Re Swiber Holdings Ltd and another matter
[2018] SGHC 180

Case Number	: Originating Summonses Nos 767 and 768 of 2016 (Summonses Nos 3426 and 3427 of 2017)
Decision Date	: 16 August 2018
Tribunal/Court	: High Court
Coram	: Kannan Ramesh J
Counsel Name(s)	: Sim Kwan Kiat, Wilson Zhu and Quek Teck Liang (Rajah & Tann Singapore LLP) for the Judicial Managers; Andrew Teo (Allen & Gledhill LLP) for the SUKUK Holders; Probin Dass and Charles Lim (Shook Lin & Bok LLP) for DBS Bank; Keith Tnee, Geraint Kang, Siaw Hui and Pang Hui Min (Tan Kok Quan Partnership) for United Overseas Bank Ltd; Kenneth Lim and Wong Pei Ting (Allen & Gledhill LLP) for United Overseas Bank Ltd (as the Security Agent for United Overseas Bank Ltd, the Governor and Company of the Bank of Ireland, Bank of America, NA and UniCredit Bank AG); Muzhaffar Omar (Wong & Leow LLC) for Siam Commercial Bank Public Company Limited, Singapore branch; Sonia Chan (JLC Advisors LLP) for Offshore Engineering Pioneer Services Pte Ltd; Mabel Tan (Virtus Law LLP) for ICBC; Geraldine Yeong Kai Jun (Dentons Rodyk & Davidson LLP) as young amicus curiae.
Parties	: Swiber Holdings Ltd — Swiber Offshore Construction Pte Ltd

Companies – Receiver and manager – Judicial management order

16 August 2018

Kannan Ramesh J:

1 A company is placed under judicial management. The judicial managers summon a meeting of the creditors. Under reg 74 of the Companies Regulations (Cap 50, Rg 1, 1990 Rev Ed) ("the Regulations"), a "secured creditor" who does not surrender its security may only vote in respect of the unsecured element (if any) of its claim. Yet who is a secured creditor for the purpose of reg 74? More precisely, is a creditor who holds a security over the property of a third party instead of the property of the company (a "third-party security") a secured creditor for the purpose of reg 74? Further, where the judicial managers call a meeting for the approval of a scheme of arrangement, may such a creditor vote for the full value of its claim? Finally, how does the analysis change, if at all, where the creditor has realised the security after lodging the proof of debt? Must the creditor update the proof of debt to reduce its claim against the company?

2 These interconnected questions were the subject of these applications by the judicial managers of Swiber Holdings Ltd ("SHL") and Swiber Offshore Construction Pte Ltd ("SOC") for directions from the court. Given the novelty of the issues at hand, I appointed a young *amicus curiae*, Ms Geraldine Yeong Kai Jun ("Ms Yeong"), to address me on them. On 3 November 2017, after hearing counsel, I gave the relevant directions and delivered brief grounds of decision. Given the importance of the issues and their full ventilation before me by the admirable work of counsel, I now deliver my full grounds of decision.

Background

3 SHL is the holding company of a group of companies ("the Group") that provides international offshore construction and support services for oil and gas field development. It is listed on the mainboard of the Stock Exchange of Singapore. SOC is the main operational entity in the Group, and is wholly owned by SHL. I will refer to SHL and SOC collectively as "the Companies".

4 The Companies provided corporate guarantees to financial institutions for banking facilities extended to subsidiaries of the Companies. The facilities were secured against assets owned by the subsidiaries (rather than assets owned by the Companies). For example, SHL provided guarantees to United Overseas Bank Limited ("UOB") in consideration of UOB extending facilities to Swiber Atlantis Pte Ltd ("SAPL") and Tuscan Offshore Pte Ltd ("TOPL"), SHL's subsidiaries. The facilities were secured against assets of SAPL and TOPL.

5 In 2015, the Group's financial situation began to deteriorate following a downturn in the oil and gas industry precipitated by a plunge in oil prices. The Companies then became unable to pay their debts as and when they fell due.

6 On 29 July 2016, SHL and SOC applied by Originating Summonses Nos 767 and 768 of 2016 ("OS 767" and "OS 768") respectively to be placed under judicial management. On 6 October 2016, I granted the applications.

The applications

7 On 25 July 2017, the judicial managers of the Companies ("the Judicial Managers") applied by Summonses Nos 3426 and 3427 of 2017 in OS 767 and OS 768 ("the Summonses") respectively for directions on the following issues:

(a) whether creditors of the Companies holding third-party securities should be regarded as secured creditors under reg 74 of the Regulations; and

(b) if such creditors should not be regarded as secured creditors under reg 74:

(i) whether such creditors may vote for the full value of their claims without deducting the value of their third-party securities, for the purpose of reg 74; and

(ii) whether such creditors are required to deduct the value of third-party securities for the purpose of voting in potential schemes of arrangement under s 210 read with s 227X of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act").

8 In the supporting affidavit for the Summonses, Mr Bob Yap Cheng Ghee ("Mr Yap"), one of the Judicial Managers, stated that the Judicial Managers were adjudicating proofs of debt filed by creditors of the Companies, to determine the voting rights of the creditors in respect of the statement of proposals which were being prepared pursuant to s 227M of the Act. The Judicial Managers had received proofs of debt from creditors who had claims against subsidiaries of the Companies secured against the subsidiaries' assets. The creditors also had parallel claims against the Companies based on corporate guarantees issued in respect of the subsidiaries' indebtedness (see [4] above), and had accordingly filed proofs of debt with the Judicial Managers.

9 Mr Yap deposed that there was a lack of clarity as to whether creditors of the Companies who held securities from their subsidiaries were entitled to vote for the full value of their claims in creditors' meetings summoned by the Judicial Managers to consider the statement of proposals. The same issue would arise if the Judicial Managers proposed a scheme of arrangement: a question would

arise over whether, for the purposes of voting, the value of third party securities should be deducted from the value of claims by creditors who held such securities. Given the lack of clarity regarding these issues, the Judicial Managers applied for directions on these matters from the court.

The issues

10 These applications raised the following three issues:

(a) First, is a creditor who holds a third-party security a "secured creditor" for the purpose of reg 74 of the Regulations; and if not, is the creditor entitled to vote for the full value of its claim without deducting the value of the third-party security ("the 1st Issue")?

(b) Second, is a creditor required to deduct the value of a third-party security for the purpose of voting in potential schemes of arrangement under s 210 read with s 227X of the Act ("the 2nd Issue")?

(c) Third, how does the analysis change, if at all, where the creditor has realised the security after lodging the proof of debt ("the 3rd Issue")?

11 At the outset, before addressing these issues, I distinguish two scenarios where a creditor holds a third-party security:

(a) In the first scenario, the creditor's claim against the company is secured against the property of a third party.

(b) In the second scenario, the creditor's claim against the company is not secured against the property of a third party. However, the creditor has a parallel claim against a third party which is secured against the property of the latter.

12 Strictly speaking, this case involved the second scenario because it was the underlying claims against the Companies' subsidiaries, and not the claims against the Companies based on the corporate guarantees, which were secured. Therefore, on the facts, the answers to the 1st and 2nd Issues were plain: the relevant creditors holding third-party securities were not secured creditors and were thus entitled to vote for the full value of their claims, whether for the purpose of approving the statement of proposals or a scheme of arrangement. However, since the parties and the *amicus* focused on the first scenario in their submissions, I will address it in discussing the 1st and 2nd Issues below.

The 1st Issue

The parties' submissions

13 The Judicial Managers submitted that a creditor whose claim against the company is secured by a third-party security is not a "secured creditor" for the purpose of reg 74 of the Regulations, for the following reasons:

(a) First, a creditor whose claim is secured by a third-party security is not a "secured creditor" for the purpose of rr 164(3)–164(4) of the Bankruptcy Rules (Cap 20, R 1, 2006 Rev Ed) ("the Bankruptcy Rules"). Rules 164(3)–164(4) are substantially similar to reg 74 and are the applicable provisions under the personal bankruptcy regime. Further, in serving statutory demands, commencing bankruptcy proceedings and proving for debts, the fact that a creditor

holds a third-party security is irrelevant.

(b) Second, foreign authorities indicate that a creditor whose claim is secured by a third-party security is not a "secured creditor" for the purpose of r 126 of the Companies (Winding Up) Rules (Cap 50, R 1, 2006 Rev Ed) ("the Winding-Up Rules"). Rule 126 is identical to reg 74 and is the applicable provision where a company is in liquidation.

The Judicial Managers submitted that a consistent approach should be adopted across the personal bankruptcy, liquidation and judicial management regimes in relation to the relevance of third-party securities to the votes of creditors.

14 UOB, who submitted a proof of debt to the Judicial Managers based on the corporate guarantees executed by SHL in its favour (see [4] above), similarly contended that a creditor whose claim is secured by a third-party security is not a "secured creditor" for the purpose of reg 74. UOB also emphasised that under the bankruptcy regime, the term "secured creditor" does not include a creditor whose claim was secured by a third-party security (see [13(a)] above), and submitted that the term "secured creditor" in reg 74 bears the same meaning.

15 Ms Yeong also submitted that a creditor whose claim is secured by a third-party security is not a "secured creditor" under reg 74 for these reasons:

(a) First, reg 74 should be interpreted in the light of the provisions in the Act pertaining to judicial management, *ie*, ss 227A to 227X of the Act. References to "security" in those provisions are confined to references to security over the property of the company.

(b) Second, a narrow interpretation of the term "secured creditor" was consistent with the purpose of restricting the secured creditors of a company under judicial management from voting in creditors' meetings. The purpose was to prevent secured creditors from scuppering corporate rescue attempts. However, a creditor whose claim against the company was secured by a third-party security would have no impetus to do so.

(c) Third, reading the term "secured creditor" in reg 74 to include a creditor holding a third-party security would go against the grain of the law, which respects a creditor's prerogative to choose between its remedies and does not require the creditor to realise the security. Such an interpretation would also unfairly penalise the creditor if the third party was in liquidation or under judicial management.

Ms Yeong also submitted that the analysis should remain the same even where the third party was a subsidiary or associate of the debtor company.

My decision

16 For the following reasons, I agreed with counsel, who were on common ground, that a creditor whose claim against the debtor company is secured by a third-party security is *not* a "secured creditor" for the purpose of reg 74.

17 First, in my judgment, the answer to the 1st Issue was apparent from the language of reg 74 itself, which states:

Votes of secured creditors

> **74**. For the purpose of voting, a secured creditor shall, *unless he surrenders his security*, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him after deducting the value of his security. If he votes in respect of his whole debt *he shall be deemed to have surrendered his security*, unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence.
>
> [emphasis added]

18 Regulation 74 refers to a creditor *surrendering its security*. First, reg 74 provides that such a creditor may not vote for the full value of its claim unless it "surrenders [its] security". Second, more pertinently, reg 74 provides that a secured creditor who votes in respect of the whole debt shall be deemed to have surrendered its security, unless the omission to value it was due to inadvertence.

19 The concept of surrendering one's security imports the idea of giving up one's rights with the effect of augmenting the debtor's estate, *ie*, increasing the pool of assets available for distribution to the general body of creditors. This is what surrendering security means under the personal bankruptcy regime: see *Chan Siew Lee Jannie v Australia and New Zealand Banking Group Ltd* [2016] 3 SLR 239 ("*Jannie Chan*") at [20], citing *In re Turner, ex parte West Riding Union Banking Company* (1881) 19 Ch D 105 ("*In re Turner*") at 112, *per* Jessel MR. In my view, the position is the same for the purpose of corporate insolvency.

20 In this light, the fact that reg 74 deems a creditor to have surrendered its security, if it votes for the full value of its claim, strongly suggests that reg 74 does *not* apply to third-party securities. If reg 74 applied to such securities, they would be deemed to form part of the debtor's estate if the secured creditor voted for the full value of its claim (without inadvertence). This cannot be the position in law. The starting point is that the third-party security is not an asset of the debtor company. Neither is the company party to the arrangement between the creditor and the owner of the security. As such, it seems untenable to conclude that reg 74 may interfere and abrogate the rights of the creditor arising from an arrangement to which the debtor company is not a party and over an asset which does not belong to the company. If that was the position, reg 74 would have the effect of interfering with contractual rights by overreaching to secure for the debtor's estate an asset conferred to the creditor under a bilateral arrangement between the creditor and the third party. That surely could not have been intended.

21 The position is different where the security is over the property of the debtor. In that case, the asset is part of the debtor's estate and would have been available for distribution to the general body of creditors but for the security. By virtue of the security, the secured creditor has a privileged claim to have the debt due to it satisfied out of that asset. All this changes where the creditor gives up its security, relinquishing to the estate its privileged claim to the asset (or is deemed to have done so). The asset, having become part of the debtor's estate, is available to be distributed to the creditors as a whole. Thus, where the secured creditor gives up its security, this augments the debtor's estate. This is why it makes sense to speak, in this context, of the creditor surrendering its security (to the estate).

22 These considerations led me to conclude that reg 74 does not apply to a creditor holding a third-party security. I was fortified in this conclusion by my view of the purpose of reg 74. As I explain at [33]–[35] below, having regard to the origin of reg 74, its purpose is to address an unfairness that only arises where a creditor who holds security *over the debtor's assets* is able to vote for the full value of its claim. Regulation 74 prevents a distortion of the vote which may arise in that context. The limited purpose of reg 74 explains why it does not apply to a creditor holding a

third-party security.

23 Second, I found it significant that this interpretation of reg 74 rendered it consistent with rr 164(3)–164(4) of the Bankruptcy Rules. These provisions, which deal with the votes in a creditors' meetings in relation to the bankruptcy of a debtor, are substantially similar to reg 74. They state as follows:

> **Entitlement to vote**
>
> ...
>
> (3) For the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given and the value at which he assesses it, and shall be entitled to vote only in respect of the balance, if any, due to him after deducting the value of his security.
>
> (4) If the creditor votes in respect of his whole debt, he shall be deemed to have surrendered his security unless the court, on application, is satisfied that the omission to value the security has arisen from inadvertence.

The term "secured creditor" is defined in s 2 of the Bankruptcy Act (Cap 20, 2009 Rev Ed) ("the Bankruptcy Act") as "a person holding a mortgage, pledge, charge, lien or other security on or against *the property of the debtor* or any part thereof as a security for a debt due to him from the debtor" [emphasis added]. Therefore, a creditor whose claim is secured by a third-party security is not a secured creditor for the purpose of rr 164(3)–164(4).

24 In my judgment, it was apposite that reg 74 of the Regulations and rr 164(3)–164(4) of the Bankruptcy Rules were interpreted consistently with each other. This was because both provisions appeared to originate from the same source, s 16(4) of the Bankruptcy Act 1869 (c 71) (UK) ("the UK Bankruptcy Act 1869") and rr 99 and 101 of the General Rules made pursuant to that Act ("the General Rules"), and thus seemed to share the same purpose.

25 I first traced the origins of rr 164(3)–164(4) of the Bankruptcy Rules. I noted that almost identical provisions were contained in r 10 of the First Schedule to the Bankruptcy Act (Cap 20, 1985 Rev Ed), the immediate predecessor to the Bankruptcy Act. Rule 10 can be traced to para 10 of the Second Schedule to the Bankruptcy Ordinance 1888 (SS Ord No 2 of 1888) ("the Bankruptcy Ordinance 1888"), which is *in pari materia* with r 10. Paragraph 10 of the Second Schedule to the Bankruptcy Ordinance 1888 is, apart from differences in punctuation, identical to para 10 of the First Schedule to the Bankruptcy Act 1883 (c 52) (UK) ("the UK Bankruptcy Act 1883"). In this light, it appeared that the Straits Settlements Legislative Council, which enacted the Bankruptcy Ordinance 1888, drew the wording of the provision from the UK Bankruptcy Act 1883.

26 I noted, however, that para 10 of the Second Schedule to the Bankruptcy Ordinance 1888 could be traced to even earlier Singapore legislation, namely, s 18(4) of the Bankruptcy Ordinance 1870 (SS Ord No 21 of 1870) ("the Bankruptcy Ordinance 1870"). Section 18(4) stated as follows:

> *A secured creditor shall, for the purpose of voting, be deemed to be a creditor only in respect of the balance (if any) due to him after deducting the value of his security*. He shall, before being allowed to prove or vote, state in his proof the particulars of his security and the value at which he assesses the same; he shall be deemed a creditor only in respect of the balance due to him after deducting such assessed value of the security; and his proof shall not be increased in the

> event of the security realizing a less sum than the value at which he has so assessed the same. *He may, however, at or previously to the meeting of creditors, give up the security to the trustee, and thereupon he shall rank as a creditor in respect of the whole sum due to him*. [emphasis added in italics]

Section 18(5), the very next sub-section, expressly defined the term "secured creditor" to refer to creditors with security over *the assets of the debtor*:

> A "secured creditor" shall in this Ordinance mean any creditor holding any mortgage, charge, or lien ***on the bankrupt's estate*** , or any part thereof, as security for a debt due to him … [emphasis added in bold italics]

27 According to the marginal note to s 18(4) of the Bankruptcy Ordinance 1870, s 18(4) derived from s 16 of the UK Bankruptcy Act 1869. Section 16(4) of the UK Bankruptcy Act 1869 stated:

> (4) *A secured creditor shall, for the purpose of voting, be deemed to be a creditor only in respect of the balance (if any) due to him after deducting the value of his security*; and the amount of such balance shall, until the security be realized be determined in the prescribed manner. *He may, however, at or previously to the meeting of creditors, give up the security to the trustee, and thereupon he shall rank as a creditor in respect of the whole sum due to him*. [emphasis added]

Section 16(5) contained the same definition of a "secured creditor" as s 18(5) of the Bankruptcy Ordinance 1870 (see [26] above). Under that definition, a creditor who held a third-party security was not a "secured creditor".

28 The portions of s 16(4) italicised in the extract above are identical to the portions of s 18(4) of the Bankruptcy Ordinance 1870 italicised in the extract at [26] above. I also noted that the non-italicised text in the extract of s 18(4) appeared to derive from rr 99 and 101 of the General Rules, which stated:

> 99. A secured creditor, unless he shall have realized his security, shall, previously to being allowed to prove or vote, state in his proof the particulars of his security and the value at which he assesses the same, and he shall be deemed to be a creditor only in respect of the balance due to him after deducting such assessed value of the security.
>
> …
>
> 101. The proof of any such creditor shall not be increased in the event of the security realizing a less sum than the value at which he has so assessed the same.

Section 18(4) of the Bankruptcy Ordinance 1870 thus appeared to derive from s 16(4) of the UK Bankruptcy Act 1869 and rr 99 and 101 of the General Rules. Further, s 18(5) of the Bankruptcy Ordinance 1870 appeared to derive from s 16(5) of the UK Bankruptcy Act 1869 since the definitions of "secured creditor" therein were identical. I therefore concluded that the ultimate origin of rr 164(3)–164(4) of the Bankruptcy Rules is s 16(4) of the UK Bankruptcy Act 1869 and rr 99 and 101 of the General Rules. These provisions appeared to be the predecessor to para 10 of the First Schedule to the UK Bankruptcy Act 1883, to which rr 164(3)–164(4) may be traced (see [25] above).

29 Turning next to reg 74 of the Regulations, the first iteration of this provision was reg 72 of the Companies Regulations 1987 (GN No S 138/1987). Ms Yeong noted that reg 72 was identical to r 126

of the Companies (Winding-Up) Rules 1969 (GN No S 184/1969), the first version of that piece of subsidiary legislation. The source of r 126 appeared to be para 8 of the First Schedule to the Companies (Winding-Up) Act 1890 (c 63) (UK) ("the UK Companies (Winding-Up) Act 1890"), which is identical to r 126 leaving aside minor editorial differences. Paragraph 8 of the UK Companies (Winding-Up) Act 1890 is in turn almost identical to para 10 of the First Schedule to the UK Bankruptcy Act 1883. Ms Yeong helpfully referred me to the speech of Sir Michael Hicks Beach, the President of the Board of Trade, in moving the second reading of the Bill that led to the UK Companies (Winding-Up) Act 1890. It was observed that one aim of the Bill was "*to assimilate*, as far as [circumstances] will admit, *the law and procedure in the winding up of insolvent companies to the law and procedure in the bankruptcy of individual debtors*" [emphasis added] (United Kingdom, House of Commons, *Parliamentary Debates* (27 February 1890) vol 341 at col 1398). It was thus apparent that the UK Parliament imported para 10 of the First Schedule to the UK Bankruptcy Act 1883 into the companies legislation as para 8 of the UK Companies (Winding-Up) Act 1890. I concluded that reg 74 of the Regulations derives from para 10 of the First Schedule to the UK Bankruptcy Act 1883.

30 As I have noted, para 10 of the First Schedule to the UK Bankruptcy Act 1883 appeared to trace to s 16(4) of the UK Bankruptcy Act 1869 and rr 99 and 101 of the General Rules (see [28] above). Thus, I arrived at the view that the origin of reg 74 is s 16(4) of the UK Bankruptcy Act 1869 and rr 99 and 101 of the General Rules. As noted at [28] above, s 16(4) of the UK Bankruptcy Act 1869 and rr 99 and 101 of the General Rules are also the source of rr 164(3)–(4) of the Bankruptcy Rules, which are substantially similar to reg 74 of the Regulations. I concluded that reg 74 and rr 164(3)–(4) have a common origin.

31 I now discuss the purpose of s 16(4) of the UK Bankruptcy Act 1869. I again derived assistance from Ms Yeong's submissions on this point. Ms Yeong brought my attention to the speech of the Lord Chancellor in moving the second reading of the Bill which was passed as the UK Bankruptcy Act 1869. The Lord Chancellor stated as follows (United Kingdom, House of Lords, *Parliamentary Debates* (23 March 1868) vol 191 at cols 15–16):

> … Deeds of [composition and arrangement] have been a feature in our Bankruptcy Law certainly since the year 1849 … *I will tell your Lordships the general nature of the complaints which are made—and they are loud and strong—as to these deeds, which have thus grown and multiplied* … ***By the present arrangement, what are called the secured creditors—that is, the creditors who hold security to the full amount or to a large amount of their debt—are entitled to vote, and do vote, in the majority;*** *so that the result may be that that majority is obtained by means of the secured creditors*, ***who bind the minority of unsecured creditors to accept less than is due to them*** … We have dealt with these objections in the present measure, and I will state the five leading features in the clauses we propose, which, if adopted, will provide a complete system of law respecting these deeds … Thirdly, ***we provide that secured creditors, if they wish to vote, must deduct the value of their securities*** … [emphasis added in italics and bold italics]

Further, in moving the first reading of the Bill in the House of Commons, the Attorney-General remarked as follows (United Kingdom, House of Commons, *Parliamentary Debates* (14 March 1867) vol 185 at cols 1871–1872):

> … I come to the [Bankruptcy Act 1861 (c 134) (UK)] … *the provisions for arrangements between debtor and creditor were advantageously modified … The Act, however, has been found* ***to work disadvantageous to dissenting creditors*** *, the powers conferred on whom are insufficient.* The difficulties have been these:— … *secured creditors*, **notwithstanding their security** *, ranked equally with the rest in their claims* **on other portions of the property** … [emphasis

added in italics and bold italics]

32 In sum, prior to the UK Bankruptcy Act 1869, a creditor holding security over the debtor's property was entitled to vote, in creditors' meetings for the approval of the debtor's proposals for settling his debts, for the full value of its claim. Such secured creditors could thus determine whether and which of the debtor's proposals were approved; in particular, they could bind the unsecured creditors to accept proposals that were prejudicial to them. This state of affairs was considered unfair as between the secured and unsecured creditors.

33 It is important to identify the precise nature of this unfairness. As I have noted, s 16(5) defined the term "secured creditor" to exclude creditors who held third-party securities (see [27] above). This reveals that the unfairness perceived by the UK Parliament did not arise from the mere fact that secured creditors did not have the same economic stake as unsecured creditors in the debtor's proposals because they could satisfy their claims, in part or in full, by realising their securities. If that were the kernel of the unfairness, s 16(4) would logically have applied to creditors with third-party securities. Yet s 16(4) did not apply to such creditors. This is unsurprising. It would be intrinsically unfair for the debtor and, even more so, its creditors, to be able to rely on a bilateral arrangement that a creditor had entered into with a third party to secure a debt owed to that creditor (see [20] above). The debtor and its other creditors have no *locus standi* in respect of that transaction.

34 In my judgment, the unfairness which s 16(4) addressed arose where securities held by secured creditors were over assets of the debtor. Those assets, being part of the debtor's estate, would have been available for distribution to the general body of creditors but for the security (see [21] above). The problem was not simply that secured creditors were not on an equal footing with unsecured creditors, because they had securities that the unsecured creditors did not possess, but that the realisation of their securities would, moreover, deplete the pool of assets out of which the claims of the unsecured creditors could be satisfied. In those circumstances, it was considered unfair that such secured creditors had an equal say with regard to "*other portions of the property*" [emphasis added] (see the Attorney-General's remarks cited at [31] above), *and could thus influence how those portions were distributed between the creditors when the claims of the unsecured creditors could only be satisfied out of those assets*. In short, it was unfair that the unsecured creditors could have their cake and eat it. The purpose of s 16(4) of the UK Bankruptcy Act 1869 was to address *this* unfairness, by only permitting creditors to participate in decisions on the debtor's proposals to the extent their debts were not secured over the debtor's property. This unfairness would also not arise where a secured creditor surrendered its security. Section 16(4) accordingly provided that upon that event, a secured creditor would "rank as a creditor in respect of the whole sum due to him".

35 I was satisfied that this same purpose underlies reg 74 of the Regulations and rr 164(3)–164(4) of the Bankruptcy Rules, which trace back to s 16(4) of the UK Bankruptcy Act 1869 (see [28] and [30] above). I thus considered it appropriate that reg 74 and rr 164(3)–164(4) were interpreted consistently with each other.

36 For these reasons, I concluded that a creditor whose claim against the debtor company is secured by a third-party security is *not* a "secured creditor" for the purpose of reg 74 of the Regulations.

37 I considered that the conclusion would be the same where the third party was a subsidiary or an associate of the debtor company, because the related party would nonetheless be a separate legal person distinct from the debtor. In this regard, I noted that the Ontario Court of Justice arrived at a similar view in *Re Olympia & York Developments Ltd* [1997] 143 DLR (4th) 536 ("*Re Olympia*"), the facts of which were similar to those here. The debtor company had provided a guarantee in

support of a claim against its subsidiary that was secured over the subsidiary's property. The issue was whether the creditor had to reduce its claim against the debtor to account for the value of the security granted by the subsidiary. Farley J held that the creditor did not have to reduce its claim, emphasising at [13] that "what is at issue is the proof in the *separate estate* of [the debtor company]" [emphasis added]. Farley J also criticised the earlier decision of *Re Mallet* [1996] NBJ No 565 ("*Re Mallet*"), which did not involve a subsidiary. There, the president of a company provided guarantees for mortgages taken out by the company. The president then filed a personal proposal under the bankruptcy legislation. The creditor's proxy filed a proof of debt in the president's personal proposal. The trustee reduced the value of the proof to reflect the security held by the creditor's proxy over the property of the company. The court upheld the trustee's decision. In *Re Olympia*, Farley J observed at [21] that the court in *Re Mallet* did not appear to have examined principles or jurisprudence, but had been "content to ignore the separation of the entities involved", adding that he "[did] not find this case persuasive in overcoming the established jurisprudence". I agreed with this sentiment, and with the result and reasoning in *Re Olympia*.

38 Finally, it seemed that the above reasoning would also apply to r 126 of the Winding-Up Rules which is identical to reg 74 (see [13(b)] above) and, as I have noted, traces back to s 16(4) of the UK Bankruptcy Act 1869 and rr 99 and 101 of the General Rules (see [29]–[30] above). Hence, a creditor whose claim against the debtor company was secured by a third-party security would not be a "secured creditor" for the purpose of r 126 of the Winding-Up Rules.

39 I accordingly answered the first part of the 1st Issue and prayer 1(a) in the Summonses (see [7(a)] above) in the negative, and the second part of the 1st Issue and prayer 1(b)(i) in the Summonses in the affirmative (see [7(b)] above). This was subject to my analysis of the 3rd Issue, regarding the appropriate course of action for a creditor who *realises* its third-party security after filing its proof of debt (see [57] below).

The 2nd Issue

40 It was common ground that reg 74 does not apply to a vote in a creditors' meeting called for the approval of a scheme of arrangement under s 210 read with s 227X of the Act. The application of reg 74 is provided for by reg 61 of the Regulations, which states:

> **Application of regulations as to meetings.**
>
> **61**. *Except where and so far as the nature of the subject-matter or the context may otherwise require*, the regulations relating to meetings hereinafter set out shall apply to ***the first meeting*** and ***the judicial manager's meetings of creditors*** , but so that those regulations shall take effect subject and without prejudice to any express provisions of the Act.
>
> [emphasis added in italics and bold italics]

In short, reg 74 would only apply to creditors' meetings called for the approval of a scheme of arrangement if such meetings fell within the meaning of "the first meeting" or "the judicial manager's meetings of creditors" under reg 61. Furthermore, even if this condition were met, reg 74 would not apply if "the nature of the subject-matter or the context … otherwise require[d]".

41 It was plain that a creditors' meeting called for the approval of a scheme does not amount to a "first meeting" under reg 61. Regulation 54 defines the "first meeting" as "[t]he meeting of creditors under section 227N(1) of the Act". However, where the judicial managers of a company call a meeting for the creditors to approve a scheme, they do so pursuant to s 227X(a) read with s 210 of the Act,

and not pursuant to s 227N(1) of the Act. Such a meeting therefore does not amount to a "first meeting" under reg 61.

42 Further, I considered that creditors' meetings called for the approval of a scheme do not fall within the scope of "the judicial manager's meetings of creditors" under reg 61. This term is defined in reg 60 of the Regulations to refer to meetings that "the judicial manager … *may himself* from time to time subject to the provisions of the Act and the control of the Court *summon, hold and conduct* …" [emphasis added]. Ms Yeong submitted, and I agreed, that this definition suggests that "the judicial manager's meetings of creditors" are those which the judicial manager summons at his or her discretion. However, under s 227X(*a*) read with s 210 of the Act, creditors' meetings for the approval of a scheme are ordered by the *court*, albeit on application by the judicial manager.

43 In any case, even if meetings under s 227X(*a*) read with s 210 of the Act fall within the category of "the judicial manager's meetings of creditors" under reg 61, I was satisfied that reg 74 does not apply to those meetings as "the nature of the subject-matter or the context … otherwise require[s]". I agreed with Ms Yeong that the conduct of meetings to approve a scheme and the adjudication of proofs of debt therein are separately provided for by s 227X(*aa*) read with s 211F of the Act. Therefore, in my judgment, even if "the judicial manager's meetings of creditors" included meetings under s 227X(*a*) read with s 210 of the Act, the carve-out in reg 61 would apply and consequently, reg 74 would not apply to such meetings.

44 For the above reasons, I concluded that reg 74 does not apply to a vote in a creditors' meeting called for the approval of a scheme of arrangement under s 210 read with s 227X of the Act. I therefore answered the 2nd Issue and prayer 1(b)(ii) in the Summonses (see [7(b)(ii)] above) in the negative.

The 3rd Issue

45 In the above discussion, I have addressed the position where the creditor has not realised its third-party security. I now turn to the position where the creditor realises its third-party security after lodging its proof of debt. The authorities and academic texts distinguish between two different situations:

(a) *Insolvency of the principal debtor*: In the first case, the principal debtor is insolvent. The creditor files a proof of debt in that insolvency, before realising its security over an asset of the surety.

(b) *Insolvency of the surety*: In the second case, the surety is insolvent. The creditor files a proof of debt in that insolvency, before realising its security over an asset of the principal debtor.

These applications involved the second situation: the secured creditors were filing proofs of debt in the judicial management of the Companies, who had provided guarantees for the debts of their subsidiaries, which debts were secured over assets of the subsidiaries (see [4] and [8] above). The subsidiaries were the principal debtors. In my judgment, however, the first situation sheds light on the appropriate analysis for the second situation. I will therefore discuss both situations. *In doing so, I restrict my observations to the position where the surety is a guarantor (as was the case in these applications).*

Insolvency of the principal debtor

46 Where a creditor files a proof of debt in the insolvency of the principal debtor, the general rule

is that the creditor is entitled to maintain the proof for the full sum due to the creditor at the commencement of the winding-up or the judicial management, *unless the debt is paid in full*: see *Barclays Bank Ltd and Others v TOSG Trust Fund Ltd and Others* [1984] 1 AC 626 ("*Barclays Bank*") at 643C, *per* Oliver LJ and *Goode on Legal Problems of Credit and Security* (Louise Gullifer ed) (Sweet & Maxwell, 5th Ed, 2013) ("*Goode*") at para 8–18. The creditor is not required to reduce its proof of debt to reflect part-payments of the debt after the commencement of the winding-up or the judicial management, either from the surety or from realisation of security over an asset of the surety. I will refer to this rule as "the general rule".

47 However, the creditor's right to prove for the whole debt "may fall to be modified by reason of the rule against double proof": see *Barclays Bank* at 643C. Under the rule against double proof, also known as the rule against double dividends, there may only be one proof for the same debt in one insolvent estate: see *In re Kaupthing Singer & Friedlander Ltd (in administration) (No 2)* [2012] 1 AC 804 at [11]–[12], *per* Lord Walker of Gestingthorpe JSC. This rule "stems from the fundamental rule of all insolvency administration that, subject to certain statutory priorities, the debtor's available assets are to be applied *pari passu* in discharge of the debtor's liabilities": see *Barclays Bank* at 636F–G, *per* Oliver LJ. The principal debtor owes only one debt and therefore there should only be one proof for that debt. If there were more than one proof, this might lead to a doubling-up of dividends in breach of the *pari passu* principle.

48 The effect of the rule against double proof is that in cases involving an insolvent principal debtor, a creditor and a surety, only one proof of debt may be filed, by either the creditor or the surety, in respect of the debt due to the creditor for which the surety is liable. Against this backdrop, there developed a rule that the surety may only file a proof if the creditor has received payment from the surety of the guaranteed debt *in full*: see *Barclays Bank* at 643D–E. The basis of this rule is that the surety has "undertaken to be responsible for the full sum guaranteed … and thus has no equity to prove for his right of reimbursement in competition with the creditor" until the surety has discharged its liability to the creditor *in full*: see *Goode* at para 8–18 and *Barclays Bank* at 643G–H. This rule has been applied in two scenarios:

(a) First, where the guarantee is construed to be for the whole of the principal debt, the surety may not file a proof if it has only paid part of the debt due. The creditor is entitled to maintain its proof for the whole debt. This rule applies even if the surety's liability under the guarantee is limited to a specific amount which it has paid. In such cases, the courts have construed the guarantee to be for the whole of the principal debt notwithstanding the limitation of liability. For example, in *In re Sass, ex parte National Provincial Bank of England, Ltd* [1896] 2 QB 12, the surety provided a guarantee "for the *whole amount now due or owing*" [emphasis added] to the creditor bank, albeit subject to a limitation of liability of £300. The guarantee was construed to be for the whole of the principal debt, notwithstanding the limitation of liability. This has been rationalised on the basis that even if a guarantor pays up to the limit of its financial liability under the guarantee, it retains "an outstanding obligation … to see that the whole debt is paid" so long as any part of the principal debt is outstanding: see *Barclays Bank* at 643G–H.

(b) Second, where the guarantee is construed to be for part of the principal debt, the surety may, upon payment of that part of the debt, file a proof for the part paid as the surety would have fully discharged its obligation to the creditor. In that event, the creditor must reduce its proof accordingly. This is the one scenario where the creditor must reduce its proof to reflect a part-payment of the debt received from the surety.

49 On first sight, it may seem odd that the creditor is not required to reduce its proof whenever and to the extent that it receives a part-payment of the debt. However, *Goode* explains the general

rule at para 8–18 as follows:

> … the rule has a sound policy base. It is a well settled principle of equity that *until the creditor has received payment of the guaranteed debt in full the surety cannot prove in the insolvent debtor's estate for a sum paid by him to the creditor*. The reason for this is that he has, expressly or by implication, undertaken to be responsible for the full sum guaranteed, including whatever remains due to the creditor after receipt of dividends by him out of the bankrupt's estate, and thus has no equity to prove for his right of reimbursement in competition with the creditor ***. If the creditor were required to give credit for a pre-bankruptcy part payment by the surety, neither of them could prove for the amount of such payment and the general body of creditors would thus be unjustly enriched*** . [emphasis added in italics and bold italics]

If the creditor were required to reduce its proof to reflect a part-payment, then there would be no proof in respect of the value of that part-payment. The surety would not be entitled to file a proof because it would not have discharged the debt in full (see [48] above). The upshot would be that the other creditors of the debtor would take the benefit of the part-payment, since the total value of claims against the estate would be reduced to that extent. The general rule prevents this undesirable outcome from arising.

50 In the above discussion, I have addressed the position where the creditor receives payment from the surety or realises security over an asset of the surety *after the commencement of the winding-up or the judicial management*. I note in passing that the law is less clear in relation to the situation where the creditor receives payment or realises security *before the commencement of the winding-up or the judicial management*. Under English law, the creditor is not required to deduct these sums from its proof: see *Goode* at para 8–18. However, in *Stotter v Equiticorp Australia Ltd (In Liquidation)* [2002] 2 NZLR 686 ("*Stotter*"), the High Court of Auckland held that the creditor must reduce its proof to reflect sums received *before* the onset of liquidation. Importantly, however, the court endorsed at [66] the general rule that the creditor is not required to update its proof to reflect sums it has received *after* the commencement of the liquidation. I note that *Stotter* has been criticised: see *Goode* at para 8–18 and Mrs Justice Andrews DBE and Richard Millett QC, *Law of Guarantees* (Sweet & Maxwell, 7th Ed, 2015) ("*Andrews & Millett*") at para 13–010. It is unnecessary for me to express a view on *Stotter* as the present applications concern a situation where payment is received after the commencement of the winding-up or the judicial management. Having said that, I would express, albeit on a tentative basis, a preference for the position in England. It seems philosophically inappropriate to distinguish between the pre-insolvency and post-insolvency situations if the basis for the rule is to ensure that only a single proof of debt is submitted, with the surety's right to do so determined by whether the surety has fully discharged its obligations under the guarantee.

51 Further, there is uncertainty regarding the cut-off date for the rule against double proof and, consequently, the general rule, which is based on the rule against double proof. When must the surety have paid the principal debt in full (or when must the security have been realised in discharge of the whole debt) for the surety to be entitled to prove in place of the creditor? On one view, the rule against double proof operates when the creditor lodges its proof. The cut-off date is thus the date when the creditor lodges its proof.

52 However, in *Barclays Bank*, Oliver LJ, in the Court of Appeal, opined at 638A that in applying the rule against double proof, the court should "look at the position at the point at which the dividend is actually about to be paid". (On appeal, the House of Lords found that the rule against double proof did not apply and hence did not address the point: see *Barclays Bank* at 675C–E). *Andrews & Millett* support Oliver LJ's position at para 13–004 as follows:

> … it is submitted that the views of Oliver LJ in *Barclays Bank Ltd v TOSG Trust Fund Ltd* are the more attractive, and *that the crucial cut-off date for payment by the surety which would qualify him to prove in the principal's insolvency is the date of the payment of a dividend to the creditor*. ***Lodgement of proof by the creditor is merely a procedural step in the insolvency, and has no substantive significance*** . *The proof can be withdrawn, rejected or expunged, and the liquidator or trustee is not bound to admit the proof or pay the dividend proved for* … The admission of proof and the calculation of dividend are procedural matters for the liquidator or trustee, and it is unsatisfactory that the right of the surety to prove should be dependent upon something as arbitrary as the date on which the creditor lodges his proof. ***The mischief of the rule against the double proof is to prevent a doubling-up of dividends, and the fact that there are two proofs for the same debt is something that can be dealt with by the liquidator or trustee when he calculates and pays the dividend, making unnecessary the application of any rule of law at any earlier stage.*** [emphasis added in italics and bold italics]

In short, there appeared to be two principal reasons for the cut-off date to be the date of payment of dividends. First, the purpose of the rule against double proof is to prevent a doubling-up of dividends. It may thus be considered apposite for the cut-off date to be the date of payment of dividends since that is the point at which the concern must be addressed. Second, it would be arbitrary for the cut-off date to be the date of lodgement of proof because such lodgement is a mere procedural step in the insolvency without any substantive significance. The date of payment of dividends seems to be the more appropriate cut-off date as it most accurately reflects the creditor's right to a share of the estate. However, I see practical difficulties in setting the cut-off date as the date on which the dividends are paid. If this were the law, the liquidator or judicial manager might have to grapple with the entitlements of the creditor and the surety just as the dividends were about to be paid. One way of addressing this is to set the cut-off date as the day before the date of payment of dividends. The liquidator or judicial manager could notify the creditors in advance of the obligation to update the proofs by a stipulated time on the cut-off date. In my judgment, this would strike a good balance between accuracy in the proofs filed by creditors and not impeding efficiency in the liquidation or judicial management.

53 In sum, in the first situation, where a creditor files a proof of debt in the insolvency of the principal debtor, before realising its security over an asset of the surety or receiving payment from the surety, the general rule is that the creditor is not required to reduce its proof by the value of the realised security or the payment received. Further, the surety is not entitled to submit a proof for the sum that the creditor has received unless the debt under the guarantee has been fully discharged. Where the guarantee only covers part of the debt due to the creditor, and the creditor receives that sum from the surety or from realisation of the security, the creditor must reduce its proof by the corresponding amount. The surety may then also submit its own proof for the amount that has been paid to the creditor. Regarding the cut-off date, in my view, this ought to be the day before the date of payment of dividends. The liquidator or judicial manager ought to set a time on the cut-off date by which all updates on the proofs of debt must be submitted.

Insolvency of the surety

54 Where a creditor files a proof of debt in the insolvency of the surety, the position under English law is that the creditor is only required to give credit in the proof for the value of security (over the principal debtor's property) realised *before, but not after*, the proof is filed. In other words, if the creditor realises the security after filing the proof, the creditor is not required to update the proof to deduct the value of the realised security from the amount claimed. This was affirmed in *In re Amalgamated Investment and Property Co Ltd* [1985] 1 Ch 349 ("*In re Amalgamated Investment*"), where Vinelott J gave two reasons for this rule:

(a) First, it was "convenient and fair" to adopt the date on which the proof was submitted as the cut-off date (at 383G–384F).

(b) Second, if a creditor were required to deduct sums received after the proof was filed but before it was admitted, "it would be in his interest to press for an early adjudication and to refrain from taking any steps, for instance to enforce a security against the principal debtor in the meantime", which might cause "[g]rave injustice" (at 385F–G).

55 However, I did not find the position in *In re Amalgamated Investment* compelling where the surety is a guarantor for the following reasons:

(a) It is a fundamental principle of the law of guarantees that the liability of a guarantor is co-extensive with that of the principal debtor: see *Andrews & Millett* at para 6–002 and *Jannie Chan* at [45]. It follows from this principle that if the principal debt is discharged (in part), the liability of the guarantor reduces accordingly: see *Andrews & Millett* at para 9-002. Hence, where the creditor realises its security over an asset of the principal debtor in (partial) discharge of the principal debt, the guarantor's liability is reduced by the value of the realised security.

(b) In this light, if the creditor realises its security over an asset of the principal debtor after filing its proof of debt in the insolvency of the guarantor, and were not required to update the proof, it would command disproportionate voting power in creditors' meetings called, *eg*, by the judicial managers of the guarantor. The creditor would be entitled to vote for the full value of a claim which has in fact reduced. This would be contrary to the imperative of ensuring fairness in the distribution of voting rights between the creditors.

(c) Moreover, I did not consider that concerns of convenience (see [54(a)] above) justified endorsing the rule stated in *In re Amalgamated Investment*. As noted by *Andrews & Millett* regarding the first situation where the creditor files a proof in the insolvency of the principal debtor, the lodgement of proof "is merely a procedural step in the insolvency, and has no substantive significance" (see [52] above). As a matter of principle, a creditor's voting rights must correspond to the value of its underlying claim against the insolvent party; and accordingly, in my judgment, the date of lodgement of proof could not be the correct cut-off date. I also did not consider that the second point noted by Vinelott J (see [54(b)] above) justified following *In re Amalgamated Investment*.

56 I therefore concluded that the rule in *In re Amalgamated Investment* should not be followed for the purposes of proofs of debt filed by a creditor in the insolvency of a guarantor. However, this conclusion raised the consequential question of what the cut-off date should be if it were not the date of the submission of the proof. In this regard, as noted above, I came to the view that in the first situation where the creditor files a proof of debt in the insolvency of the principal debtor, the cut-off date should be the day before the date of the payment of the dividends (see [52] above). This strikes an appropriate balance between accuracy in the proofs and efficiency in the judicial management or liquidation. By analogy, I considered that a creditor should continue to update its proof until the day before the date of payment of dividends (if any).

Conclusion on the 3rd Issue

57 In conclusion, where the creditor realises its third-party security or receives payment from the third party, after lodging its proof of debt, the analysis turns on whether the proof is lodged in the insolvency of the principal debtor or in the insolvency of the surety:

(a) *Proving in the insolvency of the principal debtor*: The creditor is entitled to maintain its proof for the full value of the debt unless:

(i) it receives the full value of the debt, whereupon it is not entitled to maintain its proof and the surety may prove in the insolvency for an indemnity or under the right of subrogation; or

(ii) it receives the full value of the part of the debt guaranteed, in which case it must reduce its proof accordingly and the surety will be entitled to lodge a proof for the value of that sum.

The cut-off date is the day before the date of payment of dividends (if any). Proofs should be updated by the time on the cut-off date set by the liquidator or judicial manager.

(b) *Proving in the insolvency of the guarantor*: The creditor must update its proof to reflect the reduced value of the principal debt until the day before the date of payment of dividends (if any), by the time on the cut-off date set by the liquidator or judicial manager.

Conclusion

58 For the above reasons, I gave the aforementioned answers to the prayers in the Summonses (see [39] and [44] above) and arrived at the conclusions on the 1st to 3rd Issues stated above. In conclusion, I record my gratitude to counsel for their excellent assistance. In particular, I found Ms Yeong's submissions, which were clear and comprehensive, to be of tremendous assistance.

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