest Entities under the Standby Facility (see [8] above), in respect of which Aathar had entered into a personal guarantee. The Nominee adjudicated and ascribed a value of S\$3,031,133.29 to the Crest Entities' claims and the Crest Entities voted on the basis of this value. The value of S\$3,031,133.29 was derived as follows:⁷⁰

Amount owed under Standby Facility including interest	S\$26,538,407.63
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⁶⁸ 21/2/20 NE at pp 15–18.

⁶⁹ Chairman's Report at [191] and p 2087.

⁷⁰ Chairman's Report at [207].

Default Interest under Geelong Facility	S\$746,930.34
Costs, fees and expenses	S\$3,025,994.95
Total	S\$30,311,332.92
Total after being discounted to 10% of the claim	S\$3,031,133.29

91 Aathar now submits that the Crest Entities' claims should be reduced to S\$377,292.53 as follows:⁷¹

Default Interest under Geelong Facility	S\$746,930.34
Costs, fees and expenses	S\$3,025,994.95
Total	S\$3,772,925.29
Total after being discounted to 10% of the claim	S\$377,292.53

This is because his liability under the Standby Facility has been extinguished, owing to the Court of Appeal upholding the High Court's finding that the Standby Facility was void (see *The Enterprise Fund III Ltd and others v OUE Lippo Healthcare Ltd (formerly known as International Healthway Corp Ltd)* [2019] 2 SLR 524). The High Court decision was rendered before the Creditors' Meeting, whilst the Court of Appeal decision was rendered after that meeting. Aathar submits that if the Crest Entities' claim is reduced to \$377,292.53 and even if the Indon Entities' claim (of \$65 million) is also reduced, the creditor support for the proposed 3rd VA would be 75.25% and would still cross the requisite 75% threshold in value.⁷² The Nominee essentially makes the same argument as Aathar and in support of the proposed 3rd VA (see [81] above).

⁷¹ "IVA Approval – Revised Calculations" (dated 27 February 2020) at [4]; AWS at [63]–[69].

⁷² "IVA Approval – Revised Calculations" (dated 27 February 2020) at [5]–[13].

92 Aathar did not appeal against the Nominee’s adjudication of the Crest Entities’ claims. It was OUELH who had brought the application under s 54 of the BA pertaining to the Litigation Claims (which included the Crest Entities’ claims) and which the AR had dismissed OUELH’s challenge on it as she had found no material irregularity in the Nominee ascribing a 10% value to these claims. Before me, Aathar’s counsel, Mr Goh, clarified that the present appeal pertains only to the Indon Entities’ claims, and when asked why the Crest Entities’ claims were being raised in the present appeal, Mr Goh stated that he had “no idea” and that Aathar was not challenging the Nominee’s adjudication of these claims.⁷³ As such (and given Aathar’s about-turn), it would not be appropriate for me to consider the merits of the Crest Entities’ claims.

93 Nevertheless, for completeness, I would have been unable to accept Aathar’s submission in any event. Rule 84(2) of the Rules provides that votes shall be calculated according to the amount of the debt “as at the date of the meeting”. Hence, there is no basis for recalculating the value ascribed to the debt on the basis of a change in the value occurring after the creditors’ meeting. To allow otherwise would mean that the decision of the creditors whether to approve a VA could potentially be reopened whenever a contingent creditor’s claim is crystallised, modified or extinguished after the meeting. Even if the point that Aathar (and the Nominee) wishes to make is that the court should take this into account to allow a further creditors’ meeting to be convened, I would not have allowed this (see [95] to [96] below).

⁷³ 18/6/20 NE at pp 6–7.

Conclusion

94 In conclusion, I agree with the AR that the approval given at the Creditors' Meeting should be revoked. There were several material irregularities in Aathar's proposed 3rd VA, and the Indon Entities' claims totalling \$65 million should have been disregarded for the purposes of voting.

95 In *Andrew Fender* ([74] *supra*), the English High Court, in determining that no further creditors' meeting should be convened, stated at [31]:

Mr Fender has shown a serious lack of competence both in his assessment of the Greville claim and in the expression of an opinion which he did not hold ... The only point of a further meeting would be to enable Mr Fender to exercise the power conferred by Rule 5.17(3) as to the assessment of the minimum value of the Greville claim. *Having regard to the way in which he and Mr Lloyd approached the task in the past I do not think it fair to the creditors as a whole that he should be invited to exercise the power again.* [emphasis added]

96 I am of the view that the same applies to the present facts. The material irregularities go beyond mere procedural breaches that can be rectified by summoning another creditors' meeting, and relate to the Nominee's abject failure to fulfil his duty of independence and scrutiny and Aathar's failure to discharge his duty of candour and disclosure. There is no assurance that directing the Nominee to summon another creditors' meeting will rectify the issue. In any event, having discounted the Indon Entities' claims of \$65 million, the value in support of Aathar's proposed 3rd VA would be about 74.12% in value (see [18] above), which would fall below the 75% threshold. I reiterate: the Nominee and Aathar were well aware of the previous court decisions pertaining to the 1st and 2nd VAs. It was thus incumbent on the Nominee to exercise a greater degree of scrutiny and care in assessing the proposed 3rd VA and to ensure that he discharged his duty of independence and objectivity. It was also incumbent on Aathar to fulfil his duty of candour and honesty and to

put forth all relevant facts and material before the creditors. The documents that were put forth after the Creditors' Meeting and Chairman's Report were in existence since 2017 or earlier (based on the dates of the documents), yet they were not disclosed before the Creditors' Meeting.

97 I thus dismiss the appeal. I will hear the parties on costs.

Audrey Lim
Judge

Goh Kok Leong and Ng Wei Ting (Ang & Partners) for the
appellant;
Jansen Chow and Sasha Gonsalves (Rajah & Tann Singapore LLP)
for the respondent;
Andre Arul and Adrian Kho (Arul Chew & Partners) for the
Nominee.
