IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION
2004: No. 321

BETWEEN:-

(1)FIDELITY ADVISOR SERIES VIII: FIDELITY ADVISOR EMERGING MARKETS INCOME FUND
(2) FIDELITY SCHOOL STREET TRUST: FIDELITY NEW MARKETS INCOME FUND
(3) GENERAL MOTORS INVESTMENT MANAGEMENT CORPORATION EMERGING MARKETS DEBT PORTFOLIO
(4) FIDELITY EMERGING MARKETS DEBT COLLECTIVE POOL
(5) JOHN HANCOCK HIGH-YIELD BOND FUND

Plaintiffs

-and-

APP CHINA GROUP, LTD.

Defendant

JUDGMENT

Date of trial: May 9-11, 2007[1]
Date of Judgment: May 25, 2005

Mr. Jan Woloniecki and Mr. Nathaniel Turner, Attride-Stirling & Woloniecki, for the Plaintiffs
Mr. Narinder Hargun and Mr. Paul Smith, Conyers Dill & Pearman, for the Defendant

[1] Due to the unavailability of appropriate Court facilities, the parties agreed that the trial should take place in the main Board Room of Messrs. Conyers Dill & Pearman, which this firm kindly made available. The trial location was published in the Court List and a further notice was posted on the ground floor of Richmond House to ensure that the public hearing requirements of section 6 of the Bermuda Constitution were adequately met.

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Introductory

1. On November 7, 2003 in Civil Jurisdiction 2003: No. 381 ("the Scheme Proceedings"), I granted an Order under section 99 of the Companies Act 1981 sanctioning a debt for equity scheme of arrangement between the Defendant company and its creditors ("the Scheme"), for the reasons set out in my Judgment dated November 23, 2003[2] ("the Order").

2. In making the Order, I refused the Plaintiffs' affiliates ("the Objectors") application for an adjournment to enable them to investigate their suspicions that the statutory majorities in favour of the Scheme would not have been met unless a number of creditors voting in favour had not been influenced by affiliations with the "Controlling Shareholders" of the Defendant. I also rejected the Objectors' related merits complaints that, *inter alia*, the Explanatory Statement did not adequately reveal the extent to which the existing management would, post-Scheme, retain control.

3. The Defendant through Mr. Hargun advanced two main arguments in the Scheme proceedings as to why the Plaintiffs' application ought to be refused. Firstly, it was submitted that there was pressure from certain Chinese Banks to whom the operating subsidiaries were indebted to resolve the Company's insolvency as quickly as possible. And, secondly, it was submitted that the Court ought properly to ignore what were mere suspicions, because of the Affirmation made on or about November 6, 2006 by Mr. Indra Widjaja on behalf of the Controlling Shareholders ("the Widjaja Affirmation"), was not contradicted by any other evidence before the Court. Paragraph 4 of that Affirmation deposed as follows:

> *" The APP Controlling Shareholders are not affiliated to or otherwise connected with any of the creditors, including the Supporting Noteholders, who voted in favour of the Scheme, other than BII, whose connection to the APP Controlling Shareholders is disclosed in the Scheme Document. The APP Controlling Shareholders have not directly and/or indirectly, purchased any of the Existing Notes.*"

4. On June 15, 2004, Robert Apfel of Bondholders Communications Group ("BCG") wrote to the Court purportedly withdrawing the Affidavits filed by BCG in support of the Scheme and expressing concerns about the true owners of Notes purportedly held by some 150 Taiwanese Noteholders ("the Taiwanese Noteholders") who had voted in favour of the Scheme. The previous day, the Defendant had written BCG confirming that "*a substantial number of the Taiwanese Noteholders are members of the management of the APP's Principal*

[2] [2003] Bda L.R. 50.

Indonesian Operating Companies". These companies are sister companies of the Defendant, not its own subsidiaries.

5. BCG's letter was copied to the Plaintiffs' US Counsel, Nathan Van Duzer, and the Plaintiffs duly applied by Specially Indorsed Writ issued on October 1, 2004 to set aside the Order on the grounds that it was procured by fraud, in that the averments made in paragraph 4 of the Widjaja Affirmation constituted perjured evidence. The Plaintiffs' primary case is that the deponent knew that the Taiwanese Noteholders were not the true beneficial owners of the Notes, because he and the other Controlling Shareholders were the true owners. The alternative and secondary case was that the deponent knew that the Taiwanese Noteholders were employees of companies controlled by the Controlling Shareholders, and deliberately concealed this fact by falsely swearing that none of the creditors were "*affiliated to or otherwise connected with"* himself or the other Controlling Shareholders.

The issues falling for determination

6. The applicable legal principles, which I set out below, were not substantially in dispute. It follows that the key factual issues which fall for determination are, firstly, have the Plaintiffs established, by means of evidence with the cogency that the proof of fraud requires, that Indra Widjaja deliberately lied in stating that either (i) the Controlling Shareholders did not directly or indirectly purchase any of the Existing Notes, or (ii) that the Controlling Shareholders were neither affiliated nor "*otherwise connected*" with "*any of the creditors*". Assuming the Plaintiffs establish one or other of this initial limb of their case, they must next satisfy the Court that the relevant fraud was sufficiently material to justify setting aside the Order as a whole. If they succeed in proving the second limb of their case, they must finally demonstrate that the Court should exercise its discretion in favour of taking the unprecedented step of setting aside an order sanctioning a scheme of arrangement, for the first time.

7. Subsidiary issues falling for determination are (a) the admissibility of BCG's records of telephone calls made to Taiwanese Noteholders as part of its June 2004 investigation, (b) whether the Plaintiffs are estopped from pursuing the present claim, and (c) whether the Plaintiffs have an arguable claim for damages for the tort of deceit.

The Plaintiffs' pleaded case

8. The main allegations made in the Amended Statement of Claim are the following:

> "**<u>The Company's Fraud on the Court: The Plaintiffs' Primary Case</u>**
>
> *17. It is the Plaintiffs' primary contention that, as alleged in the Apfel letter, at the material time none of the persons identified in Exhibit A of the Apfel letter ("the purported Taiwanese noteholders") were the beneficial owners of the Notes and accordingly were not Creditors entitled to vote at the Scheme Meeting.*
>
> *18. The Plaintiffs' rely upon the facts and matters disclosed in the Apfel letter, and in particular upon the following facts:*
>
> *(i) All of the purported Taiwanese noteholders are employees of Indonesian subsidiaries of APP and are residents in Indonesia.*

(ii) None of the purported Taiwanese noteholders are resident at the addresses set out in the voting forms and employees of BCG were unable to speak to any of the purported Taiwanese noteholders at the telephone numbers provided in the voting forms.

(iii) None of the persons to whom employees of BCG spoke at the Taiwanese addresses appeared to have any knowledge of the alleged beneficial ownership of any of the purported Taiwanese noteholders.

(iv) All of the purported Taiwanese noteholders are persons of limited means and do not fall within the class of persons who typically invest in bonds or notes.

(v) None of the purported Taiwanese noteholders have provided BCG with any or any sufficient evidence as to their beneficial ownership of the Notes.

(vi) As of the date of the Apfel letter, none of the purported Taiwanese noteholders had made any application to the Bermuda Monetary Authority for registration of the shares in the Company to which they are purportedly entitled under the Scheme.

19. It is to be inferred, since the same is obvious, that the Company knew the following facts at the 7 November 2003 sanctioning hearing:

(i) That the purported Taiwanese noteholders were not the beneficial owners of the notes and not entitled to vote at the Scheme Meeting.

(ii) That the beneficial owners of the notes purportedly owned by the purported Taiwanese noteholders were members of APP's Controlling Shareholders.

(iii) That paragraph 4 of the affirmation of Indra Widjaja dated 7 November 2003, in which he deposed that, "The APP Controlling Shareholders are not affiliated to or otherwise connected with any of the creditors…other than BII, whose connection to the APP Controlling Shareholders is disclosed in the Scheme Document…" was false and was known by Indra Widjaja to be false.

20. Further, and/or alternatively, each of the above facts was known to the APP Controlling Shareholders, including Indra Widjaja, and the acts and knowledge of the Controlling Shareholders, including the filing of the affirmation by Indra

Widjaja dated 7 November 2003 in which he perjured himself as aforesaid, are as a matter of law attributable to the Company….

The constitution of classes and/or discretion: The Plaintiffs' alternative case…

25. It is to be inferred from the Company's admission, in the letter to BCG dated 14 June 2004 (Exhibit F to the Apfel letter), "that a substantial number of the Taiwanese Noteholders are members of the management of the APP's Principal Indonesian Operating Companies ('PIOCs')", that the same was known to the Company and APP's Controlling shareholders, including Indra Widjaja, on 7 September 2003. In the premises, paragraph 4 of the affirmation of Indra Widjaja dated 7 November 2003, in which he deposed that, "The APP Controlling Shareholders are not affiliated to or otherwise connected with any of the creditors…other than BII, whose connection to the APP Controlling Shareholders is disclosed in the Scheme Document…" (emphasis added) was false and was known by Indra Widjaja and the Company to be false."

The Plaintiffs' evidence

9. The Plaintiff's evidence falls into two broad categories. The written depositions and video-taped evidence taken in New York from three BCG witnesses, Robert Apfel, Theodore Bloch and Amy Hsu, the evidence of Nathan Van Duzer and the expert opinion evidence given at trial in Bermuda by Charles E. Finch.

Robert Apfel

10. Robert Apfel confirmed that he sent a letter to this Court on June 14, 2004 ("the Apfel Letter"), which provided in salient part as follows:

"June 15, 2004

IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

2003: No. 381

IN THE MATTER OF APP CHINA GROUP LIMITED

and

IN THE MATTER OF THE COMPANIES ACT 1981,

Section 99

Re: Voting at the Court Meeting; New Information From the Tabulation Agent

Dear Judge Kawaley:

We are writing to you to alert you to certain information, which has come to our attention regarding the filing of voting instructions by creditors in the above-mentioned Scheme of Arrangement.

Summary

We acted as Tabulation Agent for the Court Meeting on October 30, 2003.

In the course of our work to administer certain post-Meeting aspects of the Scheme, we came across a disturbing pattern of facts that caused us to make further inquires about the status of the noteholders.

Based on this subsequent investigation, we have come to the view that approximately half of the list of noteholder creditors (by number) and one third (by amount) who were certified to vote at the Court Meeting on October 30, 2003 may not have been beneficial owners of the notes of APP China.

Instead, we have discovered that a sizable portion of these noteholders who voted at the Court Meeting are employees of APP who may not own the notes. When recently contacted by us, few of these persons were aware of the existence of the notes or their own claimed investments in them.

All of these noteholders' voting instructions were submitted on their behalf by Nomura Singapore Limited, a financial institution that is a direct participant in a global clearing system (Euroclear). Nomura had, prior to the Court Meeting, confirmed in writing, the existence of all of these persons as being holders of the notes.

It would appear that one or more persons may have "stuffed the ballot box" with votes from persons who did not own the notes of APP China and hence could not have been counted as Creditors. These persons appear to have:

- *Completed large amounts of paper documentation in which they stated that the persons identified owned the notes.*
- *Submitted documentation directing Nomura to:*
  - *Submit voting instructions on their behalf;*
  - *Block their notes at a clearing system (in order to prove their holdings);*
  - *Obtain individual registered note certificates – registered in their names – so that they could vote and be counted, numerically, at the Court Meeting.*
- *Included with their documentation materials (which appear to be individually signed by each "noteholder") including "customer reply forms", "release forms" and passport pages – all for approximately 154 persons. Approximately 150 of the "employee noteholders" employed Taiwan "addresses" – backed up by copies of pages from their Taiwan passports.*
- *Directed Conyers Dill to withhold from delivery to the BMA executed BMA forms with respect to such persons.*

In short, these investors (or those who may have orchestrated their actions) appear to have seemingly followed every technical and

procedural requirement described in the 190-page APP China Scheme document – with one MAJOR catch – we now believe that they may not "own" the notes. The Scheme document describes noteowners or specifically, "note investors", as the persons who hold the ultimate economic interest in the securities, taking full responsibility for the risks of ownership.

We have worked on many bankruptcies, schemes of arrangement, plans of composition and other related activities. We have never been exposed to the facts that we have seen here.

We find this so disturbing that we must withdraw the prior set of affidavits we provided to the Court. And, we have informed APP China that we have resigned from their account and will accept no further assignments from them and their affiliates."

11. He testified that he was the President of BCG, the company responsible for administering the voting process in relation to the Scheme and filing affidavits reporting to the Court in this regard. BCG was also responsible for administering the Bermuda Monetary Authority ("BMA") approval process for issuing shares to the new shareholders and former creditors as part of the initial Scheme implementation regime. His company had provided tabulation services in reorganisations worth some $480 billion over the last three years. In essence, he testified that his company was no longer able to stand behind its evidence filed in support of the Defendant's 2003 application for the Order because of various facts subsequently discovered which cast doubt on whether 154 Taiwanese Noteholders were the true owners of the Notes.

12. The main concerns were as follows. The Taiwanese Noteholders' votes were all received from one company, Nomura Singapore Ltd. ("Nomura"), with accounts spread between two intermediaries, P.T. Amantara and P.T. Aldiracita Corpotama. These persons represented 86% of the total number and 25 % in value of all creditors who voted on the Scheme. They were discovered to be all employees of the APP group. When BCG called various Nomura clients at the numbers provided on the voting forms, and spoke to eight Noteholders, they found no one who admitted to owning the bonds or who gave responses normally to be expected of investors in defaulted notes. In June 2004, BCG discovered that the Company's attorneys had been holding the Nomura clients' BMA forms since March with instructions (from a financial adviser) not to forward them to BCG for processing because of "*significant trading in the notes*".

13. In his Examination-in Chief Mr. Apfel denied that he wrote to this Court motivated by revenge because of the APP Group's decision not to retain him for a restructuring exercise. He also testified that he sent a June 15, 2004 resignation letter to the Defendant because BCG "*had serious questions that had been raised and for which we had not been able to receive answers.*" He also described how he was restrained by an injunction obtained by the Defendant in New York from communicating his concerns after he had shared them not just with this Court, but with the Attorney-General's Chambers, the BMA and Director of Public Prosecutions' office in Bermuda and the New York District Attorney and the Securities and Exchange Commission in the United States.

14. Under cross-examination, Mr. Apfel admitted that on July 27, 2004, he had written to this Court seeking the return of the Apfel Letter, and concluding: "*I shall not pursue this matter any further.*" He sought to downplay the significance of a fee dispute which was resolved by a February 6, 2004 settlement letter, suggesting that it was normal for clients to be concerned about the level of fees. Mr. Apfel also agreed that BCG and a company run by a former BCG employee were competing to do work on the restructuring of the APP Indonesian subsidiaries. He admitted that he made a formal offer in this regard by letter dated May 17, 2004 and subsequently learned that the job had been given to the competitor company. However, he was somewhat evasive when asked to confirm

[3] why he declined to take up the Defendant's offer in their June 10, 2004 letter to take "*all reasonable steps to allay your concerns that the Taiwanese Bondholders are not the beneficial owners of the bonds*", or similar offers made by the Company's advisers on telephone conference calls.

15. When cross-examined on the Apfel Letter, his assertion that the Taiwanese Noteholders voting documentation all came through Nomura was not challenged. Mr. Apfel agreed that the enquiries BCG had initially made of Nomura to satisfy itself of the identity of the beneficial owners were sufficient for normal purposes but insisted that the usual steps were insufficient for the situation described in the Apfel Letter. He was also not challenged on his assertion that 82 noteholders represented by a New York firm called Pershing had not asked for individual certified notes. Although it was put to Mr. Apfel that all the forms in question had now been approved by the BMA and share certificates issued, his evidence that the Company's Bermuda lawyers had kept the BMA forms between March and June 2004 with instructions not to process them was not challenged. In response to the suggestion that some Pershing clients had also asked for their BMA forms to be held back because of pending sales, Mr. Apfel stated:

> "*It is possible there were delays on the part of other bondholders in seeking or gaining approval from the BMA. But certainly no approvals of such a large number of people clustered together as this group.*"

Theodore Bloch

16. Theodore Bloch swore three Affidavits on October 16 and 30 and November 6, 2003 in the Scheme Proceedings. His First Affidavit explained what documentation had been sent to creditors. His Second Affidavit produced the results of the voting on the Scheme. His Third Affidavit deposed to the fact that seven institutional investors were among those voting in favour of the Scheme. This evidence was relied upon by the Defendant in the Scheme Proceedings to contradict the Objectors' case that no reasonable creditor acting in its own interests would have supported the Scheme.

17. Mr. Bloch commenced drafting "*probably the first page or so*" of the Apfel Letter, and then seemingly steered well clear of Mr. Apfel's completion of the letter. He also had little if any involvement with the investigations that led to the Apfel Letter. When asked by the Plaintiff's Counsel whether he now had any view of the accuracy of his Affidavits he answered:

> "*Well, no, I don't have a view….I think there is…there may be some basis for further investigation. But I don't have a view.*"

18. Unsurprisingly, Mr. Bloch was not cross-examined.

Amy Hsu

19. Ms. Jin Feng Hsu (known as "Amy Hsu") was the Director of BCG's Data Analysis Group who was asked by Robert Apfel in or about June 2004 to call the Taiwanese Noteholders to check the accuracy of the information BCG had on file. She made contemporaneous notes in Chinese on post-it tabs and from these notes prepared a typed spreadsheet setting out in English who she called and the answers she received.

20. Under cross-examination, the witness explained that she told whoever answered the phone that she was calling from Bondholders in New York, a representative of

[3] The witness did appear tired at this juncture, with these questions being asked after 4.00 pm. The deposition started at 10.00 am with a lunch break between 12.30 and 1.30 pm.

APP China, and wanted to make sure that the noteholders' information was correct and current. She admitted that without refreshing her memory by reference to her notes and/or the spreadsheet based on her notes, she had no independent recollection of what was said to her on any of the calls. She spoke to around eight actual noteholders, none of whom acknowledged being the owner of the notes. Ms. Hsu was unsure when she made each call-some where made on June 1, 2004-but said the spreadsheet was prepared on June 10, 2004, the date at the bottom of each page. When it was suggested, based on the Nelson Wheeler Report prepared for the Defendant, that her notes did not accurately record what the actual noteholders had said, Ms. Hsu stood by the general accuracy of her notes, though looking somewhat concerned at the idea that she might have made even a minor mistake.

21. The eight entries in the spreadsheet which appear to record calls made to actual noteholders read as follows:

Phone Logs with Taiwanese Bondholders					
No.	***Custodian***	***Beneficial Holders***	***Amount***	***Telephone***[4]	***Note***
26	*Nomura Securities Limited*	*Chu Ting Chi*	*$1,250,000.00*	*866* […]	*Currently live in Indonesia (254* […]*), claimed will ask his Financial Advisor to call me back. Haven't received the call back yet.*
58	*Nomura Securities Limited*	*Chao Jen Tseng*	*$880,000.00*	*886* […]	*Currently live in Indonesia (254), ("the connection was really bad, can't get much information.")*
75	*Nomura Securities Limited*	*Shih Chun Jen*	*$750,000.00*	*886* […]	*Currently live in Indonesia, work for APP Indah Kiat (761), ("asked me to contact Manager Chen Kao Jen for details.") (6/8/04)*
77	*Nomura Securities Limited*	*Chang Chao Ming*	*$750,000.00*	*886* […]	*("Talked to Mr. Chang (812) in Indonesia, he has been working for APP for 15 years, his current title is Manager in the Construction Department but has no idea what is going on.")*
90	*Nomura Securities Limited*	*Chang Jung Hsiang*	*$650,000.00*	*886* […]	*Currently live in Indonesia (321*[…]*- work, 321- home), work for Tjiwi Kimia, asked me to call Manager Sun Tung Yang for details – 321*[…]*.*
96	*Nomura Securities Limited*	*Lin Bing Huang*	*$575,000.00*	*886* […]	*Currently live in Indonesia 811 (Mobile), 254* […] *(home), work for APP, has no idea about this bond.*
98	*Nomura Securities Limited*	*Chen Chin Cheng*	*$500,000.00*	*886 […]*	*Currently live in Indonesia (811*[…]*), works for APP, has no idea what I was talking about, can't remember anything.*
132	*Nomura Securities Limited*	*Tseng I. Shen*	*$300,000.00*	*886 […]*	*Currently live in Indonesia (761*[…]*), works for APP, has no idea about this bond, will call me back 6/9/04.*
141	*Nomura Securities Limited*	*Chen Tien Hwa*	*$200,000.00*	*886* […]	*Currently in Taiwan, will be out of work for 6 months for personal reasons, his old title was engineer in APP, and said that he forgot the details of this investment, and claimed that the company in Taipei handled all the information for them, (6/8//04)…*

[4] Complete numbers have been omitted in each case, but appear in the original document.

22. The complete spreadsheet records conversations with less than 50 individuals, 40 of whom are third parties. Of these third parties at least 10 are wives while the record suggests that-apart from one maid-family members live at the addresses of record for the Taiwanese Noteholders. Most responses of family members are inconclusive; but even where they (exceptionally) record the suggestion that the Noteholder could not afford the investment, the recorded responses are entirely consistent with the speaker being either (a) uninformed or (b) protective of confidentiality. One entry alone, in connection with a China-based employee, plainly supports the notion that the Defendant at the very least knew that its employees held notes before the Scheme was sanctioned: "*…wife remembered that received something from the court, and, confused, but APP asked them to support the company, and told them not to worry about it later on.*"[5]

Charles Finch

23. Charles Finch was accepted as an expert and confirmed his August 25, 2006 Report and the November 14, 2006 Addendum. An Economist and Accredited Valuation Analyst, he testified that he has been accepted as an expert in the courts of the United States on approximately 50 occasions, with his evidence being ruled inadmissible only once.

24. His Report made the following significant assertions. Based on publicly available data, the average annual salaries for Indonesian workers working in the paper industry between 1998-2000 were US$513, which would have permitted savings (assuming a rate of 6.7%) of $34 per year. A Taiwanese worker in the paper industry in Taiwan would, on average, have saved far more annually, some $750 during the period of 1987-2000. According to the Nelson Wheeler Report which was produced for the Defendant (but not positively relied upon at trial), most of the Taiwanese Noteholders' Notes (worth a total face value of US$ 125,054,000) were purchased between 2001 and 2002, when the average trading price was $0.1187 per face value dollar. Each Noteholder would have paid US$98,959 for their bonds, which would take 132 years for the average Taiwanese worker in the paper industry in Taiwan or 2,870 years for the average Indonesian-based worker to save.

25. In paragraph 21 of his Report, Mr. Finch opined:

> "*In my experience in analyzing distressed companies and the debt of distressed companies, there are buyers willing and financially able to take on the substantial risk associated with the purchase of distressed bonds. Those buyers are sophisticated institutional players in the debt and equity markets, not individuals risking their life savings.*"

26. The Expert's Addendum throttled back somewhat, in terms of the likely wages of the Taiwanese Noteholders contended for, taking into account that the relevant criterion was the average wage for managers and professionals working in Indonesia, not average workers generally. Relying on the '*Statistical Yearbook of Indonesia*' 2003, he further opined that the average professional, managerial or technical worker in Indonesia would only have earned US$2,769, $3,813, $3,218, $838, $1,772 and $1,683 in 1990, 1993, 1995, 1998, 1999 and 2000, respectively. The Addendum was primarily prepared by way of response to the Witness Statement of the Defendant's witness, Payroll Administrator Dama Yanty Jamar. In this regard, Mr. Finch pointed out: (a) the salary spreadsheet she produced had no supporting documentation, (b) over half of the names listed in the Nelson Wheeler Report are missing, (c) salaries are shown as constant over 5-6 years, and (d) the Defendant's case on salaries still would require all net income over 5-7 years to have been invested to buy the "*severely distressed bonds*".

[5] Page 5, number 105.

27. Under cross-examination, Mr. Finch conceded that he had not investigated the salary scales payable to expatriate managers and professionals in Indonesia. With a forensic flourish, Mr. Hargun requested the witness to do an internet search on a computer connected to a large screen keying in the words: "*salaries for expat workers in Indonesia*". He was then asked to click on the search result '*Guidelines for Salary standards for Foreign Workers*', and a copy of what appeared to be a directive from the Indonesian Director General of Taxation was found on that website. This suggested that Taiwanese managers and technicians should earn roughly $50,000 per annum working in Indonesia, while general managers should earn some $83,000. Assuming a 20% tax rate and yearly savings of 28% and 36% respectively, Mr. Finch accordingly conceded that if these rates actually applied, annual savings would be between $11,359 and $24,119 for managers and general managers, respectively. This would still require saving over periods of 8.7 and 4.1 years for managers/technicians and general managers, respectively. He stated that even if the Taiwanese Noteholders had food and accommodation fully paid for by their employers increasing monies available for savings, the evidence he had reviewed suggested that many had families in Taiwan who they were likely to be supporting.

28. One important aspect of Mr. Finch's initial report was not challenged in cross-examination. He stated that on analysis of the list of Taiwanese Noteholders attached to the Apfel Letter, he found that there were (a) 150 Noteholders with (b) Notes worth altogether $125,054,000 in terms of their face value.

The Defendant's evidence

29. Mr. Indra Widjaja was deposed and video-taped in Singapore, and it is he that the Plaintiffs allege gave perjured evidence in the Widjaja Affirmation. Witness statements were relied upon under Order 38 rule 21 in respect of three Taiwanese Noteholders, Chang Chao Ming, Chao Jen Tseng and Chu Ting Chi. Two witnesses gave oral evidence in Bermuda, Ms. Dama Yanty Jamar and Mr. Suresh Kilam[6].

Mr. Indra Widjaja

30. In his examination-in-chief, Mr. Widjaja (speaking through an interpreter) explained that his Affirmation was signed in Ningbo, China. He confirmed that as he deposed in paragraph 3, he had seen a copy of the November 6, 2003 Van Duzer Affidavit. He also confirmed that his Affirmation was referring in particular to paragraph 6 of the Van Duzer Affidavit, which read as follows:

> "*It is the belief of the Fidelity Funds and I am informed the belief of the Hancock Funds that a significant number of creditors who voted in favour of the Scheme did so as a result of affiliations such creditors have with the Controlling Shareholders of the Company, in order to ensure the continuance of control of the Company by the Controlling Shareholders directly or indirectly and to insulate the interests of the Controlling Shareholders in the Indonesian based operations of APP from the claims the holders of the bonds have against APP on account of APP's guarantee of payment of the bonds. It is further the belief of the Fidelity Funds and I am informed the belief of the Hancock Funds that if the votes of affiliated creditors were excluded from the count, it is doubtful whether the Scheme would have been upheld by the requisite number of creditors holding the requisite value of debt.*"

31. Mr. Widjaja next confirmed that his understanding of the meaning of the term "*APP Controlling Shareholders*" used in the Van Duzer Affidavit corresponded with the definition on page 30 of the Scheme Document[7] : "*certain members of*

[6] Mr. Bertie Mehigan of White and Case Singapore attended, but was not cross-examined.
[7] Page 47 of Exhibit "TAL-1" to the First Alex Goh Affirmation sworn on September 19, 2003 in the Scheme Proceedings.

the Widjaja family who hold, directly or indirectly, the power to direct or cause the direction of the management and policies of APP, whether through the ownership of voting securities or by contract or otherwise". (It is common ground that a Singapore company, Asia Pulp & Paper Ltd. ("APP") is the ultimate parent company of the Defendant, and was prior to the Scheme's sanction the guarantor of the Notes). He then testified that he reviewed a list of the creditors who voted in favour of the Scheme but could not either when he swore his Affirmation or now recognise any as employees of the operating companies of the APP Group.

32. He explained that he worked primarily in the Sinar Mas Group of Companies, which was represented in the paper industry by APP. In Indonesia alone, APP had 11 factories with 300,000-500,000 employees. About 2000-3000 employees were expatriates. His role was as a Commissioner on the Supervisory Board of Directors at the holding company level, so the witness had no involvement at the operating company level. His brother Teguh was responsible for the paper side of the business, while he himself was responsible for finance. Mr. Widjaja's other responsibilities included being president of a bank, Bank International Indonesia ("BII") and a director of insurance businesses.

33. Mr. Widjaja next confirmed that he believed the following crucial sentence in his Affirmation of November 7, 2003 to be true when he signed it:

> *"The APP Controlling Shareholders are not affiliated to or otherwise connected with any of the creditors, including the Supporting Noteholders, who voted in favour of the Scheme, other than BII, whose connection to the APP Controlling Shareholders is disclosed in the Scheme Document.*"

34. The following questioning then took place concerning his understanding of the word "*affiliated*":

"*Q. The expression in that sentence, "affiliated," do you see that?*

A. Yes.

Q. What did you have in mind when you used the expression "affiliated"?

A. Okay, I used the word "affiliates" here because it's -- has a relationship with the Widjaja family.

Q. You also used the expression in that sentence "or otherwise connected with." What did you mean by the expression "otherwise connected with"?

A. It -- it has the same meaning with the affiliation -- "affiliation" and the "otherwise connected" -- it's the same meaning.

Q Let me ask you -- is it supposed to add anything to the word "affiliated"?

A. No, it has the same meaning.

Q. Now, I want you -- to ask you a few more questions in relation to paragraph 4, but for present purposes, Mr. Widjaja, please assume with me that these individuals are, in fact, employees of the operating companies.

MR. WOLONIECKI: Sorry, which individuals of the operating companies?

MR. HARGUN: The individuals with the addresses in Taiwan, the creditors.

If you knew that the individuals with addresses in Taiwan, in the list of creditors who supported, were in fact the employees of the operating companies, would you change the first sentence of paragraph 4 of your affirmation?

A. No. No, the -- the lists of the creditors, they -- they have nothing to do with the Widjaja family. They have no relationship with the Widjaja family, and I will not

change the -- the statement. We have so many employees, about 300,000, more. It would, -- it would be impossible that all of them are our family.

Q. Well, let me make sure that I understand it. Would you consider that the employees of the operating companies are affiliated to the Widjaja family?

A. It has -- okay. It has no relationship with Widjaja family. Affiliacy [sic] has no relationship with the -- okay, we have a banking regulation. If we have a affiliation which is related to the family, we have to report to the Bank Indonesia, central bank."

35. Mr. Widjaja then said that he would know if any family members had bought any of the notes because he was responsible for cash flow, and denied that this had occurred. He also denied that any family members had assisted any of the employees to buy the notes. He went on to explain that he met with creditors because "*in the Widjaja family, I'm the banker who understand more about this restructuring, and I also represent the shareholder.*" As stated in his Affirmation, the details of the Scheme were not discussed, only the broad debt for equity concept. However, he did not meet with any of the Taiwanese Noteholders. He stated:

> *"I was involved in several meetings with the creditors. The meetings were held in New York, in Singapore, Jakarta, Bali. Okay, there is a lot of creditors and bondholders and export agencies from several countries. They also came to my office in several meetings.*"

36. Under cross-examination by Mr. Woloniecki, Mr. Widjaja stated that most of these meetings concerned APP and the Indonesian companies, not the Defendant. Mr. Widjaja explained that the Sinar Mas Group had been established by his now elderly father, and the APP Controlling Shareholders were essentially now himself and his brothers. He said that his first language was Mandarin Chinese, which he agreed was the national language of Taiwan. He testified that his elder brother Teguh was involved with the details of the Scheme, as he was a director of APP China[8]. The witness only discussed the restructuring at a high level with his brother. The following questioning then took place as to why it was that the witness and not Teguh was chosen to give the Affirmation:

> "

Q. Yes. And you were chosen, Mr. Widjaja, to swear an affidavit in the Bermuda proceedings, an affirmation which we have seen, as one of the controlling shareholders -- you were asked to do that. That's correct, isn't it? As a -- you signed this affirmation as a controlling shareholder of APP?

A. Yes, correct.

Q. Now, is there a reason why you were selected to swear that -- sign that affirmation, as opposed to your brother -- any of your brothers?

A. As I explained before, during the restructure -- restructuring, I was a banker and most of the creditors already know me, and I was very active in the restructuring and I know the -- the financial condition of the Widjaja family, and I'm the right person who give -- who should give the statement.

Q. Just pausing, that last response -- you say you are the representative who should give the statement. You've told us that it was your brother Teguh who

[8] This must be a reference to the intermediate holding company between APP and the Defendant, whose directors at page 140 of the Scheme Document do not include Teguh Widjaja.

handled the details of the restructuring, and it was Teguh who was involved in the issuing of the bonds; that's correct, isn't it?

A. *Yes.*

Q. *Yes. So why didn't Teguh sign the affirmation, Mr. Widjaja?*

A. *As I mentioned before, if it's related to the purchase of the bonds and whether the employees is part of the -- the affiliates, I know more than Pak Teguh.*

Q. *So your evidence is that you know more than Teguh about who was purchasing the bonds; is that correct?*

A. *That's not -- that's not correct. That's not correct.*

Q. *No. So, could I just clarify what -- what his evidence is as to why he, rather than Teguh, signed this affirmation?*

A. *As I mentioned before, I know more about the financial condition of the Widjaja family and I -- and in the statement, I mentioned that we never buy the -- the bonds of the APP, issued by APP China. And I know who -- who is the affiliates and who is not the affiliates of Widjaja family, and when I received the fax from the lawyers regarding the statement from Van Duzer, if -- after reading the fax sent by them, I know who is the affiliates and who is not the affiliates, and if Pak Teguh is the -- if my brother Teguh is the one who sign, he would -- he would -- he would be saying the same, that -- that those are not the affiliates.*"

37. Mr. Widjaja then explained that he read Mr. Van Duzer's allegations in English, and "*overall*" understood what the allegation was. His Affirmation was drafted in English by his lawyer, and discussed in English. When he received Mr. Bloch's Affidavit with the list of creditors, he testified: "*I only spoke to my lawyer and I never spoke to my brother* [Teguh] *about that.*" The following interchange took place when the Plaintiffs' Counsel again raised the issue of why the witness had been chosen to swear the Affirmation:

"

Q. *Yes, I understand that. Why is it, Mr. Widjaja, that you are the person who is swearing this affirmation, when you told us that Teguh was the person who was direct -- more directly involved in putting together the scheme of arrangement?*

A. *Because as the representative of the shareholders, I am entitled to -- to represent in the negotiations with the creditors, and -- and Teguh is more involved with the -- his company in China. And he represents the company and I represent the shareholders.*

Q. *Well, I'm grateful for that answer, because this affidavit -- this affirmation is sworn on behalf of the company. You understand that this document is filed in the Bermuda court on behalf of the company and not on behalf of the shareholders; do you understand?*

A. *This is -- this is as requested by the company to the shareholders, to give the statement on behalf of the company.*"

38. Mr. Widjaja was then asked about the extent of his family's ownership interest in the Defendant after the Scheme, and whether he agreed that their interest was limited to the 1% shown in the chart on page 15 of the Scheme Document, which indicated that 99% of shares would be held by creditors immediately after the Scheme. He initially agreed that this suggestion was correct, but he quickly corrected himself, pointing out that BII was a creditor ultimately owned by his family. When referred to a share register for the Company as at February 22, 2005, he admitted that at this later date he was recorded as owning 3000 shares, but could not initially recall when and how they had been purchased. It later emerged that these shares were issued because Mr. Widjaja lent the Company $1.5 million to cover Scheme expenses.

39. With respect to the corporate structure of the Group and where the Indonesian operating subsidiaries fitted in, Mr. Widjaja confirmed the accuracy of the chart set out on page 9 of the April 17, 2000 Supplement to the original Offering Memorandum dated March 9, 2000 issued by the Defendant in respect of the US$403,000,000 14% Notes due in 2014. This showed that APP owned through an intermediate company PT Purinnan (at the same level of the Defendant's parent) six Indonesian operating companies including companies referred to by Counsel as Indah Kiat and Tijiwi Kimia. Referred to page 201 of the Offering Memorandum where APP's directors are described, the witness admitted that (a) his brother Teguh was President Director of Indah Kiat in November 2003, and also a director of Tjiwi Kimia, and (b) that his brothers Franky and Muktar were also (in 2000 at least) directors of Tjiwi Kimia and Indah Kiat. He also agreed a large number of Taiwanese Noteholders were employed by the Indonesian operating companies in November 2003, and were part of their management as the Defendant had admitted. However, they were not at the director level. When asked whether Teguh would have known some or all of the Taiwanese Noteholders, Mr. Widjaja said that he did not know. He then gave the following evidence:

"

Q. Yes. Just so that we are clear as to what your evidence is, you said that at the time you signed this affirmation, you did not know that the identity of any of these noteholders -- you did not know that they were employees of the Indonesian operating subsidiaries; that's your evidence

A. Yes, I did not know at all.

Q. Yes. If you had been told in November that 150 or so people who are noteholders are employed by APP's operating subsidiaries in Indonesia, would that have made any difference to what you said in the affirmation?

A. I would -- I would not make a different statement, especially regarding whether they are the affiliates to -- whether they have affiliation to the shareholders. If I had known, I may have add one more statement that says that they are the employees of the APP operating subsidiary in Indonesia -- if I had known at that time.

Q. Yes. So, your evidence is that if you had known, you would have disclosed that fact to the Bermuda court?

A. *Yes, of course.*"

40. Mr. Widjaja further disclosed that he and his brothers in 1999 resigned as directors of BII because they all failed the fit and proper test for banking purposes. This was not because they broke banking regulations by lending too much to family-owned companies, although after the financial crisis when the Indonesian currency fell, the level of such loans became too high. As to the

exact reasons for failing the fit and proper test: "*I did not know the exact reasons, but we admitted that we are lacking—we were lacking in terms of the risk management.*" He admitted knowing two stockbrokers who were tenants in the BII building, PT Amantara Securities and PT Aldiracita Corpotama, and who were shown in the Nelson Wheeler Report as confirming the ownership of the Taiwanese Noteholders. There were about 200 such firms in Indonesia.

41. Mr. Widjaja denied that the bond market was smaller than the stock market and rejected the suggestion that specialist investors typically purchase distressed bonds. He insisted it was plausible that the Taiwanese Noteholders would be interested in investing in the China side of APP's business because there were prospects of the employees joining those operations in the future, and because they were familiar with the Group's business activities there. He indicated that he believed BII, on whose behalf he voted in support of the Scheme, applied to get their shares in early 2004. He denied knowing that the 150 Noteholders used the same Singapore broker, Nomura, and did not know why all these Noteholders by May 2004 had not applied for their shares. He reiterated that he signed the Affirmation without consulting other family members such as Teguh:

"

Q. And is it your evidence that you have never discussed with your brother Teguh who these noteholders are?

A. Yes, correct.

Q. And is it your evidence, then, that APP did not know -- not you personally, but is it your evidence, to the best of your knowledge, that APP did not know in November 2003 that 150 people employed in Indonesia allegedly invested their own money in these bonds?

A. I -- I didn't know because I was in -- in China at the time, and I did not question APP, whether they are the shareholders -- they are related to the shareholders. So I just give the statement that they are not affiliated to the shareholders.

Q. I think I am going to have to have -- put that question again, because I don't believe I got an answer to it. We'll take it slowly. I'll just see where it was. (Interpretation continues)

Can we have that on the record, please? If -- it should be on the record.

A. (In English) yes, translator can. (Interpretation continues). At that time I didn't know whether APP has a relationship or not. I just made the statement whether this people, the 150 staff here -- oh, whether this -- all of these creditors has affiliates -- affiliation to the -- with the -- the shareholders or not.

Q. *Yes.*"

42. While frequently denying suggestions put to him in unequivocal terms, he responded to the following suggestions thus:

"

MR. WOLONIECKI: I'm -- I'm asking Mr. Widjaja if he agrees with this suggestion, that all, or nearly all of them did not buy those bonds using their own money.

A. I don't know.

Q. You don't know. I suggest to you, Mr. Widjaja, that the market speculation was well-informed and that, in fact, you and members of your family engaged in a systematic buying of bonds in APP.

A. I don't think that is correct.

Q. I suggest to you, Mr. Widjaja, that no other explanation is credible.

A. I think they can say what they want, because it's just a speculation. And I can also say that he also bought the – the – I can also suggest that you also bought the – the bonds, because it's just a speculation.

43. Finally, he insisted that his Affirmation remained true today, including the first sentence of paragraph 4, and the assertion that the "*APP Controlling Shareholders are not affiliated to or otherwise connected with any of the creditors…other than BII,…whose connection …is disclosed in the Scheme Document.*"

Suresh Kilam

44. Mr. Kilam, director, Chairman and Chief Executive Officer of the Defendant company, confirmed his Witness Statement of August 23, 2006. He has been with the APP Group for more than 15 years and oversees the marketing of its products. In addition to setting out the background to the present proceedings, Mr. Kilam stated that the Plaintiffs had been issued shares under the Scheme between October 15, 2004 and February 17, 2005. He explained that the names of only two of the Taiwanese Noteholders were familiar to him, but in general terms the Taiwanese employees were a "*close knit group. Culturally, they are risk takers*". Many of the Group's Taiwanese employees had initially worked for the Indonesian subsidiaries when they were under Taiwanese Government ownership, and remained after the APP Group acquired the companies between 1985 and 1992. He also explained that Mr. Widjaja's 3000 shares were issued to him in consideration of a $1.5 million loan advanced by the Controlling Shareholders to fund Scheme expenses.

45. Mr. Kilam also stated that it would be extremely difficult to overturn the Scheme because the Notes no longer existed. The Taiwanese Noteholders were now shareholders, and they and other shareholders (including transferees post-Scheme) would be prejudiced if the Scheme were to be overturned.

46. Under cross-examination, Mr. Kilam confirmed that Mr. Goh is still with the Defendant and in good health, and had served as General Manager Finance at Indah Kiat between 1993 and 1998. He agreed that the Nelson Wheeler Report revealed that the overwhelming majority of the Taiwanese Noteholders were from Indah Kiat. However, he pointed out this company had four locations. Counsel then referred the witness to financial statements for the years ending 2003 and 2004 for a property development company called PT Duta Pertiwi Tbk. Mr. Kilam agreed that he had no reason to doubt based on these documents that (a) Muktar Widjaja was its president Director, and that (b) this company was related to Indah Kiat, PT Aldiracita Corpotama and PT Amantara Securities.

47. Mr. Kilam insisted that the Defendant was not presently insolvent but would become insolvent if the existing shareholders became creditors. Although he had not seen recent accounts, he knew that due in part to the rise of the price of pulp (which had more than doubled since November 2003), the Chinese operating subsidiaries were doing better than expected in November 2003.

48. Under re-examination, Mr. Kilam, in a lengthy soliloquy, painted a vivid picture of the APP Group as a feared world leader in its fields, describing large-scale paper mills in the middle of the Indonesian jungle, the size of cities, in which

the workers lived in free staff accommodation with free "mess" food. They had no overheads, so they could save all their income and invest it. Unabashed about cultural stereotyping, he observed:

> "*My Lord…these Taiwanese, they're basically gamblers or risk takers. When in 1992, when Tjiwi Kimia and Indah Kiat, when we went public in Jakarta Stock exchange. Most of the people borrowed money. Most of the team from whatever savings they had until 1992, they bought these shares. Made money. So they are basically risk takers. I don't mind saying that they're basically gamblers…*"

Dama Yanty Jamar

49. Ms. Jamar, a Payroll Administrator "*in the centralised human resources department*" for the five "*Indonesian Companies*", confirmed (through an interpreter) her September 22, 2006 Witness Statement. Attached to this Statement was a spreadsheet setting out salary data for 52 expatriate employees who consented to this information being disclosed. She stated that these salaries are in addition to free accommodation, food and utilities. The salary data is for job descriptions primarily consisting of general managers, deputy general managers, section chiefs and vice-directors. The salaries listed range, for the years 1997 to 2002, roughly between US$50,000 and US$170,000.

50. Under cross-examination, as clarified in re-examination, Ms. Jamar explained that the Director of Personnel asked her to prepare the spreadsheet and that she did so from computer records that she accessed using a separate password supplied by her supervisor for each year. Under re-examination she stated that these employees were paid through HSBC online banking.

The Three Taiwanese Bondholders

51. Chang Chao Ming states (Witness Statement dated August 24, 2006) that he has worked for PT Lontar Papyrus pulp and Paper Industries for more than 15 years. He paid US$58,125.00 or 7.75% of the face value of his Notes on August 21, 2001, out of his savings. His statement exhibits a letter dated August 21, 2001, from his brokers PT Amantara Securities, signed by both the broker and himself.

52. Chao Jen Tseng states (Witness Statement dated August 25, 2006) that he is a Vice Director who has been employed by Indah Kiat for 11 years. He used savings to purchase US$880,000 face value Notes for US$137,500, on December 21, 2001. He also attaches a broker's letter PT Aldiracita Corpotama confirming this fact.

53. Chu Ting Chi (Witness Statement dated August 25, 2006) states that he is a marketing director at Indah Kiat where he has worked for 21 years. He bought at an 85% discount (for US$ 195, 312.50) Notes with a face value of US$1.25 million, also on December 21, 2001. A broker's letter from PT Aldiracita Corpotama is also attached.

54. These statements were all admitted on the grounds that the witnesses were beyond the seas in Indonesia.

The admissibility of Amy Hsu's telephone call records

55. In the face of Mr. Hargun's intimidating submissions on the inadmissibility on hearsay grounds of Ms. Hsu's spreadsheet, Mr. Woloniecki sought to beat a dignified retreat. The Plaintiffs did not rely on the records for proof of the truth

56. The Defendant's Counsel firstly referred to section 27H of the Evidence Act 1905, which preserves the common law rule on admissions. One potential exception to the hearsay rule was admissions made by agents as BCG were contended to be. These rules were summarised in '*Bowstead on Agency'*, Sixteenth Edition[9], Article 96:

> "*(1) An admission or representation made by an agent may be received in evidence as an admission binding on the principal only in the following cases:*
>
> *(a)Where it was made as part of a communication expressly authorised by the principal;*
>
> *(b)Where it has reference to some matter or transaction upon which the agent was engaged on the principal's behalf at the time when the admission or representation was made, and the making thereof was in the ordinary course of that activity;*
>
> *(c)Where it has a reference to some matter or transaction respecting which the person to whom the admission or representation was made had been expressly referred by the principal to the agent for information…*"

57. The spreadsheet prepared by Amy Hsu was clearly not "*part of a communication expressly authorised by the principal*", as Counsel rightly contended. This was an internal document prepared by BCG as part an investigation launched by Robert Apfel after the Defendant reneged on an apparent commitment to retain BCG for a new project. This aspect of the admissions rule contemplates an admission being made by an agent to a third party. Nor was the preparation of the spreadsheet part of the ordinary course of BCG's duty as Tabulation Agent. As both Apfel and Bloch agreed, ordinarily it is accepted market practice to accept representations as to ownership made by clearing houses or custodians such as Nomura and to act on the basis of documentary evidence forwarded by such entities. The Apfel Letter itself proclaimed with respect to the circumstances of the present case: "*we have never been exposed to the facts that we have seen here.*" Sub-paragraph (c) clearly does not apply.

58. I also accept Mr. Hargun's submission that the telephone call record is not admissible under section 27D(1) as part of "*a record compiled by a person acting under a duty from information which was supplied by a person, whether acting under a duty or not, who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information and which, if not supplied by that person to the compiler of the record directly, was supplied by him to the compiler of the record indirectly through one or more intermediaries each acting under a duty.*" The type of record which the statute applies to was classically described by Bingham J. (as he then was) in *H v Schering Chemicals Ltd.* [1983] 1 All ER 849 at 852:

> "*The intention of that section was, I believe, to admit in evidence records which a historian would regard as original or primary sources, that is documents which either give effect to a transaction itself or which contain a contemporaneous register of information supplied by those with direct knowledge of the facts.*"

59. The authorities cited by Mr. Hargun make it clear that the sort of record which is contemplated by the statute does not extend to a record prepared on an ad hoc basis as part of an investigation into an exceptional case. Accordingly, the

[9] (Sweet & Maxwell: London, 1996).

spreadsheet Ms. Hsu prepared is not admissible as to the truth of the statements she records therein on this basis or at all.

The Defendant's estoppel defence

60. Mr. Hargun sensibly did not emphasise the weakest link in his defensive chain, the estoppel defence. This defence fails for the following reasons.

61. I find that the Plaintiffs at the earliest had notice of the Apfel Letter on June 15, 2004. I find that their broker emailed the Defendant on or about September 15, 2004 requesting an update on the issuance of the Plaintiff's Scheme shares. Mr. Van Duzer accepted that this enquiry was made with authority. But on September 21, 2004, the brokers were instructed to take no further action in this regard. When the September 15, 2004 email was re-sent on October 11, 2004, the agents had no authority to make this request. And the proceedings had been commenced on October 1, 2004 by then. In any event, this innocuous routine enquiry can hardly be construed as a waiver of the Plaintiff's right to challenge the Scheme, and there is no evidence of any detrimental reliance on the Defendant's part.

62. Mr. Van Duzer under cross-examination described negotiations with the Defendants which were ongoing on September 21, 2004 with a view to a purchase of the Plaintiffs' bonds. It is not in dispute that a meeting took place on August 24, 2004 and a follow-up telephone conference on September 9, 2004. On September 17, 2004, Mr. Van Duzer emailed Bertie Mehigan: "*We can give your side until Friday September 24th but will need a firm offer by then.*" This deadline was extended by Van Duzer to September 27, 2004 by his email dated September 24, 2004: "*If we have not reached a deal by then we will begin litigation.*"

63. I find that Nathan Van Duzer was the only agent of the Plaintiffs, at all material times, with actual or apparent authority to waive the Plaintiffs' right to bring the present proceedings. The administrative enquiry by the broker about the status of the shares neither represented a waiver of the present claims nor was relied upon by the Defendant as such. This Defence accordingly must be rejected.

The Plaintiffs' claim for damages for the tort of deceit

64. Mr. Woloniecki also did not press the weakest limb of his clients' case. The claim for damages by way of relief is not supported by any substantive plea of an arguable cause of action. The pleading makes out a case that a fraud was committed on the Court, but no allegation that the Plaintiffs were deceived is made. Nor was any evidence capable of supporting such a plea led at trial.

65. Accordingly, this aspect of the Plaintiffs' case is summarily dismissed.

Legal findings: proof of the fraud allegation

66. There was no serious dispute on the legal principles applicable to proving the fraud allegation. Mr. Woloniecki submitted that (a) perjury was a recognised form of fraud for the purposes of an application to set aside a judgment by fraud, (b) the action must be based on new evidence not previously available, (c) a witness for the successful party in the previous proceedings must be shown to have wilfully made a statement he knew to be false or did not believe to be true[10], (d) the burden was on the Plaintiffs to establish that perjury was "*distinctly more probable than not*", and (e) the perjured evidence would be material if it "*entirely changed the nature of the case*" : *Kuwait Airways Corp-v-Iraqi Airways Corp (No.5)* [2003] 1 Lloyds Rep 448.

[10] This is consistent with the offence of perjury under Bermuda law under section 119 of the Criminal Code.

67. I also accept the following submissions of Mr. Hargun. Firstly, this action is limited to the fraud issue and cannot be treated as a rehearing of the original application under section 99 of the Companies Act 1981 for the sanction of the Scheme: *Flower-v-Lloyd* [1876] Ch. 297 at 301. Secondly, the allegation must be fully particularised and strictly proved; "*there must be conscious and deliberate dishonesty, and the declaration must be obtained by it*": *The Ampthill Peerage* case [1977] AC 547 at 571. I accept this latter dictum, having regard to the fact that deliberate dishonesty is what is pleaded in this case, but mindful of the fact the strict legal position appears to be that recklessness will suffice. In *Fletcher-v- Royal Automobile Club Ltd.* [2000] 1 BCLC 331, Neuberger J held:

> "*The fraud alleged in the present case is therefore an admittedly inaccurate statement made by or on behalf of RACL allegedly in order to deceive the court into granting the relief which it duly granted. So far as the principles are concerned in relation to pleading and establishing this fraud, it seems to me that the following five points apply.*
>
> *First, the position is no different from any other allegation of allegedly fraudulent misstatement.* **What has to be pleaded and established is actual dishonesty or recklessness. Mere negligence or inadvertence is plainly not enough. In other words, the plaintiffs would have to establish that the person responsible for giving the information knew it was wrong or was completely unconcerned as to whether it was right or wrong and took no steps whatever to check;** *it would not be enough to show carelessness…."* [emphasis added]

68. When I raised with Counsel whether it was open to the Court in light of the pleadings to find that an admission as to perjury by way of recklessness had been made, a point neither Counsel had addressed, their respective positions appeared to be as follows. Both agreed that deliberate dishonesty was legally required and implicit in the Plaintiff's pleaded case, while Mr. Hargun disputed that recklessness would suffice, on the Plaintiff's pleaded case, if at all. Dealing at this juncture only with what the bare legal requirements are, it seems clear from the above *dictum* that to the extent that the criminal offence of perjury embodies as an essential element the witnesses' knowledge of the falsity of his testimony, recklessness is a species of knowledge, and is generally a sufficient *mens rea* for crimes of specific intent. Whether recklessness is adequately pleaded will depend on the facts of every case. But, where it is established that a witness was deliberately dishonest in their approach to their evidence, whether they had actual knowledge of the falsity of their evidence or were being deliberately reckless as to its truth or falsity must be a distinction without any material difference.

69. The most important legal point which in my view was not clearly elucidated by any of the authorities was the precise scope of the requirement that the perjured evidence must be "*material*". The Defendant's preferred position was that unless the Court was satisfied the result would have been different, but for the perjured evidence, a judgment was not liable to be set aside. The Plaintiffs relied on the somewhat abbreviated dictum of Steel J in the *Kuwait Airways Corp* case, that the difference between the perjured evidence and the true evidence would be material if it "*entirely changed the nature of the case*." But this test is derived from the House of Lords decision on which the Defendant relied, *Hunter-v- Chief Constable of the West Midlands Police* [1982] AC 529 at 545B.

70. Having regard to the fact that an action to set aside a judgment on the grounds of fraud is not a rehearing of the original action, I find that the perjury complained of must merely be material in the sense that it "*entirely changed the nature of the case*". If the Plaintiffs prove that such a fraud occurred, this Court would have jurisdiction to exercise a discretion as to whether or not to actually

set the judgment aside and, if so, to what extent. Only at this secondary stage does the question of whether the final result should be altered arise. This conclusion is supported by the passage from the Judgment of Neuberger J in *Fletcher-v- Royal Automobile Club Ltd.* [2000] 1 BCLC 331 at 340, the final paragraph of which Mr. Hargun relied upon in support of his wider proposition:

> *"The first question I should consider is whether, even if this line of reasoning is correct, it would be right to let the order stand. In other words, assuming that I was fraudulently misled and that there is power to set aside the order, if the misleading information made no difference to the result, is it a complete answer to the plaintiffs' claim to set aside the order?*
>
> *On this issue, I have been referred to a very recent decision of Langley J, Sphere Drake Insurance plc v Orion Insurance Co plc (11 February 1999, unreported). He said (at p 107):*
>
> *'There is no doubt that in law a judgment obtained by fraud is liable to be set aside and that a judgment obtained by perjury is a judgment obtained by fraud for the purposes of that principle: Hunter v Chief Constable of the West Midlands Police [1981] 3 All ER 727, [1982] AC 529 on appeal from McIlkenny v Chief Constable of the West Midlands [1980] 2 All ER 227, [1980] QB 283.'*
>
> *He continued (at p 113):*
>
> *'Mr Grabiner's submission, relying on Hunter and McIlkenny is that the fresh evidence relied upon must be "likely to be decisive" on the result of the case. Mr Sumption's submission, relying on dicta in Hip Foong Hong v N Neotia & Co [1918] AC 888 and other authorities which have quoted them with approval is that the test is whether the perjured evidence was material to the reasoning in the impugned judgment and might have led to a different decision.'*
>
> *After considering the authorities, Langley J came to these conclusions, which I should read (at pp 116-117):*
>
> *'(1) The principle of finality in litigation is one to which the courts will not lightly find or apply exceptions.*
>
> *(2) Consistent with that principle there is a real distinction between the appellate process and so the rules as to when and what fresh evidence may be admissible in that process and a collateral attack on a judgment of a court of co-ordinate jurisdiction which is the case before me.*
>
> *(3) In the latter case a judgment obtained by perjured evidence is, like any judgment obtained by fraud, liable to be set aside but there must be apparently credible evidence as to the fraud or perjury which not only was not available at the trial and could not have been obtained with reasonable diligence for use at the trial, but which is such as entirely changes the aspect of the case in the sense that it must be likely to be decisive of the outcome of the claim in question.' (Langley J's emphasis.)*
>
> *I gratefully adopt that analysis which Langley J put in somewhat different words at p 120.*
>
> *Mr Ian Croxford QC, who appears for the plaintiffs, together with Mr Thomas Lowe, says that there is not merely the interest of the parties to be considered: there is also a public interest against maintaining judgments obtained by fraud. In those circumstances, he suggests, even though the court may be convinced that no different result would obtain, it may be right, at least in some*

> *cases, to set aside a judgment obtained by fraud, even if the test laid down by Langley J is not satisfied.*
>
> *While it is always dangerous to say that a particular conclusion is never right, I would take a lot of persuading that, in any case, it would be right to set aside a judgment obtained by fraud, where the court was satisfied that the result would have been the same even if the fraud had not been perpetrated. If it is satisfied that some sort of fraud occurred, or may well have occurred, the court's powers are quite wide enough to ensure that appropriate sanctions are applied without having to incur the pointless cost, effort and court time in re-running a case whose result is a foregone conclusion."*

71. It would be tantamount to proclaiming a perjurer's charter to hold that a judgment is only liable to be set aside on the grounds of fraud in circumstances where, but for the fraud, the original decision would not have been made. The law must be that the perjured evidence was material in the sense that it is shown to have been likely to affect the original result. This analysis is consistent with the earliest cases which established the parameters of the action to set aside on the grounds of fraud, and on which the Defendant relied. In *Flower-v-Lloyd* [1876] 6 Ch. 297, Jessel M.R. (at page 300) said, citing a then well known treatise, that the fraud must relate to "'*the principal point in issue'*."[11] This view is also consistent with the more detailed attention given to this question in another of Mr. Hargun's cases, *Boswell-v-Coaks* (1894) 6 R. 167 (H.L.). In this case, the Earl of Selborne (at page 170) held that the new evidence must be "*something material in this sense, that prima facie it would be a reason for setting the judgment aside.*" Most authoritatively, however, the Judicial Committee of the Privy Council, in another case on which the Defendant's Counsel (for rather different purposes) relied, *Boodosingh-v-Ramnarace* [2003] UKPC 50, approved the following materiality test:

> "*'Where a party deliberately misleads the court in a material matter, and that deception has probably tipped the scale in his favour (or even, as I think, where it may reasonably have done so), it would be wrong to allow him to retain the judgment as unfairly procured. Finis litium is a desirable object, but it must not be sought by so great a sacrifice of justice which is and must remain the supreme object. Moreover, to allow the victor to keep the spoils so unworthily obtained would be an encouragement to such behaviour, and do even greater harm than the multiplication of trials. In every case it must be a question of degree, weighing one principle against the other. In this case it is clear that the judge and jury were misled on an important matter.'* "[12]

72. The final legal issue relevant to what the Plaintiffs must prove to establish their fraud allegation is the question of whether or not the fraud of Mr. Widjaja, if proved, may be imputed to the Defendant. The Defendant did not take any point on this issue. No point could sensibly be taken. In the present case the Widjaja Affirmation, albeit sworn on behalf of the APP Controlling Shareholders, was both sought and positively relied upon by the Defendant at the sanction hearing. Assuming there was no other proof that the Defendant adopted the Affirmation and knew it to be false, the Plaintiffs' primary case, Mr. Woloniecki submitted that the fraud of the party rule was satisfied since Mr. Widjaja was part of the Defendant's "*directing mind*": *Odyssey Re London Ltd. –v- OIC Run-Off* [2001] 1 Lloyd's Rep IR 1. That same case also demonstrated that the rule was satisfied where a party knowingly adopted the

[11] Lord Redesdale, 5th edition, pp. 112, 113.
[12] Lord Brown, Judgment, paragraph [19], citing Holroyd Pearce LJ in *Meek-v-Fleming* [1961] 2 QB 366 at 379.

perjured evidence. For reasons that I set out below when dealing with the evidence on attribution, it seems to me that the Company's knowledge independently of Mr. Widjaja is such that it is not strictly necessary for the Plaintiffs to rely on this exceptional application of the rules of attribution, to a person who is not formally a director or other agent/employee of the Company concerned.

73. That the Defendant did not know of the fraud was positively disputed on the pleadings, but issue was not seriously joined on the attribution rules, and the course of the Defendant's evidence appeared to take a wide berth around what (through the imputed knowledge of its more formal agents) the Company actually did know. Since the Scheme was explicitly promoted on the basis that Mr. Widjaja and his family were the "*APP Controlling Shareholders*" who ultimately controlled the APP Group including the Defendant, on the facts no genuine issue could properly be joined on the attribution issue, assuming the normal rules applicable to officers and other agents do not apply. In this event, I adopt the legal test approved by Nourse LJ in the *Odyssey Re* case, who considered the crucial evidence on attribution to be (a) the fact that the non-director witness was the party's "*vital*" witness, and (b) the fact that the corporate party in the prelude to the trial had made the witness "*part of a team which was rowing it victory*"[13]. It is far from clear, however, for the evidential reasons considered below, that the application of the more traditional attribution rules means that there is any need for the Plaintiffs to rely on the exceptional directing mind principle. As Lord Hoffman pointed out in the Privy Council decision in *Meridian Global Funds Management Asia Ltd.-v-Securities Commission* [1995] 2 A.C.500 at 506-507 :

> "*Any proposition about a company necessarily involves a reference to a set of rules. A company exists because there is a rule (usually in a statute) which says that a persona ficta shall be deemed to exist and to have certain of the powers, rights and duties of a natural person. But there would be little sense in deeming such a persona ficta to exist unless there were also rules to tell one what acts were to count as acts of the company. It is therefore a necessary part of corporate personality that there should be rules by which acts are attributed to the company. These may be called "the rules of attribution."*
>
> *The company's primary rules of attribution will generally be found in its constitution, typically the articles of association, and will say things such as "for the purpose of appointing members of the board, a majority vote of the shareholders shall be a decision of the company" or "the decisions of the board in managing the company's business shall be the decisions of the company." There are also primary rules of attribution which are not expressly stated in the articles but implied by company law, such as*
>
> *'the unanimous decision of all the shareholders in a solvent company about anything which the company under its memorandum of association has power to do shall be the decision of the company: see Multinational Gas and Petrochemical Co. v. Multinational Gas and Petrochemical Services Ltd. [1983] Ch. 258.*
>
> *These primary rules of attribution are obviously not enough to enable a company to go out into the world and do business. Not every act on behalf of the company could be expected to be the subject of a resolution of the board or a unanimous decision of the shareholders. The company therefore builds upon the primary rules of attribution by using general rules of attribution which are equally available to natural persons, namely, the principles of agency. It will appoint servants and agents whose acts, by a combination of the general principles of agency and the*

[13] 2000 WL 191217, transcript, page 12.

company's primary rules of attribution, count as the acts of the company. And having done so, it will also make itself subject to the general rules by which liability for the acts of others can be attributed to natural persons, such as estoppel or ostensible authority in contract and vicarious liability in tort.

It is worth pausing at this stage to make what may seem an obvious point. Any statement about what a company has or has not done, or can or cannot do, is necessarily a reference to the rules of attribution (primary and general) as they apply to that company. Judges sometimes say that a company "as such" cannot do anything; it must act by servants or agents. This may seem an unexceptionable, even banal remark. And of course the meaning is usually perfectly clear. But a reference to a company "as such" might suggest that there is something out there called the company of which one can meaningfully say that it can or cannot do something. There is in fact no such thing as the company as such, no ding an sich, only the applicable rules. To say that a company cannot do something means only that there is no one whose doing of that act would, under the applicable rules of attribution, count as an act of the company.

The company's primary rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations. In exceptional cases, however, they will not provide an answer. This will be the case when a rule of law, either expressly or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability. For example, a rule may be stated in language primarily applicable to a natural person and require some act or state of mind on the part of that person "himself," as opposed to his servants or agents. This is generally true of rules of the criminal law, which ordinarily impose liability only for the actus reus and mens rea of the defendant himself."

74. Finally, as indicated when dealing with the materiality test above, even if the Plaintiff makes out its case on fraud, the Court still retains the discretion as to whether or not, and, if so, to what extent, the Order should be set aside: *Fletcher-v-Royal Automobile Club Ltd.* [2000] 1 BCLC 331 at 345.

Factual findings: the Plaintiffs' primary case

75. The Plaintiffs' pleaded case asks the Court to find that, based on the facts and matters set out in the Apfel Letter, the following facts may be inferred:

> "*(i)That the purported Taiwanese noteholders were not the beneficial owners of the notes and not entitled to vote at the Scheme Meeting.*
>
> *(ii)That the beneficial owners of the notes purportedly owned by the purported Taiwanese noteholders were members of APP's Controlling Shareholders.*
>
> *(iii)That paragraph 4 of the affirmation of Indra Widjaja dated 7 November 2003, in which he deposed that, 'The APP Controlling Shareholders are not affiliated to or otherwise connected with any of the creditors…other than BII, whose connection to the APP Controlling Shareholders is disclosed in the Scheme Document…' was false and was known by Indra Widjaja to be false."*

76. The primary allegations are that:

> *"(i)All of the purported Taiwanese noteholders are employees of Indonesian subsidiaries of APP and are residents in Indonesia.*
>
> *(ii)None of the purported Taiwanese noteholders are resident at the addresses set out in the voting forms and employees of BCG were unable to speak to any of the purported Taiwanese noteholders at the telephone numbers provided in the voting forms.*
>
> *(iii)None of the persons to whom employees of BCG spoke at the Taiwanese addresses appeared to have any knowledge of the alleged beneficial ownership of any of the purported Taiwanese noteholders.*
>
> *(iv)All of the purported Taiwanese noteholders are persons of limited means and do not fall within the class of persons who typically invest in bonds or notes.*
>
> *(v)None of the purported Taiwanese noteholders have provided BCG with any or any sufficient evidence as to their beneficial ownership of the Notes.*
>
> *(vi)As of the date of the Apfel letter, none of the purported Taiwanese noteholders had made any application to the Bermuda Monetary Authority for registration of the shares in the Company to which they are purportedly entitled under the Scheme."*

77. It is admitted (or not seriously disputed) that (a) the Taiwanese Noteholders are employees of the APP Indonesian subsidiaries resident in Indonesia, (b) that they are not resident at the Taiwanese addresses provided for voting purposes, (c) that the recipients of telephone calls from BCG did not acknowledge ownership or display knowledge of the Notes, and (d) that BMA forms for the Taiwanese Noteholders had not been forwarded to the BMA by the date of the Apfel letter. In any event, I find that the Plaintiffs have proved these elements of the primary case.

78. These facts, however, standing by themselves, would not justify the inference that the Taiwanese Noteholders were not owners of the Notes and that the Controlling Shareholders are, let alone the crucial finding that the Company and/or Indra Widjaja knew these facts and that paragraph 4 of the Widjaja Affirmation was false.

79. I have assumed for the purposes of these proceedings generally, that all of the Taiwanese Noteholders were employees. In paragraph 23(b) of the Defence, the Defendant's June 14, 2004 letter to BCG is expressly admitted. In this letter it was admitted that "*a substantial number of the Taiwanese Noteholders are members of the management of the APP's Principal Indonesian Operating Companies.*" Although paragraph 18(i) of the Statement of Claim (which pleads that "*All of the purported Taiwanese noteholders are employees of*

Indonesian subsidiaries") is positively denied, it is far from clear that the employment connection does not apply to all Noteholders. Amy Hsu certainly spoke to at least one Taiwanese Noteholder working in China, and neither BCG nor Nelson Wheeler contacted each of the 150 or so Noteholders. It seems reasonable to assume in the circumstances that, in the absence of contrary evidence, all of the Noteholders were expatriate employees of the APP Group, primarily working in Indonesia.

80. I have also assumed, based on Exhibit 2 to the Second Bloch Affidavit filed in the Scheme Proceedings, which sets out a list of creditors in respect of whom the Chairman (Alex Goh) as proxy holder voted in favour of the Scheme, that the correct number of Taiwanese Noteholders is 150.

81. The mere fact that the Noteholders were employees is not inconsistent with genuine ownership. The fact that none of the eight Noteholders that BCG actually contacted admitted ownership or knowledge of the Notes, combined with the fact that they are all employees, gives rises to two obvious inferences, one in favour of the Plaintiffs and the other in favour of the Defendant. The first inference is that the Noteholders knew nothing because they were not the genuine owners. The second inference is that they were simply protecting their privacy in response to an unsolicited phone call. A third inference, not referred to in argument, is that the Noteholders knew nothing about the Notes because the individuals called had entrusted all legal and administrative responsibility for their investment to a colleague and/or their broker, and for this reason knew little about the details mentioned when Ms. Hsu called. I found her to be an honest witness with no axe to grind, and I accept the accuracy of the notes which she took of the calls.

82. That Taiwanese addresses were used for 150 employees resident outside Taiwan supports an inference that an attempt was made to conceal their link with the Controlling Shareholders as their resident addresses would likely have been the mills of the various Indonesian subsidiaries, in most cases at least. This would only very tenuously support the inference that these addresses were used to conceal both the fact that the Noteholders were employees and the fact that the APP Controlling Shareholders were the true owners of the Notes, even in combination with the other proven facts relied upon by the Plaintiffs.

83. The fact that none of the Taiwanese Noteholders had asked for their BMA forms to be processed by June 2004 does potentially support the inference that the Taiwanese Noteholders did not own the Notes. The explanation proffered by the Defendant to BCG of heavy trading in the Notes is consistent with the case that the Taiwanese Noteholders were not the true owners when the Widjaja Affirmation was sworn, and that the delay was to facilitate the Notes being transferred into the names of the APP Controllers, or other entities owned and/or controlled by them, after the Scheme had been approved. But this would still not, even in conjunction with the other proven primary facts, justify the conclusion contended for by the Plaintiffs, with the cogency required to prove an allegation of fraud. I accept Mr. Kilam's evidence that shares were issued to the Taiwanese Noteholders "*substantially on 19th and 21st October 2004*" (Witness Statement, paragraph 13). It is also plausible that they genuinely purchased the Notes at a substantial discount for voting purposes, and were then preparing to sell them on at a profit.

84. In my judgment, the Plaintiffs' primary case stands or falls on proof of the two factual issues the Defendant vigorously contested. Most significantly, have the Plaintiffs proved that the Taiwanese Noteholders lacked the means to purchase the Notes from their own resources? If they prove this aspect of their case, it would logically follow that the Defendant has failed to adduce sufficient evidence of their ownership in the face of prima facie evidence that the Noteholders cannot be the true owners of the Notes. The converse will be the case if the Plaintiffs fail to prove that the Taiwanese Noteholders lacked the means to purchase the Notes from their own resources.

85. The Plaintiffs' case on the earning capacity of the Taiwanese Noteholders came in like a lion and went out like a lamb. Mr. Woloniecki submitted in opening, with seeming hyperbole, that the Noteholders would have to had started saving from the time of the Ming dynasty to be able to afford the Notes. The Plaintiffs' Counsel's time-line would have been reasonably accurate if I had been able to accept that the Taiwanese Noteholders merely earned between roughly US$1500-$3000, as Mr. Finch opined in the Addendum to his First Report. But the Plaintiffs' expert was ultimately bound to concede that Taiwanese expatriate managers and technicians working in Indonesia, based on the Director of Taxes' Guidelines, were likely to have earned at the material time in excess of US$50,000 per annum. This meant that, assuming they purchased at an average discounted rate of 11%, the purchase price for the Notes only represented 4-8 years worth of savings.

86. The independent assessment by the Plaintiffs' own expert of the likely salary levels of the Noteholders was supported, as regards a selection of Taiwanese Noteholders, by the evidence of Ms. Jamar, Payroll Administrator at the Indonesian subsidiaries centralised expatriate workers' personnel department. Her evidence as to the salaries the employees listed in the spreadsheet attached to her witness statement received was not directly challenged. Mr. Finch's evidence was that assuming each Taiwanese Noteholder paid the market average of 11%, they spent on average nearly $100,000. Such a huge investment does seem improbable, but it must be remembered that Mr. Finch accepted that the top earners would have been able to save twice that of the lower earners. It is also possible that the Notes would have been available to some far more cheaply than the average rate of 11% of face value, and indeed, that the Controlling Shareholders purchased a block of Notes in the run-up to the Court meeting and sold them on at heavily discounted rates to the employees as part of a "ballot-stuffing" exercise, to borrow the phrase used in the Apfel Letter.

87. I do not accept Mr. Kilam's suggestion that the Taiwanese Noteholders had all of their disposable income after tax available for savings and investments. I accept his evidence as the accommodation and other benefits they received, but the fact that Amy Hsu spoke to so many wives and other family members of the Taiwanese Noteholders in Taiwan makes it more likely than not that many are making remittances to family outside of Indonesia. But these are matters of detail and degree, in a factual matrix in which it is not demonstrably impossible for the employees concerned to have purchased the Notes.

88. Looking at all the evidence in the round, the Plaintiffs have not demonstrated with the degree of clarity required to support allegations of fraud that the Notes were beyond the means of the Taiwanese Noteholders. I accept Mr. Finch's expert opinion that ordinarily individuals do not invest in distressed bonds. I do not accept Mr. Kilam's non-expert opinion that the APP Group's Taiwanese employees are by cultural disposition gamblers and risk takers, but I do accept his factual evidence that an entire team at Indah Kiat once invested in stock of the company they were working for. It seems to me that it is more plausible that senior employees would invest in the Group they are working for than for unconnected individuals to do so. The fact that individuals do not normally invest in distressed bonds does not lead inevitably to the conclusion that because the Taiwanese Noteholders are individuals, they would not have purchased in their own right. It is equally possible that, ignoring the evidence untested by cross-examination of the three Noteholders who have given evidence as to how much they were actually paid, that the Noteholders purchased at a substantial discount arranged by the Controlling Shareholders with a view to supporting the Group and obtaining job security in troubled economic times. And this would be consistent with the Plaintiffs' secondary case on fraud.

89. In these circumstances I reject the plea that the Defendant has adduced insufficient evidence that the Taiwanese Noteholders[14] are the beneficial owners of the Notes. Mr. Kilam testified that shares have now been issued to them pursuant to the Scheme in return for their Notes. From the Agreed Bundle of Documents[15], it is apparent that the Defendant's Bermuda attorneys under cover of a letter dated October 1, 2004 forwarded the BMA forms to the BMA in respect of the Taiwanese Noteholders. It follows that the BMA has approved the issue of such shares, and I am bound to have regard to the presumption of regularity in respect of official acts. The evidence of Mr. Apfel and Mr. Bloch, in any event, supports the conclusion that prior to voting on the Scheme, the Taiwanese Noteholders produced *prima facie* evidence in accordance with market practice that they beneficially owned their Notes, but that subsequent events warranted further enquiries. The Plaintiffs have carried out such enquiries, and their case as a whole does not justify a finding that either (a) none of the Taiwanese Noteholders beneficially owned their Notes or that (b) some of the Taiwanese Noteholders did not beneficially own their Notes.

90. It follows that the Plaintiffs' primary case on fraud fails, because it is not open to me to infer, based on the facts that I have found, that paragraph 4 of the Widjaja Affirmation was false in failing to acknowledge that the Controlling Shareholders owned the relevant Notes.

Approach to assessing credibility of Mr. Widjaja

91. A number of factors require me to exercise considerable care in assessing the credibility of Mr. Widjaja as a witness. Firstly, the Plaintiffs' reliance on allegations of perjury mean that the issue of credibility is the centre-piece of a case which requires proof to a higher than usual standard of proof in the civil context. Secondly, it is a serious matter for a Court to be asked to find that a witness has perjured himself, albeit in a civil case where the witness is beyond the jurisdiction of this Court and unlikely to face any criminal sanctions. Thirdly, the witness has given his evidence through an interpreter and has a cultural background with which I am not intimately familiar, which decreases the weight that might otherwise be attached to the demeanour of the witness and the general manner in which his evidence is given.

92. In *Beddo-v-Cayzer* [2006] EWCA 557, Tugendhat J made the following observations on this topic[16]:

> "*The normal first step in resolving issues of primary fact is, I feel sure, to add to what is common ground between the parties (which the pleadings in the action should have identified, but often do not) such facts as are shown to be incontrovertible. In many cases, letters or minutes written well before there was any breath of dispute between the parties may throw a very clear light on their knowledge and intentions at a particular time. In other cases, evidence of tyre marks, debris or where vehicles ended up may be crucial. To attach importance to matters such as these, which are independent of human recollection, is so obvious and standard a practice, and in some cases so inevitable, that no prolonged discussion is called for. It is nonetheless worth bearing in mind, when vexatious conflicts of oral testimony arise, that these fall to be judged against the background not only of what the parties agree to have happened but also of what plainly did happen, even though the parties do not agree.*
>
> *The most compendious statement known to me of the judicial process involved in assessing the credibility of an oral witness is to be found in the dissenting speech of Lord Pearce in the House of Lords in Onassis v Vergottis 1968] 2 Lloyds Rep 403 at p 431. In this he touches on so many*

[14] It is unclear whether all of the Taiwanese Noteholders became shareholders or remain shareholders as it seems that the Notes and/or shares may have been traded since the Order was made.
[15] Volume 1, TAB 21.
[16] Judgment dated March 20, 2006, transcript, paragraph 248.

of the matters which I wish to mention that I may perhaps be forgiven for citing the relevant passage in full:

> *''Credibility' involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person telling something less than the truth on this issue, or though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over much discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part.'*

Every judge is familiar with cases in which the conflict between the accounts of different witnesses is so gross as to be inexplicable save on the basis that one or some of the witnesses are deliberately giving evidence which they know to be untrue . . . . more often dishonest evidence is likely to be prompted by the hope of gain, the desire to avert blame or criticism, or misplaced loyalty to one or other of the parties. The main tests needed to determine whether a witness is lying or not are, I think, the following, although their relative importance will vary widely form case to case:

> *(1) the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred;*
>
> *(2) the internal consistency of the witness's evidence;*
>
> *(3) consistency with what the witness has said or deposed on other occasions;*
>
> *(4) the credit of the witness in relation to matters not germane to the litigation;*
>
> *(5) the demeanour of the witness.*

The first three of these tests may in general be regarded as giving a useful pointer to where the truth lies. If a witness's evidence conflicts with what is clearly shown to have occurred, or is internally self-contradictory, or conflicts with what the witness has previously said, it may usually be regarded as suspect. It may only be unreliable, and not dishonest, but the nature of the case may effectively rule out that possibility.

The fourth test is perhaps more arguable. . . .'"

93. The reliability of demeanour, particularly in cross-cultural contexts, as a primary guide to determining the truthfulness of a witness is much to be doubted. Lord Bingham, writing extra-judicially, has sagely observed [17] :

> "*If too much attention has over the years been paid to the demeanour of the witness in guiding the trial judge to the truth, to little has perhaps been paid to probability. I do not use that word in any mathematical or philosophical sense, but simply as indicating in a general way that one thing may be regarded as more likely to have happened than another, with the result that the judge will reject the evidence in favour of the less likely…a judge must of course bear in mind that the improbable account may nonetheless be the true one…*"

94. The above approach to credibility provides rather more solid juristic support for the way the Court should approach the evidence than the admittedly apposite literary passage which Mr. Woloniecki commended to the Court on this topic, in his opening speech:

> *"Alice laughed. 'There's no use trying,' she said: `one can't believe impossible things.' 'I daresay you haven't had much practice,' said the Queen. 'When I was your age, I always did it for half-an-hour a day. Why, sometimes I've believed as many as six impossible things before breakfast.'"*[18]

Findings: the Plaintiffs alternative case on fraud

95. The Plaintiffs' pared down alternative case on fraud is substantially based on the Defendant's admission that the Taiwanese Noteholders were members of the senior management of the APP Group. A complaint that they should have been constituted as a separate class for Scheme voting purposes was sensibly jettisoned at trial. It may be helpful to set out once again the plea that is made in this regard:

> "*25. It is to be inferred from the Company's admission, in the letter to BCG dated 14 June 2004 (Exhibit F to the Apfel letter), "that a substantial number of the Taiwanese Noteholders are members of the management of the APP's Principal Indonesian Operating Companies ('PIOCs')", that the same was known to the Company and APP's Controlling shareholders, including Indra Widjaja, on 7 September 2003. In the premises, paragraph 4 of the affirmation of Indra Widjaja dated 7 November 2003, in which he deposed that, "The APP Controlling Shareholders are not affiliated to or otherwise connected with any of the creditors…other than BII, whose connection to the APP Controlling Shareholders is disclosed in the Scheme Document…" (emphasis added) was false and was known by Indra Widjaja and the Company to be false.*"

96. The case relies on one primary allegation and two conclusory allegations. The primary allegation is that the Company and Indra Widjaja knew on November 7,

[17] '*The Judge as Juror*' in '*The Business of Judging*' (Oxford University Press: Oxford, 2000), page 13.
[18] Lewis Carroll, 'Through the Looking Glass', Chapter 5.

2003, when the Widjaja Affirmation was signed and relied upon by the Defendant to obtain the Order, "*that a substantial number of the Taiwanese Noteholders are members of the management of the APP's Principal Indonesian Operating Companies ('PIOCs')*". The conclusory allegations are that (a) paragraph 4 of the Widjaja Affirmation falsely stated that "*The APP Controlling Shareholders are not affiliated to or otherwise connected with any of the creditors…other than BII, whose connection to the APP Controlling Shareholders is disclosed in the Scheme Document… (emphasis added)*", and (b) that the Defendant and Indra Widjaja knew that the Affirmation was in this respect false. Although the third element of this point of law is not explicitly pleaded under the Plaintiffs' alternative case on fraud, it is implicitly obvious that the knowledge allegations are not simply (i) that the Defendant knew, and (ii) that Indra Widjaja knew (as is explicitly pleaded), but also that (iii) Indra Widjaja's knowledge is attributable to the Defendant, as pleaded in paragraph 20 of the Amended Statement of Claim. I have assumed the reference to "*7 September 2003*" in paragraph 25 of the Amended Statement of Claim is a typographical error, and should read "*7 November 2003*", the date when the affirmation was made[19], filed by the Defendant and relied upon in support of the Order. Paragraph 23 of the Defence makes no admission about the knowledge of the deponent or the APP Controlling Shareholders about the employment of the Taiwanese Noteholders, and only expressly denies the remainder of paragraph 25 of the Amended Statement of Claim.

Factual Findings: Attribution of Knowledge to the Defendant

97. The Company's knowledge falls to be determined primarily by reference to the knowledge of Mr. Widjaja as he is the only witness for the Defendant who gave relevant evidence at trial, assuming that no other rules of attribution come into play. Mr. Suresh Kilam's responsibility is for marketing operations, and there is no suggestion that he was involved in the promotion and sanction of the Scheme. Alex Goh was an Executive Officer of the Defendant, chaired the Court Meeting at which the Scheme was approved and filed two Affirmations on the Defendant's behalf in the Scheme proceedings, one in support of the application for leave to convene the meeting to consider the Scheme. In paragraph 1 of his October 30, 2003 Affirmation reporting on the results of the meeting, he claimed to be *"intimately aware of the affairs of the Company."* Mr. Goh, who worked at Indah Kiat between 1994 and 1998 and who I find would most likely have known at least some of the Taiwanese Noteholders, was not called by the Defendant to say that the Defendant did not know that the Taiwanese Noteholders were APP employees. Mr. Kilam (either in his Witness Statement or in his oral evidence) did not deny that the Defendant knew this fact on November 7, 2003. He denied, as Chairman of the Defendant, personally knowing that they had purchased the Notes before asking Alex Goh to investigate the Apfel concerns in June, 2004. And he admitted that he recognized at least one name on the Voting List. But he did not directly address either (a) the issue of whether any other directors or officers of the Defendant were likely to have the relevant knowledge, or (b) the issue of whether it was appropriate for the knowledge of the APP Controlling Shareholders and/or Mr. Widjaja to be attributed to the Defendant. So the Defendant adduced no positive in support of the bare denial in paragraph 25 that the Company knew the Widjaja Affirmation was false.

98. If it was the case that Mr. Widjaja's involvement with the Defendant and its promotion of the Scheme was distant and peripheral and that operational officers of the Defendant were the true directing minds of the Defendant in this regard, one would have expected the Chairman and Chief Executive Officer of the Defendant to say so. This is why I indicated, when discussing the legal question of attribution above, that it seemed to me the propriety of attributing Mr. Widjaja's knowledge to the Defendant was not seriously in issue as an evidential matter.

[19] The English translation of the notarial certificate states that the Affirmation was signed on November 6, 2003, but the certificate itself is dated November 7, 2003. It was first filed, in facsimile form, on November 7, 2003. There is no dispute as to which Affirmation the pleading refers to.

99. Mr. Widjaja's evidence was that he attended meetings in various cities with Noteholder creditors including some in his own office, representing his family's interests as Controlling Shareholders, although most of these meetings involved the wider restructuring, not the Defendant. He did meet with the Supporting Noteholders and discussed the broad concept of the Scheme. The only person at these meetings whom he disclosed was the Chief Financial Officer of APP, Mr Hendrik Tee. He is not listed in the Explanatory Statement as one of the Company's officers; Alex Goh was Chief Financial Officer (Appendix 8, page 140). He denied working with Alex Goh on a regular basis in connection with the restructuring, but as far as the meetings with Supporting Creditors are concerned, Mr. Widjaja is the only person who appears to have been representing the interests of the Company, despite the fact that he sought, looking back, to characterize himself as acting on behalf of the Controlling Shareholders.

100. Although the Scheme was clearly drafted by lawyers and other professionals, there is no suggestion of any other agent of the Defendant was the directing mind of the Company, as far as dealing with creditors are concerned. The only person identified by Mr. Widjaja himself as being more involved with the details of the Scheme, in his somewhat faltering explanation of why he swore the Widjaja Affirmation, was his brother Teguh, another Controlling Shareholder, seemingly primarily concerned with the Chinese operating companies. The Widjaja Affirmation was explicitly made on behalf of the Controlling Shareholders as a whole. This is not only consistent with the usual realities in terms of how family-owned businesses operate in practice, but, to some extent at least, the disclosures made in the Explanatory Statement about (a) the interests of the APP Controlling Shareholders as creditors of the Defendant (paragraph 2.3.15 (a)), and (b) their undertaking not to vote in respect of such interests under the Scheme (paragraph 2.3.16). In addition, Appendix I ("Significant Considerations") disclosed the fact that:

> *" In addition, holders of a majority of the outstanding principal amount of the notes have informed the Company that they intend to vote for the Scheme and to agree among themselves policies relating to the management and business affairs of the APP China Group…***These holders and our controlling shareholders will, therefore, have significant influence over APP China Group and may be able to direct the affairs and business of APP China Group, including the appointment of directors and the approval of most actions requiring the approval of shareholders.***"*[20] [emphasis added]

101. This constitutes an implicit admission that the status quo - before the restructuring made the creditors the majority shareholders of the Defendant - was that the Controlling Shareholders had "*significant influence over*" the Defendant. In these circumstances, and having regard to the evidence of Mr. Widjaja under cross-examination, I find that the central factual issue is his knowledge of the fact that the Taiwanese Noteholders were APP employees, bearing in mind that in making his Affirmation, he purported to be testifying as to the knowledge of the Controlling Shareholders as a whole. Despite his somewhat inconsistent testimony that (a) his brother was more involved with his company in China, and (b) his brother was more involved with the details of the Scheme, he insisted that he was the Controlling Shareholder who was most involved in negotiating with the creditors and most appropriate to speak on behalf of the Controlling Shareholders:

> *"Q. Yes, I understand that. Why is it, Mr. Widjaja, that you are the person who is swearing this affirmation, when you told us that Teguh was the person who was direct -- more*

[20] Scheme Document, page 87, cited at paragraph 67 of my Judgment in the Scheme Proceedings setting out the reasons for the Order.

> *directly involved in putting together the scheme of arrangement?*
>
> *A. Because as the representative of the shareholders, I am entitled to -- to represent in the negotiations with the creditors, and -- and Teguh is more involved with the -- his company in China. And he represents the company and I represent the shareholders.*"

102. Finally, the Widjaja Affirmation was clearly *filed* by and on behalf of the Company, even if it was primarily *made* by the deponent in his capacity as one Controlling Shareholder on behalf of them all. This much is clear from the caption in the top right hand corner of the Affirmation ("*On behalf of the Company*"), and from the back-sheet which, names the Defendant's attorneys in their capacity as "*Attorneys for the Applicant*". The only "*Applicant*" in the Scheme Proceedings was the Defendant, who at the November 7, 2003 hearing (as opposed to on the earlier application for leave to summon the meeting of creditors) was more properly described as the "*Petitioner*" The APP Controlling Shareholders had no application before the Court on November 7, 2003 when the Affirmation was filed. The evidence was unarguably adopted by the Defendant.

103. In addition to the attribution of Mr. Widjaja's knowledge to the Defendant, however, it also seems obvious that the knowledge of other agents of the Company must also be imputed to it. Since BCG was engaged by the Defendant to act as Tabulation Agent, it was clearly authorised to receive the various voting documents from the Taiwanese Noteholders and other voting creditors on the Company's behalf. The Company must clearly be deemed to have knowledge of the fact that the Taiwanese Noteholders used two brokers with offices at the same address as Mr. Widjaja, and of the fact that they all used one intermediary, Nomura Singapore. Mr. Alex Goh was authorised by the Company to act as Chairman of the Court Meeting, and so his knowledge of the results, as well as the various reports in relation thereto which were filed in Court by its attorneys must also be imputed to the Company.

104. Further and/or alternatively, the Company assumed an ongoing duty, in promoting the Scheme in the way it did, to disclose all connections that might have existed between creditors and the APP Controlling Shareholders. Mr. Goh was clearly the agent employed by the Company to seek Court approval for the Scheme, because he was the only officer of the Company, who filed an affidavit in support of the applications for leave to convene the Court Meeting and a Report in support of the Petition for the sanction of the Scheme. The Petition so closely followed Mr. Goh's reports dated October 30, 2003, that the final two sentences of the paragraph 15 replicated the first person language of paragraph 4 of the "Report by Chairman of Results of Court Meeting": *"I should advise that BII Bank Limited, a creditor of ACGL in the amount of $143,429,829.94, voted in favour of the Scheme. The vote of BII in this regard has been included in the above table."* This disclosure was only made because BII is an affiliate of the APP Controlling Shareholders. The Report notes that the vote took place after the Chairman answered certain questions, which I find included the questions asked by Mr. Van Duzer about undisclosed affiliations on the part of the persons supporting the Scheme.

105. There is no suggestion that, after signing his Chairman's Report, Mr. Goh's task of seeking approval for the Scheme came to an end. I find, on the balance of probabilities, that he was the primary agent of the Company responsible for investigating the issue of undisclosed affiliations on the part of the Supporting Creditors and other creditors, once the Van Duzer Affidavit of November 5, 2003 was served, at the very latest, and after the conclusion of the Court Meeting at the earliest. By necessary implication, he was employed by the Company to investigate the Objectors' allegations between on or about November 5, 2005 and November 7, 2003. His knowledge in these circumstances may be imputed to the Company: *El Ajou-v-Dollar Land Plc* [1994] 2 All ER 685 at [702-703], per Hoffman, LJ. A

very limited investigation (a review of Exhibit 2 to the Second Bloch Affidavit) would have revealed that 150 out of 169 creditors who supported the Scheme were Taiwanese Noteholders. A very limited further enquiry (a brief discussion with Theodore Bloch, who was in Bermuda with Mr. Goh for the Court Meeting, or an email or telephone call thereafter) ought to have revealed that all of the Taiwanese Noteholders were clients of two firms who were tenants of BII. These enquiries should have revealed the fact that the Taiwanese Noteholders were management employees of the APP Group, mostly based in Indonesia. I have regard also to the probability that, if Mr. Goh bothered to peruse the BCG list of creditors who voted in favour of the Scheme, he should have recognised at least one or two of the Indonesian-based Taiwanese managers, since he himself worked for Indah Kiat (for whom most of the Noteholders worked) between 1993 and 1998.

106. If Mr. Goh carried out these enquiries which he ought to have done, he would have acquired actual knowledge of the fact that the first sentence in paragraph 4 of the Widjaja Affirmation was false, by virtue of the employment relationship between the Taiwanese Noteholders and the APP Controlling Shareholders. In these circumstances, I find that the Company had constructive knowledge of the fact that the Taiwanese Noteholders were APP employees, in any event. If the Company (acting through Mr. Goh or other agents) adopted the Widjaja Affirmation without checking the true position, in breach of its obligation to ascertain the true position, it was in any event a party to any fraud on Mr. Widjaja's part, by reason of its own deliberate dishonesty, irrespective of whether the Controlling Shareholder's knowledge was properly attributable to the Company under the "directing mind" principle.

Factual findings: did the Defendant and Indra Widjaja know on November 7, 2003, that the Taiwanese noteholders were members of the management of APP's Principal Indonesian Operating Companies?

107. Although it is clearly necessary for the Plaintiffs to prove that Mr. Widjaja gave perjured evidence in the Scheme Proceedings, and the Plaintiffs' primary case is that his knowledge should be attributed to the Company, on the facts of the present case, my key factual findings of knowledge below are based on the premise that relevant knowledge of Mr. Widjaja and the Company (as imputed to it by its agents engaged in the promotion of the Scheme) is broadly the same.

108. His evidence became somewhat less logical when he was asked whether he agreed that, in light of what he now knew, Mr. Widjaja considered paragraph 4 was inaccurate. Firstly, he stated that he did not consider that the term "*affiliated*" applied to employees of subsidiary companies at all, because in the banking world such employees would not be considered to be affiliated. Secondly, he stated that he did not think that the words "*or otherwise connected*" added anything to the word "affiliated". But thirdly, he acknowledged that if he had known that the Taiwanese Noteholders were employees, he would have felt obliged to disclose that fact. Logically, if the witness genuinely did not know of the connection between the Noteholders and the APP Group, one would expect him to be less concerned about whether or not if he had known, the Affirmation was false. The suggestion that to this obviously sophisticated and substantial businessman, the words "*or otherwise connected*" added nothing to "*affiliated*" is inherently unbelievable. The witness was confident enough with the English language to give instructions to and receive advice from his own lawyer in English (quite understandably he elected to be cross-examined in his first language), and under cross-examination demonstrated an appreciation of legal subtleties. When it was suggested that he had made his Affirmation on behalf of the Defendant, he replied, as mentioned above:

> "Q. *Well, I'm grateful for that answer, because this affidavit -- this affirmation is sworn on behalf of the company. You understand that this document is filed in the Bermuda court on behalf of the*

company and not on behalf of the shareholders; do you understand?

A. *This is -- this is as requested by the company to the shareholders, to give the statement on behalf of the company.*"

109. Mr. Widjaja correctly answered that he made his Affirmation in his capacity as a Controlling Shareholder, but also at the request of the Defendant and for the purpose of being filed on behalf of the Company. Mr. Widjaja had well before November 7, 2003 been interviewed by the media about suspicions that his family was buying up Notes so as to retain control post-Scheme. He agreed under cross-examination that he had denied these allegations as reported in the online edition of the International Herald Tribune for October 6, 2003. That same publication discussed the fact that APP-owned BII would get a 23.1% stake in the Defendant under the cash for equity. The Van Duzer Affidavit was reviewed by Mr. Widjaja just over one month later. The deponent agreed under cross-examination that he was responding to paragraph 6 of Nathan Van Duzer's November 5, 2003 Affidavit, the first sentence of which read as follows:

> " *It is the belief of the Fidelity Funds and I am informed the belief of the Hancock Funds that a significant number of creditors who voted in favour of the Scheme did so as a result of affiliations such creditors have with the Controlling Shareholders of the Company, in order to ensure the continuance of control of the Company by the Controlling Shareholders directly or indirectly and to insulate the interests of the Controlling Shareholders in the Indonesian based operations of APP from the claims the holders of the bonds have against APP on account of APP's guarantee of payment of the bonds…"*

110. The primary allegation that Mr. Widjaja was responding to involved the assertions that (a) a significant number of creditors voted in favour of the Scheme by virtue of affiliations with the Controlling Shareholders, and that the Controlling Shareholders procured these votes motivated by a desire to (b) retain control directly or indirectly and (c) to insulate the Indonesian operations from attack through enforcement of the APP guarantee of the Notes. So it is difficult to see how Mr. Widjaja could genuinely believe, looking back at what he deposed to and assuming that he only subsequently learned of the connection between the Indonesian-based Taiwanese employees and APP, that these Noteholders were neither affiliated nor connected with the Controlling Shareholders. It is inherently inconsistent to freely acknowledge that the employment relationship would warrant disclosure, but at the same time to contend that it is neither (a) the sort of "*affiliation*" contemplated by the Van Duzer Affidavit nor (b) embraced by his Affirmation's phrase "*affiliated or otherwise connected with*". His assertion that he would not change his Affirmation in any way coupled with the admission that he would disclose the employment relationship, if he knew of it when making his Affirmation, simply does not make sense. It is the sort of statement that reflects a witness who is more concerned about defending a strategic position than in speaking the absolute truth.

111. In this regard, it was very striking how uncomfortable he generally was about explaining why he, and no other deponent, had been chosen to respond to the Van Duzer Affidavit. In his evidence-in-chief, he confirmed that he had personally been involved with meeting the Supporting Noteholders, as stated in his Affirmation, and gave the impression that many meetings had taken place. Under cross-examination, he clarified that most of the multi-city meetings he had described involved not the Company's restructuring, but APP and the Indonesian operating subsidiaries. He stated that his brother Teguh had been involved in both the issuance of the Notes, and the details of the Scheme, and then admitted that he

was nevertheless the best person to state whether the Taiwanese Noteholders were employed or affiliated to the Controlling Shareholders:

> *" Q. Yes. So why didn't Teguh sign the affirmation, Mr. Widjaja?*
>
> *A. As I mentioned before, if it's related to the purchase of the bonds and whether the employees is part of the -- the affiliates, I know more than Pak Teguh.*

112. When this answer was repeated in Mr. Woloniecki's follow-up question, he immediately retracted it, and gave a much more tactically correct answer which made a distinctly different point. He asserted that he swore the Affirmation because he knew best as the family banker what the financial affiliations were. He did not complain that his previous answer had been incorrectly translated, and the answers were so different as to make an error in translation improbable. His initial answer, somewhat more logically in light of his involvement in negotiations with the Company's creditors and his being the family press spokesman on pre-Scheme trading allegations, was in effect firstly, that he knew more than anyone about recent trading activities with respect to the Notes. The 150 Taiwanese Noteholders were, after all, clients of two brokers which were both (a) related to the APP Group and (b) operating out of offices in the same building complex as Mr. Widjaja himself. Secondly the retracted answer asserted that he was best qualified to know whether any creditors had affiliations with the family. Mr. Widjaja's re-formulated answer was consistent with his idiosyncratic definition of affiliation, and his insistence that, although he would have disclosed the fact (had he known it on November 7, 2003) that the Taiwanese Noteholders were employees, he would not have considered them to be "*affiliated or otherwise connected*" to the APP Controlling Shareholders in any event. This aspect of Mr. Widjaja's evidence also suggested to me that his approach to making Affirmations and giving evidence generally, particularly on matters involving his family's vital commercial interests, was to place greater emphasis on the goal to be achieved than the absolute truth.

113. A witness, who casually admits to being reckless with the truth when giving previous testimony, particularly in the context of responding to allegations of perjury, is one whose evidence as a whole must be looked at with considerable care. Set out and explained below is my finding that Mr. Widjaja has in both law and fact effectively admitted the Plaintiffs' secondary case on perjury. Because the Plaintiffs case was not advanced on this basis, I rely on this aspect of his testimony as casting doubt on his general credibility as a witness of truth. It was striking that a witness who throughout his evidence took great care to deny the main elements of the Plaintiffs' case, and to portray himself as credible, should so glibly admit being reckless as to the truth in respect of the central issue his allegedly perjured Affirmation dealt with. He seemed to view it as a perfectly respectable answer to the question as to why he signed the Affirmation on behalf of all of the Controlling Shareholders without consulting them to say, in effect, that he just decided to say the creditors were not affiliated, even though he did not know whether this was true. Mr. Widjaja did not appear to think that doing this required any extenuating circumstances or other justification.

114. The fact that he and his family have admittedly failed the fit and proper test for banking purposes, and were suspected of rigging the Scheme vote (by commercial entities who were willing to publicly voice their suspicions on an attributed basis in the press) in the run-up to the Court Meeting are of peripheral significance. However, these matters do emphasise the fact that the impugned witness did not seek to put himself forward as a person of such impeccable ethical integrity, that the mere suggestion that he might have given perjured evidence was completely outrageous.

115. The above general observations on the witness' testimony notwithstanding, my assessment of his evidence and the question of whether or not I am satisfied he deliberately lied in his Affirmation when he deposed that none of the creditors, other than BII, were "*affiliated or otherwise connected with*" the APP Controlling Shareholders, primarily turns on assessing what is probable, having primary regard to admitted, agreed or non-contentious facts.

116. The Widjaja Affirmation was made on November 6, 2003 against the following essentially agreed background facts, or, in any case, facts that I consider to have been proved. The following findings are substantially based on the Court documents filed by the Company in the Scheme Proceedings (Agreed Trial Bundle, Volume 1), as well as the oral and written evidence produced in the present trial:

(1) Mr. Indra Widjaja was personally in charge of representing his family's interests in the restructuring of the Defendant's debt which was to be effected by the Scheme;
(2) Mr. Widjaja was personally involved in promoting the Scheme, attending various meetings with creditors of the Defendant and other APP affiliates, at least one meeting taking place in his own office;
(3) Mr. Widjaja knew that the Scheme was a debt for equity Scheme which would transfer the overall control of the Defendant from his family (as Controlling Shareholders) to the Defendant's creditors;
(4) Mr. Widjaja knew that there was public speculation that he and his family were seeking to retain covert control of the Defendant despite agreeing to a restructuring that purported to transfer control away from the Controlling Shareholders in favour of the Defendant's creditors;
(5) The Scheme Document made extensive disclosure about the extent of control related party creditors would have as shareholders of the Defendant if the Scheme was approved, and described the extent of such control as 23%. Mr. Widjaja was admittedly aware that if it was known that a significant number of creditors were APP employees, that was a matter which ought to be disclosed;
(6) Mr. Widjaja knew that approval of the Scheme was an important step in preserving the value in the Defendant's Chinese operating subsidiaries, which certain Chinese banks were threatening to liquidate;
(7) Mr. Widjaja knew that the Scheme offered himself and his family a huge financial benefit in that the ultimate parent of the Defendant, APP, would be released from its guarantee obligations in respect of the Notes, in an amount in excess of US$ 500 million including interest, not to mention the possibility of profiting from the APP China operations in the future;
(8) Mr. Widjaja knew or must be deemed to have known, not least because he personally voted on the Scheme, that the Scheme would not be approved by this Court unless a majority in number of creditors voted in favour, as well as 75% in value;
(9) Mr. Widjaja personally met with Supporting Noteholders, who were described in the Scheme Document as holding a majority in value of Notes, to ensure sufficient support for the Scheme existed;
(10) as a percentage of all creditors voting, the Supporting Noteholders represented at most 48% of all claims, while BII's claim was worth nearly 22% in value;
(11) Excluding the vote of BII, the Taiwanese Noteholders held some 88% in number (assuming they were 150 and not 154) and 24% in value of all claims voting[21]. They represented an apparently

[21] For these purposes, I accept Charles Finch's evidence as to the number of Taiwanese Noteholders and the total face value of their Notes. My own arithmetical analysis of the Voting List attached to Exhibit 2 of the Second Bloch Affidavit suggests that there were indeed 150 Taiwanese Noteholders. The percentage value

coherent group, obviously capable of blocking the Scheme in number s terms, and almost capable of blocking the Scheme in value terms, based on those who actually voted;

(12) The Taiwanese Noteholders were all management level employees of APP, primarily working in Indonesia;

(13) The Taiwanese Noteholders held nearly 25% of all Notes with a total face value of over US$ 125 million and a market value of approximately US$13.75 million.

(14) The Taiwanese Noteholders were clients of only two firms. The firms they used (two out of some 200 brokerage firms in Indonesia) are related to the APP Group and/or the Controlling Shareholders;

(15) The brokers used by the Taiwanese noteholders are not only tenants of the APP-controlled BII. Their offices are in the same complex as Mr. Widjaja's office address;

(16) The Taiwanese Noteholders all voted through the same Singapore-based intermediary, Nomura[22];

(17) The Taiwanese Noteholders all used their Taiwanese addresses when voting rather their Indonesian work addresses, even though many (if not all) have been resident in Indonesia in the employ of the APP Group for many years. This concealed the fact that they were employees of the APP Group;

(18) The BMA forms , which were completed by or on behalf of the 150 Taiwanese Noteholders before Mr. Apfel "blew the whistle", all left the "*present employer*" box blank, suggesting a deliberate concealment of their employment connection with APP;

(19) The Taiwanese Noteholders constituted an overwhelming majority in number of the prospective shareholders, and were an undisclosed bloc of creditors connected to the APP Group who could potentially control the routine running of the Defendant after the implementation of the Scheme, as ordinary resolutions of the company in general meeting could (unless a poll is requested) be passed by a simple majority in number of votes[23].

117. According to the Petition for the sanction of the Scheme, the voting was as follows:

"Table 1 – Results of the Scheme Meeting

Meeting		*(1)*		*(2)*		*(3)*	
	How Present	*Present and Voting*		*Voted for the resolution*		*Voted against the resolution*	
		No.	*Value of the claim*	*No.*	*Value of the claim*	*No.*	*Value of the claim*
Creditors	*In person*						
	By Proxy	*179*	*659,334,256.14*	*169*	*587,145,058.34*	*10*	*72,189,197.80*
	Totals	*179*	*659,334,256.14*	*169*	*587,145,058.34*	*10*	*72,189,197.80"*

118. The above Table demonstrates how significant a block of creditors some 150 Taiwanese Noteholders representing some 88% in number and 18.96% in

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of the BII claim and the total number and value of creditors voting are based on paragraphs 14-15 of the Petition filed by the Defendant in the Scheme Proceedings, and any arithmetical errors are my own.

[22] According to paragraph 14 of and Exhibit 5 to Theodore Bloch's First Affidavit dated October 16, 2003 in the Scheme Proceedings, various "participants" were requested to indicate how many hard and/or electronic copies of the Scheme documentation they required. Nomura appears only to have requested eight hard copies and one electronic copy of the Scheme Document 11 days before the Court Meeting.

[23] Bye-Law 56, page 244 of Exhibit "TAL1" to the First Affirmation of Alex Goh dated September 19, 2003, filed in the Scheme Proceedings; Scheme Document, page 144. If a poll is requested , each shareholder has one vote per share, so the majority in value will prevail.

value of all creditors who voted would have been in the run-up to the Court meeting of October 30, 2003. The Objectors' claims were worth nearly 11%. It seems likely that almost all Noteholders voted, because the Explanatory Statement assessed the total debt of the Company (excluding post March 31, 2003 interest on the Notes) as follows:

> "2.3.15 *To the best of the Company's knowledge, the debts of the Company comprise:*
>
> *(a) the amount of US$141,843,428 owing to BII Bank (an entity controlled by the APP Controlling Shareholders) as of March 31, 2003;*
>
> *(b) The principal accreted value of the Existing Notes amounting to US$343,922,355 together with all accrued and unpaid interest amounting to US$143,400,834 as of March 31, 2003;*
>
> *(c) The amount of US$5,831,140 owing to APP and the APP Parties as of March 31, 2003. This debt has arisen as a result of certain professional fees and expenses paid on behalf of the Company by APP and the APP Parties; and*
>
> *(d) A loan up to the amount of US$1,500,000 to be made available by the APP Controlling Shareholders to the Company prior to the Bar date for the funding of the costs and expenses incurred or to be incurred in connection with the Scheme.*
>
> *The debt of the Company recognized on Bar Date may differ from the amounts set forth above depending on the actual amount of interest that may accrue on such debt up to the Record Date, the existence of other claims that may be made and accepted through the Adjudication Procedure and the actual extent of the drawings made under the loan referred to in paragraph (d) above."*

119. The total debt estimated in the Explanatory Statement was US$636,497,757. Another six months interest on the principal value of the notes at 14% would be roughly $25,000,000, taking the total to just over $660,000,000. it would therefore appear to be the case that nearly all known[24] creditors voted, as the total value of claims voting was $659,334,256.14. The creditors voting against the Scheme, after all, represented over 10% in value of all creditors who voted. The Taiwanese Noteholders represented nearly 90% in number. It seems obvious that the principal commercial and logistical goal of anyone promoting a Scheme of Arrangement is to ensure that sufficient support is obtained to meet the statutory minimum target of a majority in number and 75% in value. It is to my mind simply impossible to believe that Mr. Widjaja (and the mind and management of the Defendant) would have sought leave to convene the Court Meeting, after BCG had identified to the best of their ability all of the Noteholders who needed to be notified of their right to vote, without seeking to identify and garner support from nearly 90% in number of the creditors entitled to vote.

120. Mr Widjaja was himself involved in garnering support from the Supporting Creditors, he admitted. But such creditors, assuming they did not include the Taiwanese Noteholders, could only have approved the Scheme if the Taiwanese Noteholders did not vote at all. Yet according to Mr. Widjaja, who spent considerable time and money meeting with Supporting Noteholders (and other

[24] As far as the value of Noteholder claims is concerned.

creditors in relation to the wider restructuring), " *in New York, in Singapore, Jakarta, Bali*", as well as in his own office, had no idea who these people were. Nor did he admit to having any interest in ensuring that these supposedly unknown creditors did not vote against the Scheme. It is true that it may well have been unclear how many Noteholders existed; only the total value was known. But even in value terms, it is clear that the Supporting Noteholders (assuming they did not include the Taiwanese Noteholders) combined with BII did not hold claims worth 75% in value. Because the Taiwanese Noteholders had Notes worth nearly 19% in value, and those creditors who voted against the Scheme had Notes worth nearly 11%.

121. Paragraph 15 of the Petition pursuant to which the Order was made disclosed the fact that BII's vote was included in the table set out above, and that it was valued at $143,429,839.94. This represents 21.75%, or nearly 22% in value of claims. The Objectors' Notes were worth nearly 11% and the Taiwanese Noteholders some 19%, or 30% altogether. So the Supporting Noteholders votes (assuming, somewhat improbably, that no other uncanvassed creditors voted for the Scheme), cannot have been worth more than 48% in value of all creditors who actually voted. 48% of the total value of all claims ($659,334,256.14) is $316,480,442.90, which does represent a substantial majority of the Noteholders. I therefore accept that the Supporting Noteholders would in value terms have been expected, together with BII and some further support, to carry the day so far as the 75% in value threshold is concerned. But, the numbers situation would have been, unless the Taiwanese Noteholders' support was known to be "in the bag", completely uncertain.

122. The Defendant's own voting figures reveal that a total of 179 creditors voted altogether. At least 150 were supposedly unknown, 10 voted against, and one was BII. 179-161=18. The Supporting Noteholders can only have numbered, at most, 18. This small number was consistent with their being institutional investors who either held the Notes as beneficial owners or on behalf of more numerous beneficial owners who might not have elected to request individual certificates so that their votes could be counted individually (e.g. Pershing voted as one objector on behalf of some 80 beneficial owners). However, when Theodore Bloch swore his First Affidavit of October 16, 2003 on behalf of the Defendant, the Defendant knew or must be deemed to have known that the Participant List (Exhibit 5) indicated that 158 copies of the Scheme Document and related papers had been requested from North America alone, with a further 9 requested from Asia and 2 from Europe:

" Participant List

Results of Querying Custodians as to the Name of Sets of Materials Required

	Sets Needed	
North America	Paper	Electronic
State Street Bank	5	1
JP Morgan Chase	15	1
Bank of NY	9	1
Pershing	80	1
Bear Stearns	8	1
Nomura	3	1
Citibank	8	1
Citigroup Global Markets	12	1
Herbert J. Sims		1
Fleet Securities	2	1
J.P. Morgan Chase	16	1
Brown Brothers	0	1
Total	**158**	
Asia		
UBS Singapore	1	1

BNP Singapore	0	1
Nomura Singapore	8	1
Citibank Hong Kong	0	1
Total	**9**	
Europe		
Clariden Bank	0	1
Dresdner Bank	0	1
CSFB London	2	1
Total	**2"**	

123. So two weeks before the Court Meeting at least, the Defendant and Mr. Widjaja, who was admittedly heavily involved in discussions with the Supporting Noteholders (this was why he was chosen to make the Affirmation), quite possibly expected that at least 169 creditors would vote plus BII, making a minimum total of 170 in number[25]. Since BCG had offices in Hong Kong, New York, and London which could have mailed out hard copies, and Participants were expressly requested to circulate copies to beneficial owners[26], the Participant List would have given some idea of the likely number of voters. Mr. Widjaja and the Defendant had seemingly already, before the draft Scheme Document was presented to the Court in late September, identified the Supporting Noteholders, who were referred to in that document. Discussions with them were described in the Explanatory Statement (page 12) as "*ongoing*". So it would have been known that they numbered no more than 18 (plus BII), and (based on BCG's Participant List) that there were another 151 potential voters whose support was not "in the bag". There would have been no way of anticipating whether all these potential opponents to the Scheme would vote individually or on a collective basis. So, the number of copies of the Scheme Document requested by the various participating intermediaries or clearing houses on behalf of their clients should have represented a reasonably accurate basis for ascertaining how many Noteholders were likely to vote (BII was the only other significant non-noteholder creditor who was expected to vote). It is an interesting coincidence that Nomura's late-voting clients included some 150 Taiwanese Noteholders and that PT Amantara Securities added two votes, effectively cancelling out the potential numerical opposition.

124. So as of October 16, 2003, the total number of likely voting creditors was some 170, with support formally guaranteed from only 19 (at most), and the position of 151 uncertain. Faced with these numbers, the proponents of the Scheme, I find, must have been seriously concerned about whether a majority in number of these 151 creditors linked to named agents could be persuaded to support the Scheme. Assuming no more Noteholders came out of the woodwork, 151 could vote against the Scheme and only 19 in favour. There was a potential deficit of at least 133, and possibly more. It is obvious that the total value of Notes was ascertainable, but that the numbers of votes were somewhat intangible, because of (a) the possibility of trading up to October 27, 2003, and (b) the possibility the holder of a large bloc of Notes could easily sell smaller parcels to multiple new holders, in the run-up to the October 30, 2003 vote. Once companies and their shareholders commit to a court-sanctioned reorganisation, the most important practical consideration (unless the statutory levels of support are already guaranteed) is garnering the support necessary to obtain Court approval.

125. Mr. Widjaja was charged with protecting his family's vital commercial interests and seeking to both retain the potential to profit from the valuable Chinese operating subsidiaries, obtain a release for APP from a liability of nearly $1/2 billion, and keep the wider Widjaja empire, including the

[25] It is a remarkable coincidence that the final tally was precisely 169.
[26] First Bloch Affidavit, paragraphs 15-16 and Exhibit 1.

Indonesian operations, intact. I find it impossible to believe that he would have taken no steps to identify who the majority in number of creditors was with a view to procuring their support. Assuming of course that he did not already know.

126. In early October, 2003, it is not in dispute, press stories speculated that the Widjajas were purchasing bonds to increase their control over the Company. The Defendant has filed three witness statements from APP employees who claim to have bought their bonds through the same two brokers that the 150 Noteholders used in 2001. Curiously, having regard to the fact that only two firms, both related in some way to APP, were used by all the Taiwanese Noteholders, these friendly firms were not requested to inform the Court when the majority of these Noteholders purchased their Notes, or to explain who acted on their behalf in this regard. These Noteholders were all, according to the Defendant's own case, senior managers, many of longstanding association with the APP Group. They would, surely, be more likely to wish to proclaim their support for the APP cause from the rooftops, rather than insist on confidentiality. Mr. Kilam, who worked with Indah Kiat in the early 1980's, said he recalled when Taiwanese managers invested as a team in that entity. This supported his description of them as a tightly knit group, but also indirectly supports the logical inference that persons outside that circle of APP employees, particularly the senior management of the Group, would be likely to know if a large number of employees were investing in nearly 19% in value of the Defendant's total debt and nearly 25% of all Notes. Mr. Widjaja's suggestion that they had no obligation to tell anyone of their investment is, looked at practically, most unconvincing. It is, however, unclear on the evidence, when the 147 Taiwanese Noteholders (assuming the evidence of the three witnesses to be genuine) acquired their Notes.

127. It seems improbable to me that the Taiwanese Noteholders mostly bought their Notes long in advance of the promotion of the Scheme. But if they did, I am satisfied that Mr. Widjaja and the Defendant must have known of their identity. The financial difficulties of the Widjaja Empire were well known, and it is clear that the 150 Taiwanese Noteholders voted as a group using two broking firms which (a) are related to the APP Group, and (b) collaborated together by selecting one "Participant", Nomura Singapore, which happens to be located in APP's place of incorporation. The Taiwanese Noteholders held notes worth 24% of the debt of all creditors (essentially Noteholders) who voted, excluding BII's loan debt, and represented the largest single bloc of Noteholders by number, almost twice that of the Pershing group. It seems highly improbable that if they made such a massive investment in the Defendant's fortunes between 2001 and 2003, that the Widjaja family (and Mr. Indra Widjaja, the family's banker) would have been oblivious of that fact. But, even if they were oblivious of their employees' generous investment before the Scheme (assuming it had at that point been made), after leave to convene the Court Meeting to approve the Scheme had been obtained from this Court on September 25, 2003, Mr. Widjaja and the Defendant had the strongest possible motives for discovering the identities of the Taiwanese Noteholders with a view to procuring their support.

128. By October 16, 2003, BCG had identified for the benefit of this Court 170 potential voting creditors in the Participants List. It is simply impossible to believe that, at this juncture at the latest, Mr. Widjaja would not have arranged to contact or meet with the representatives of the participating agents to see what their position was on the Scheme. If the Taiwanese Noteholders had all or mostly purchased their Notes long ago, it is improbable that Nomura Singapore would not have been able to obtain permission from the two brokers to reveal the happy news that of course they were supporting the Scheme, because the beneficial owners were all APP employees, and accordingly there was no need to meet with them to canvass their support. Alternatively, Nomura could simply have put the Scheme-promoters directly in touch with the two brokers. In any event, no question of having to contact

129. In this light, it is even more incriminating, that 150 Noteholders, working in Indonesia and using Indonesian brokers, should utilise for voting purposes addresses in Taiwan which in many cases (according Mr. Kilam) they have not used for several years. Noteholders #147-149, on BCG's Voting List, registered their names "*c/o Nomura Singapore*", and used Nomura's address. PT Amantara Securities voted twice (#159 and 160) in its own name, perhaps on behalf of clients. The PT Amantara Taiwanese Noteholders could all have given their broker's address, and the PT Aldiracita Corpotama Noteholders could all have given this broker's address. Both brokers are located at the BII Plaza, and share common ownership and/or management with the Indonesian subsidiaries, Mr. Kilam was bound to admit on the strength of financial statements signed by Muktar Widjaja, borne of the APP Controlling Shareholders. But using their broker's addresses, no doubt, would have made it more obvious to the casual observer that (a) they were not disparate individuals but a coherent group, and (b) that they were resident in Indonesia, using brokers linked to the APP Group. But, even more straightforward still, assuming the Taiwanese Noteholders were all notorious risk-takers not bashful about being seen to be having the odd risky investment "flutter", they could have used their central work addresses, as they were mostly (with one or two exceptions) living at no more than two or three Indonesian locations.

130. In fact, of the 17 non-Taiwanese Noteholders in the BCG Voting List, all save for two (individuals purportedly resident in Malaysia and Singapore respectively) have used what appear to be non-residential addresses. Most obviously non-institutional investors have used the addresses of a clearing house or some other intermediary, rather than a private address. That no practical purpose was served by supplying Taiwanese addresses in the context of voting on the Scheme is illustrated by the inability of BCG to find a single Noteholder residing at the addresses they supplied. From an administrative standpoint, it would surely have been far easier for those processing the voting process on their behalf to avoid using 150 different addresses. This strongly suggests that the link with the APP Controlling Shareholders was being deliberately concealed from the outset and before the Court Meeting took place.

131. This inference is strongly supported by the evidence relating to the BMA forms. Mr. Apfel testified, without contradiction, that the Defendants' Bermuda attorneys in the course of responding to his suspicions in June, 2004 admitted that they had received the BMA forms for the Taiwanese Noteholders in March, 2004, but had been asked to retain them because of heavy trading in the Notes. This suggests that the Taiwanese Noteholders, having successfully supported the Scheme and run the gauntlet of the opposed application to sanction the hearing, were (again acting *en bloc*) now disposing of their shares, perhaps to the APP Controlling Shareholders or their nominees. On April 12, 2004, Drew & Napier, who also was apparently acting on behalf of the Company in respect the issuance of all shares, gave an email instruction to the Defendant's Bermuda attorneys not to forward Batch 5 to

the BMA (Agreed bundle of Documents, Volume 3, TAB 1). This email stated in material part as follows:

> "*We had a meeting with the Company today and have been informed that one of the parties in Batch 5 of the BMA forms (the Batch that has not gone out to BMA yet) has contacted the Company to talk about the possibility of selling its interest in receiving the shares. In the circumstances, the Company has instructed that Batch 5 should not be sent to BMA for approval yet.*"

132. In an April 21, 2004 email, sent from an email address in Singapore to Conyers Dill & Pearman, Jeff Khoo (who seems from related correspondence to have been acting on behalf of the Company in respect of the issuance of all shares) wrote[27]:

> "*Hi Carol Ann,*
>
> *Tried calling you earlier but reached your voicemail! Great work in chasing and obtaining BMA approval for Batch 3. Now it is left with only Batch 4.*
>
> *During your absence Blossom has previously sent out an email requesting for Batch 5 to be put on hold and NOT submitted to BMA yet as* **we received instructions from our client that there may be a potential purchase for the lot of shares due to Taiwanese Shareholders**. *In the meanwhile, can I request from you the list of names in your Batch 5 and also, please wait for our instructions before this is submitted to BMA.*" [emphasis added]

133. These communications, it must be noted, were taking place not with the lawyers who had appeared in the Scheme Proceedings, but, it seems to be obvious, with corporate administrators. In any event, this evidence suggests that one of the Taiwanese Noteholders was in contact with the Company about the bloc of shares in April 2004, which is consistent with the proposition that they did not acquire their Notes prior to the Court Meeting in circumstances where they wished to conceal the fact from the Company. What is also significant is that it appears that all of the shares were to be sold as a bloc. This supports the view that they were most likely acquired as a bloc. So the most incriminating evidence of all, to my mind, is the added fact that *all* of the forms apparently forwarded in March to the Defendant's Bermuda attorneys, and forwarded on to the BMA in October, have blank "*current employer*" boxes (Agreed Bundle of Documents, Volume 3, TAB 21). Nomura Singapore was, for the purposes of the Scheme, acting on behalf of two Indonesian brokers, both not only affiliated with the APP Group, but also tenants of the APP-owned BII bank in the same building complex[28] where Mr. Widjaja's office is located. It is simply impossible to believe that these firms before and after the Order was obtained accidentally omitted (a) to disclose the Noteholders' Indonesian addresses, and (b) to disclose their current place of employment. Someone acting on behalf of this massive numerical bloc of creditors must have decided to deliberately conceal (in particular from BCG and the Company's lawyers) their employment connections with the APP Controlling Shareholders, both before and after the Court Meeting.

134. It seems to me to be far more probable that the Taiwanese Noteholders did not acquire their Notes, or the vast majority thereof, until after the Defendant decided to promote the Scheme. It seems to me more likely than not this acquisition took place with logistical and financial support and/or encouragement from the APP Controlling Shareholders. Mr. Apfel of BCG indicated that, looking back at the fact pattern in light of the belated disclosure

[27] Agreed Bundle of Documents, Volume 3, TAB 2.
[28] Their addresses, set out below, suggest a building complex rather than a single building.

in June of 2004 that the overwhelming majority in number of Noteholders, he considered the following events to be suspicious. The voting documentation for 150-plus Noteholders from Nomura and 82 Noteholders from Pershing arrived extremely late. (It was surprising to him that the Pershing Noteholders did not seek to vote individually, having regard to their number; some 74 voted against the Scheme. I find it curious that the second largest group of Noteholders, in number, should not have voted individually to make their numbers count, but draw no inferences one way or the other in this regard). I agree with Mr. Apfel that the fact that the Defendant's Bermuda attorneys were instructed not to forward the BMA forms of the Taiwanese Noteholders to the BMA for processing because of significant trading in those Notes is suspicious. It supports the drawing of an adverse inference against the Defendant, combined with various other suspicious proven facts : (a) their undisclosed status as senior management members of the APP Group, (b) their use of inactive overseas addresses, (c) the late submission of their documentation to BCG, (d) the importance of their votes in terms of numbers in defeating the potentially more numerous votes of objectors who, in the event, did not vote on an individual basis, (e) the market speculation that the Widjajas were buying Notes to retain control after the Scheme was approved and, after the fact, (f) the omission of their current employer details on all BMA forms prepared for the issuance of shares.

135. The adverse inference is that The Noteholders, with the active assistance of the Company and/or the APP Controlling Shareholders, covertly acquired their Notes shortly before the Court Meeting and were proposing to sell them after the Scheme (possibly at a profit) so that shares would be issued to other persons most likely linked to the Controlling Shareholders.

136. But even if this adverse inference can not properly be drawn on the above grounds alone, I still find that it is impossible to believe that, if the Taiwanese Noteholders did, by spontaneous combustion as it were, decide to invest as a group in the run-up to the Court Meeting, this would not have been known by Mr. Indra Widjaja who was, it seems, effectively in charge of ensuring the success of the Scheme at the "electoral" level. In the two weeks before the Court Meeting, it must have been far from clear that a majority in number would vote in favour, and the Taiwanese Noteholders represented almost 19% in value of the Defendant's debt and almost 90% in number of all creditors voting. The Scheme was vitally important not just to the Widjajas but, to a lesser extent admittedly, the Indonesian operating subsidiaries of APP as well. The fact that this significant bloc of votes was about to be cast could easily have been ascertained, not just from leading representatives of the Group, but from BCG, the Defendant's agent. BCG were employed by the Company to handle the voting process and were mindful of the fact that trading might be taking place right up to the 'Record Date', October 27, 2003. Paragraph 7 of the First Bloch Affidavit stated as follows:

> "*On the 27th October, 2003 BCG will compile a final report ("the Final Report") identifying the persons…that have filed an Account Holder Letter in respect of the Existing Notes as at that record date. The Final Report will be available for inspection at our offices.*"

137. BCG received account holder letters in respect of the Taiwanese Noteholders from Nomura Singapore from as early as October 24, 2003, although collating the material seemingly took a weekend to complete. But, by October 16, 2003 at the latest, the Defendant filed the First Bloch Affidavit, which exhibited the Participant List which the Company could have used as the basis for soliciting support from Noteholders not previously approached. Knowing that BII and the Supporting Noteholders could easily be blocked in terms of the majority in numbers requirement, it is (as already noted) impossible to believe that unless and until the Scheme promoters knew they had the requisite votes "in the bag",

they would not have been extremely keen to find out who any significant bloc of Noteholders were. But if, inconceivably, Mr. Widjaja and the Company went into the Court Meeting blissfully unaware of this tidal wave of support from the management ranks of their own wider corporate family, after the Scheme was approved, they ought to have been even more interested in discovering the identity the Taiwanese Shareholders for two reasons.

138. Firstly, and more positively, a major matter of commercial significance and, no doubt, family pride for the APP Controlling Shareholders must have been the level of control they would have over the Company in the post-Scheme era. And, secondly, in light of the questions asked by Mr. Van Duzer at the Court Meeting and the possibility of an opposed hearing to sanction the Scheme, responding to any criticisms as fully and frankly as possible ought to have been a significant concern. The Company had clearly expended considerable resources in utilizing expert and reputable lawyers to prepare a complex and comprehensive Scheme Document, according to Mr. Kilam, Mr Widjaja himself advanced by way of loan of $1.5 million to cover Scheme expenses. Extensive steps were taken in the Scheme Documentation, and the Petition itself, to fully disclose the extent of the APP Controlling Shareholders' voting power at the Court meeting and as a shareholder post-Scheme. They utilised Conyers Dill & Pearman in Bermuda, and White and Case in Singapore. The First Alex Goh Affirmation[29] boasted that advice had been sought from internationally-renowned insolvency guru Gabriel Moss QC. All this effort was expended because of the importance voting creditors would likely place on the extent of control they have if they exchanged their debt for shares in the company, as explained in the Van Duzer Affidavit[30] to which the Widjaja Affirmation responded.

139. Whenever a company becomes insolvent, creditors are required to make a commercial decision as to whether to remove the existing management and appoint a liquidator instead, to wind-up the company's affairs, or rather to pursue some form of what is popularly known in the United States as a debtor in-possession restructuring. The concept of a debt-for-equity restructuring, through a Chapter 11 Plan of Reorganization or, in Bermuda, a Scheme of Arrangement, is not new. But, like similar restructurings which are implemented by the pre-existing management, an important ingredient in selling the proposal is convincing the statutory majorities in number and value that the existing management can be trusted to act in the best interests of the creditors. The most important safeguard for the interests of the creditors, in a debt-for-equity restructuring as was proposed through the Scheme, is the knowledge that when the creditors receive their new shares in place of their old debt, they will unequivocally have the voting power to control the restructured company. This is the commercial context in which the Scheme was promoted by the Defendant, under the leadership of Mr. Widjaja. In relation to a family-owned business, perhaps more so than in any other case, it is likely that the family will be keen to maximize the level of their retained control, because the business that they have built will often represent not just dollars and cents, but personal and family pride. Even if this is not true in the exceptional case, perceptions of such motivations will no doubt abound in the minds of interested observers.

140. The Scheme Document itself seeks to meet these concerns in two broad ways. Firstly, the Explanatory Statement seems to make it clear that the Company is fully cognisant of creditors concerns and that full disclosure is being given about (a) the voting involvement of the APP Controlling Shareholders, and (b) the extent of control that the APP Controlling Shareholders will have after the restructuring takes place. Creditors are told that the APP Parties will abstain in respect of certain loans made to the Company, but the fact that BII will vote is disclosed in the Explanatory Statement. In paragraph 1.7 of the Explanatory

[29] Paragraph 40.
[30] Paragraph 32.

Statement, it is said that creditors will hold 99% of the shares and the APP Parties, including shares obtained in respect of certain loans, will only hold 1%. However, in paragraph 2.3.15(a), set out above, it is disclosed that BII "*(an entity controlled by the APP Controlling Shareholders)*" is owed nearly $142 million, which will implicitly entitle it to more than 21% worth of shares. Appendix I to the Explanatory Statement, "*SIGNIFICANT CONSIDERATIONS*," discloses that the Controlling Shareholders will, directly or indirectly, "*have voting power over approximately 23.1%*" of the shares after the Scheme is consummated. The following statement then appears:

> *" In addition, holders of a majority of the outstanding principal amount of the notes have informed the Company that they intend to vote for the Scheme and to agree among themselves policies relating to the management and business affairs of the APP China Group…***assuming there is no claim in respect of any unidentified debt, these holders and our controlling shareholders will, therefore, have significant influence over APP China Group** *and may be able to direct the affairs and business of APP China Group, including the appointment of directors and the approval of most actions requiring the approval of shareholders."*[31] [emphasis added]

141. I have no doubt that Mr. Widjaja, irrespective of the extent to which he was involved in the legal minutiae of the Scheme Document, understood the commercial significance to independent creditors of knowing fully how much control the Widjajas would retain. He would have known this not just from the press stories debating this issue, to which he personally responded (in one case at least), but also from the fact that he only voted on behalf of BII. He personally lent $1.5 million to cover Scheme-related expenses (and received 3000 shares in this regard), but knew that he did not vote in this respect. So, the Defendant and Mr.Widjaja, who had met with Supporting Noteholders and agreed in principle to jointly control the Company, should, after the vote, have been keen to see whether any unidentified creditors had voted which would affect the balance of shareholder control. This would be of legitimate concern not just to the Widjaja interests, but to the Supporting Noteholders and the Company's existing management as well.

142. So, in my judgment, it is impossible to believe that if Mr. Widjaja and the Company did not realise prior to October 30, 2003 (a) that the Taiwanese Noteholders were substantially members of the management of affiliated APP companies, (b) that they voted as a bloc through Nomura Singapore, (c) that they used two brokers firms who were tenants of BII, and related to APP, and (d) that they would potentially represent nearly 90% in number of the shareholders, and nearly 19% in value, they would not in all probability have taken steps to work this out soon after the Court Meeting. The Second Bloch Affidavit exhibiting the meeting results was sworn on October 30, 2003 and filed on October 31, 2003. Exhibit 1 set out an overview of the voting, from which it would have been readily apparent (assuming the results had not been previously considered) that the Scheme was approved in number by 169 to 10. Exhibit 2 lists all the Noteholders who voted while Exhibit 6 represents that all account holder letter folders were available at the Court Meeting.

143. Whether or not the 150 Taiwanese Noteholders constituted "*unidentified debt*"[32], the Supporting Noteholders (and probably a few other supporters) and BII represented all of the remaining 19 votes for the Scheme, it would be immediately obvious that a large number of previously unknown creditors had voted for the Scheme. Exhibit 2 to the Second Bloch Affidavit set out a list of votes cast by the Chairman of the Court Meeting, Alex Goh, which accounted

[31] Scheme Document, page 87.
[32] As the quantum of the notes was known, it is more likely this term when used envisaged totally unknown claims.

for 167 of the votes in favour. BCG had worked over the weekend preceding the Court Meeting processing the 154 Nomura Noteholders and the 82 Pershing Noteholders, and could easily have confirmed that the 150 Taiwanese Noteholders used Nomura as an intermediary but were clients of only two brokers firms, the names of which would immediately have rung a bell to Mr. Widjaja and, more likely than not, any senior officer of the Defendant as well. It would at that stage be quite simple to work out that this hitherto unknown group of individual investors were in fact APP expatriate employees, at a management level, and that they would likely be issued nearly 19% in value of the shares.

144. Indeed, Alex Goh, the Defendant's Executive Officer (whom the Scheme Document described as having worked for Indah Kiat between 1993 to 1998 and who must have known of the large number of Taiwanese employees working there), would most likely have recognised one or two names on the list of voting creditors, at least, as Mr. Kilam did. If these Indonesian-based Taiwanese employees were indeed notorious for risky investments, so many Taiwanese addresses should have (at the very least) raised a question as to whether these Noteholders had links to the Group. And Mr. Widjaja would obviously have known of the Taiwanese expatriate representation in the APP Group's employment ranks, because he must have known (as the family financier) that the APP Indonesian subsidiaries were acquired from the Taiwanese Government. What again seems wholly implausible is the proposition that Mr. Goh, as Chairman for the Court Meeting, would have exercised his proxy in favour of the 159 Taiwanese Noteholders without taking any interest in whom they were. It is noteworthy that the Defendant elected not to call the officer most closely identified with the obtaining of the Order as a witness in the present proceedings, which resemble (as a result) the clichéd scenario of a performance of '*Hamlet*' without the Prince. Mr. Goh, as Executive Officer (and, according to Mr. Kilam, still employed by the Company) should have had a keen personal interest in ensuring not just that the Scheme was approved, but that the new shareholders were persons who could work with his existing ultimate bosses, the APP Controlling Shareholders.

145. The voting results would mean that, while the Scheme Documentation disclosed that APP-related parties would only control 23% of the voting power of the Company, the APP-related parties would in fact control nearly 42% of the voting power, a sizeable difference. Mr. Widjaja admitted that the employment relationship was something which ought to have been disclosed, and on any objective view expatriate employees of a "*powerful Indonesian family*"[33] are affiliated to the family-owned group of companies they work for. Moreover, as explained in the Explanatory Statement and as provided in bye-laws 56-57 of the Company's bye-laws[34], unless a poll is requested (in which case each shareholder has one vote per share), votes in general meeting are usually passed by a simple majority of shareholders voting on a show of hands. So an overwhelming majority in number of shareholders would, potentially at least, be significant in control terms.

146. The identity of the Taiwanese Noteholders, assuming Mr. Widjaja and the Company did not know who they were at all material times previously, should also have been of considerable interest to them in light of questions raised by Nathan Van Duzer at the Court Meeting. According to paragraphs 29-30 of his November 5, 2003 Affidavit, it appears that Mr. Van Duzer merely asked about the identity of the Supporting Noteholders referred to in the Explanatory Statement. Mr. Goh was possibly technically truthful in denying that these Noteholders were affiliated to the APP Controlling Shareholders. But if the Defendant was acting in good faith and did not know the identity of 88% in

[33] ' *Asia Pulp divesting China assets*', International Herald Tribune Online, October 6, 2003, Exhibit "NVD1" to the November 5, 2003 Nathan Van Duzer Affidavit, sworn and filed in the Scheme Proceedings.
[34] Exhibit "TAL1" to the First Alex Goh Affidavit, page 244.

number and nearly 19% in value of those who had voted in favour, it should have (a) disclosed at the Court Meeting that 88% in number and nearly 19% in value of those who actually voted for the Scheme were unidentified creditors, and (b) offered to investigate who they were. If a genuinely innocent oversight was discovered after the Court Meeting, the Court could have been apprised of this by the time the sanction application was heard on November 7, 2003, one week later. But, more importantly than that, the Company represented to this Court by filing and relying upon the Widjaja Affirmation, that all reasonable steps to identify any connections between creditors voting in favour of the Scheme had been taken, with negative results.

147. The Petition seeking this Court's sanction for the Scheme summarised the voting at the Court Meeting, and expressly disclosed that BII's vote was included in the voting figures. This was an express representation, consistent with similar disclosures in the Explanatory Statement, that (a) the Defendant had applied its mind to the question of whether any voting creditors had connections with the Controlling Shareholders, and (b) the Company had adopted a policy of disclosing any material connections. And paragraph 15 of the Petition, following on from the table of voting, described value of BII's claim, before stating: "*The vote of BII in this regard has been included in the above table*". By necessary implication, this represented that the Company had identified BII as the only related creditor who voted at the Court Meeting. At the Court Meeting, questions had been raised about suspected affiliations with the APP Controlling Shareholders on the part of creditors who had voted. If the Defendant and the Controlling shareholders were acting in good faith and were unaware of the obviously material connections between them and the Taiwanese Noteholders, they would in my judgment have investigated and discovered between October 30, 2003 and November 7, 2003 who they were, so that they could advise the Court and any objectors accordingly.

148. The Van Duzer Affidavit was sworn in the United States on November 5, 2003, and filed in the Registry at 9.27a.m on the morning of November 6, 2006. It is possible that an advance copy of this was supplied to the Defendant, otherwise it is difficult to understand how the Widjaja Affirmation was, according to the notarial attestation, signed in China that same day, November 6, 2006, with China being 12 hours ahead of Bermuda time. The Third Bloch Affidavit was filed in Bermuda at 4.17pm on November 6, 2003, obviously in partial response to the Van Duzer Affidavit, because it disclosed the names of some 8 independent institutional investors, only one of whose names was evident on the face of the list of creditors. This is understandable, because much of Mr. Van Duzer's attack focussed on the suspicious concealment of who the Supporting Noteholders were. But, as he early on in paragraph 6 of his Affidavit also raised concerns that a "*significant number of creditors*" had voted based on "*affiliations*", it is difficult to understand on what basis the Company could legitimately have felt no need to deal with the largest numerical supporting voting bloc as well.

149. According to the Court file in the Scheme Proceedings, on November 6, 2003 at 4.13pm., an un-signed version of the Widjaja Affirmation was filed. The first sentence of paragraph 4 (and perhaps the entire document) was unchanged in the signed version filed in facsimile form at 2.22pm on November 7, 2003, shortly before the sanction hearing resumed after the luncheon adjournment. The notarial certificate attached in Chinese with English translation certifies that the Affirmation was signed before the notary on November 6, 2003, but that the certificate itself was signed on November 7, 2003. "*26/9 2013 10.42 Fax*" appears at the top of each page of the facsimile version of the Widjaja Affirmation. No points were taken on these details, and nothing very much turns on them, perhaps. The un-signed Affirmation was, however, filed in Court in Bermuda at 4.13am China time on November 7, 2003(assuming a 12 hour difference). If the Widjaja Affirmation was in fact signed late at night on November 6, 2003 China time (say 11.59pm), this would have been just before noon on November 5, 2003, the

same day the Van Duzer Affidavit was sworn in Massachusetts, so the Defendant must have received an advance copy of this Affidavit in un-sworn or un-filed form. And if the notarial seal was not completed until the following morning China time (the evening of November 6, 2003 Bermuda time), this could explain why the signed version of the Widjaja Affirmation did not reach Bermuda until after the sanction hearing had started on November 7, 2003 in Bermuda.

150. But this timeline, though rather tight, does demonstrate that both the Defendant and Mr. Widjaja had time to check the accuracy of their response, because (a) they filed the draft Widjaja Affirmation roughly seven hours after the Van Duzer Affidavit was filed (and probably had sight of that in draft the previous day), and (b) they filed the signed version of the Widjaja Affirmation roughly 22 hours after the draft version. The draft Affirmation was filed so quickly, however, that it strongly suggests that no further investigations were undertaken, after first sight of the Van Duzer Affidavit, as to the identity of any then unknown Noteholders. This can mean only one of two things. The Defendant by this stage either knew who the Taiwanese Noteholders were and simply decided to deliberately mislead the Court. Or, alternatively, it was decided to deliberately mislead the Court by not checking, and filing an Affirmation which was known to be false in the sense that it falsely implied that the Affirmant had made proper inquiries as a basis for affirming that none of the creditors had any connection with the Controlling Shareholders.

151. If the Defendant or Mr. Widjaja wanted more time to respond, the Defendant as Petitioner could simply have asked for the sanction hearing to be adjourned for a few hours or a day. In not seeking more time, the Defendant and Mr. Widjaja fortified the impression that they were fully cognisant of who all supporting creditors were, and had fully disclosed any material connections. Bearing in mind the questions that had been raised on October 30, 2003 by Mr. Van Duzer, it would have been reasonable to anticipate an opposed sanction hearing. And, unless the directing minds had taken a "political " decision that enquiring minds had no right to know what the directing minds of the Defendant already knew, it would be reasonable to assume that the voters list would have been carefully scrutinized with a view to making further reassuring disclosures to the Objectors and the Court. The Third Bloch Affidavit sought to assuage the Objectors' concerns about who some of the Supporting Noteholders likely were, and Mr. Widjaja's Affirmation to some extent completed this circle by explaining that confidentiality agreements had been entered into with them (paragraph 6). This left outstanding the important issue of whether any other supporting creditors were affiliated or connected with the Controlling Shareholders, and this was the issue which the crucial first sentence of paragraph 4 of the Widjaja Affirmation addressed. And these other creditors, who voted through a single intermediary, represented nearly 90% of all creditors voting, not one or two creditors who could accidentally have been overlooked.

152. Under cross-examination, Mr. Widjaja, with a distinctly guarded expression on his face, admitted that he was familiar with the names of the two broking firms used by the 150 Taiwanese Noteholders were tenants in the BII building, and known by him. In cross-examination, Mr. Kilam agreed that in the financial statements issued by Indonesian operating subsidiary PT Duta Pertiwi Tbk for year end 2003-2004, these same firms are described as related to four APP Indonesian subsidiaries. These two entities are both on the voting list Mr. Widjaja claims to have scrutinized before he signed his Affirmation, which he was selected to do because he was the best family member to recognise affiliated entities. Under paragraph 38 (b) of the Notes to the Financial Statements before these entities are listed states as follows: "*Related parties which have partly the same stockholders and management, directly or indirectly, as that of the company and its subsidiaries are as follows.*" Muktar Widjaja is President of Duta Pertiwi.

153. So the Widjaja Affirmation not only failed to disclose the connection of the Indonesian subsidiaries' employees among the ranks of creditors voting in favour of the Scheme. It also failed to disclose one affiliated company admittedly known to Mr. Widjaja, since PT Amantara Securities, was listed as numbers 159 and 160 on the BCG list of those who voted in favour of the Scheme. The failure to mention this affiliation in his Affirmation was not directly put to Mr. Widjaja, perhaps because it was only discovered after he gave his evidence. In any event, this was not the central allegation. But this omission on his part strongly suggests that he signed his Affirmation deposing that there were no affiliations at all when, in this respect, he had actual knowledge of another affiliation falling clearly within his narrow usage of that term. Either this was the position or he did not, as he testified in these proceedings, check the creditors list carefully or at all before signing his Affirmation. If this is the case, it would in any event demonstrate a propensity for recklessly false testimony on his part. Even if the broker was not voting on its own behalf but on behalf of an undisclosed client, disclosure should clearly have been made.

154. It is worth noting the addresses that Mr. Widjaja and the brokers used by the Noteholders share:

1. Mr. Widjaja (per his Affirmation): "*Plaza BII, MH Thamrin, Jakarta, Indonesia*" and "*Jalan Thanrin, No. 51, Jakarta, Indonesia (per his deposition)*;
2. PT Amantara Securities (per their Confirmation of Chang Chao Ming's purchase): "*Plaza BII Menara III Lt.11 Jl. M.H.Thamrin No.51 Jakarta, Indonesia*";
3. PT Aldiracita Corpotama (per their confirmation of Chao Jen Tseng and Chu Ting Chi purchases): *Plaza BII Menara II, Lantai 32 Jl. M.H.Thamrin No.51 Kav 22 Jakarta 10350, Indonesia."*

155. For all these reasons, it is impossible to believe that when the sanction hearing took place, Mr. Widjaja and the Defendant did not know that the Taiwanese Noteholders were senior employees of the APP Indonesian subsidiaries. Applying the criminal law standard of proof, the only reasonable inference to draw from the proven and substantially admitted facts is that the Mr. Widjaja and the Defendant knew that the Taiwanese Noteholders were employees of the APP Indonesian Operating Subsidiaries on November 6, 2003, before the Widjaja Affirmation was signed.

156. For the avoidance of doubt, the finding that the Defendant knew that the Taiwanese Noteholders were employees of the Indonesian Operating Subsidiaries is based on (a) an attribution of knowledge on the part of Mr. Widjaja and the Controlling Shareholders, and (b) the actual and/or constructive knowledge of the largely unidentified Defendant's officers who were involved in promoting the Scheme. No suggestion whatsoever is made that the Defendant's legal advisers or BCG acted in anything less than an entirely professional manner.

Factual findings: did Mr. Widjaja wilfully, knowingly and falsely affirm that none of the voting creditors apart from BII were "affiliated or otherwise connected with" the APP Controlling Shareholders?

157. The Widjaja Affirmation was sworn on behalf the APP Controlling Shareholders and relied upon by the Defendant to persuade the Court to (a) refuse the Objectors' application for an adjournment to investigate their suspicions that persons affiliated with Controlling Shareholders had voted in favour of the Scheme, and (b) sanction the Scheme notwithstanding the Objectors' complaints that, inter alia, insufficient information had been given as to the identity of the Supporting Noteholders in light of the market

speculation that the Widjaja family was buying blocks of Notes to retain control.

158. The Scheme was promoted on the explicit basis that the Defendant was fully cognisant about (a) the sensitivities of creditors about the extent of control which would be retained by the Controlling Shareholders if the Scheme was approved and (b) the Company's obligation to fully disclose any affiliations which might exist. In particular, the Explanatory Statement in advising that the Supporting Noteholders represented a majority in value of Notes and would influence the management of the Company after the restructuring represented (a) that the Supporting Noteholders were not affiliated to the APP parties, whose interests had been fully disclosed, and (b) that if any significant bloc of unidentified creditors voted, this might affect the issue of control. This implied that the Company assumed an obligation to disclose any previously unidentified affiliations or connections between the APP Group and/or the Controlling Shareholders, in a commercial context in which it was well known that the identity of the creditors might change at any point up until the Record Date of October 27, 2003.

159. For the reasons already set out above, I find that that it is simply impossible to believe that the Defendant and Mr. Widjaja, representing the interests of the Controlling Shareholders and actually voting on BII's behalf in favour of the Scheme, would not have known on or before November 7, 2003 that (a) 150 management employees of the Indonesian operating subsidiaries had voted in respect of Notes representing some 88% in number and nearly 19% in value of all votes cast, and (b) that this fact ought to have been disclosed in the Widjaja Affirmation. Mr. Widjaja admitted that had he known of the employment relationship, he would "*of course*" have disclosed it. If Mr. Widjaja and the Defendant did not make and rely upon the Widjaja Affirmation with deliberate dishonesty, it should have been easy for them to discover the employment relationship between October 30, 2003 and November 7, 2003. The Taiwanese Noteholders voted as a block, using their own names and not those of agents, through brokers related to APP. In my view, no honest person would have signed the Widjaja Affirmation without ensuring that proper inquiries were made as to who this substantial bloc of supposedly unknown Noteholders, who purportedly had never been met with, actually were. Because, implicitly, the main purpose of the Affirmation was to satisfy the Court that, although the Objectors might by virtue of uninformed suspicions believe that a "*significant number*" of those who voted in favour with the Scheme had undisclosed affiliations, Mr. Widjaja and the Company had actual knowledge that this was not the true position.

160. The only issue which requires further analysis is whether, on technical grounds, the Plaintiffs' pleaded case fails because I cannot be satisfied that Mr. Widjaja perjured himself, in particular, by deliberately and falsely stating in paragraph 4 of his Affirmation that:

> "*The APP Controlling Shareholders are not affiliated to or otherwise connected with any of the creditors, including the Supporting Noteholders, who voted in favour of the Scheme, other than BII, whose connection with to the APP Controlling shareholders is disclosed in the Notes*."

161. Mr. Widjaja testified that, based on the meaning of affiliation in the banking world, employees of a subsidiary company ultimately owned by the Controlling Shareholders were not considered by him to be "*affiliated*". He did not think the words "*otherwise connected*" added anything to the word "*affiliated*". The logic of this argument is almost completely destroyed by the witness' later concession that he would "*of course*" have disclosed the fact of the employment relationship, had he been aware of it, even though he would not have changed a word of the first sentence of paragraph 4 of his Affirmation. Mr. Widjaja obviously appreciated that the Plaintiffs' pleaded case fell within a narrow

compass, and was centred on paragraph 4 of his Affirmation. The whole purpose of paragraph 4, in its context however, was to deny the existence of any form of affiliation or connection whatsoever, so to admit that the employment relationship would have been disclosed, if known, but at the same time argue that paragraph 4 would still have been accurate was sophistry of the highest order. It was, in effect, a submission that even if the Court was satisfied that Mr. Widjaja knew of the employment relationship and deliberately concealed it, the Defendant still should win on a technicality, because the witness did not believe that the relevant relationship was caught by the words used in paragraph 4 when he signed his Affirmation. This argument was, in fact, formally advance in paragraph 26 of the Defendant's Outline Opening Submissions.

162. I reject Mr. Widjaja's evidence that he believed affiliation in the context of the issues he was addressing in his Affirmation had a narrow technical meaning which only embraced inter-relationships between companies, or company-shareholder relationships, but excluded a company's employees. This narrower meaning is, of course, a commonly used meaning. But the critical question is, firstly, what Mr. Widjaja understood by the term "*affiliated*" when he used it in the Affirmation drafted for him by his lawyer. Paragraph 4 of his Affirmation cannot be understood without reading paragraph 3, which makes it clear that he is purporting to adopt the meaning of the term as used in the Van Duzer Affidavit to which he is replying:

> *"3. I have seen a copy of the affidavit of Nathan H. Van Duzer filed herein on 6 November 2003 ("the Van Duzer Affidavit"). In his affidavit, Mr. Van Duzer claims that a 'significant number of creditors who voted in favour of the Scheme' are 'affiliated' to the APP Controlling Shareholders, and that they voted in favour of the Scheme as a result of that 'affiliation.' "*

163. Paragraphs 6-8 of the Van Duzer Affidavit stated as follows:

> "6.**It is the belief of the Fidelity Funds and I am informed the belief of the Hancock Funds that a significant number of creditors who voted in favour of the Scheme did so as a result of affiliations such creditors have with the Controlling Shareholders of the Company, in order to ensure the continuance of control of the Company by the Controlling Shareholders directly or indirectly** *and to insulate the interests of the Controlling Shareholders in the Indonesian based operations of APP from the claims the holders of the bonds have against APP on account of APP's guarantee of payment of the bonds. It is further the belief of the Fidelity Funds and I am informed the belief of the Hancock Funds that if the votes of affiliated creditors were excluded from the count, it is doubtful whether the Scheme would have been upheld by the requisite number of creditors holding the requisite value of debt.*
>
> *(1) The concerns of the Fidelity Funds about the motives of the Company in propounding this Scheme and the suspected affiliated creditors in voting in favour of the Scheme were not calmed by what was said at the Court Meeting by representatives of the Company in answer to questions from the floor. On the contrary, they were fanned by the Company's evasive answers to direct questions bearing on the issue of the identities of supporting creditors.*
>
> *8. Considering the contents of the Scheme Document, the Fidelity Funds do not consider that a creditor acting in its own interest could*

> *reasonably approve the Scheme on the information provided by the Company. This is for a number of reasons which I will outline below.* **However, it is worth noting at this stage that the patent unattractiveness of the Scheme to an "independent" creditor also goes to suggest that those creditors who approved the Scheme may have had an ulterior interest or affiliation encouraging them to do so which is not made clear on the face of the Scheme Document.**" [emphasis added]

164. Concerns were explicitly expressed about "*those creditors who approved the Scheme."* Paragraphs 17-27 of the Van Duzer Affidavit raised concerns which centred on the identity of the Supporting Noteholders referred to in the Scheme, and paragraphs 28 to 30 raised more general questions about who the creditors generally were, having regard to reports of recent market activity aimed at ensuring that the Widjaja's retained control. Paragraph 29 of the Van Duzer Affidavit stated:

> "*In a confused exchange at the Court Meeting, notwithstanding that no one representing the Company could confirm the identities of the Supporting Noteholders, Mr. Goh was able to confirm that the Supporting Noteholders were not affiliated to the APP Controlling Shareholders.* **This exchange provided no reassurance that these creditors voting in favour of the Scheme were truly independent of the APP Controlling Shareholders.** *On the contrary, my suspicions that they were affiliated were greatly increased.*" [emphasis added]

165. In my judgment, it was obvious that Mr. Van Duzer was expressing concern about the identities of all creditors supporting the Scheme, including the Supporting Noteholders, and whether they were "*truly independent*" of the APP Controlling Shareholders in a general sense. That this was appreciated by Mr. Widjaja is reflected in the fact that he deposed to the absence of any affiliation or other connection in respect of not just the Supporting Noteholders with whom discussions had taken place, but creditors generally. The term "*affiliation*", therefore, was obviously being used in its broadest sense, and not in any narrow technical legal sense. The adjective "*affiliated*", if used before a noun, admittedly generally means "*an organisation/club etc. that is a member of a larger group or organization, or is closely connected to it*": '*Longman Online Dictionary*'. The noun "affiliate" specifically refers to companies or organizations which are "*connected with or controlled by*" another entity. The verb affiliate, according to the same dictionary, may mean an individual "*to join or become connected with*" a group or organisation.

166. But, secondly, even if the word "*affiliated*" was not intended to apply to management staff employed by companies controlled by the Controlling Shareholders, Mr. Widjaja affirmed that none of the creditors were affiliated "*or otherwise connected with*" the APP Controlling Shareholders. This phrase was obviously intended to be as broad as possible, and I reject Mr. Widjaja's evidence that he felt these words added nothing to the term "*affiliated*". According to the '*Longmans Online Dictionary*', "*if people… are connected, there is some kind of relationship between them.*" Bearing in mind that Mr. Widjaja had not only read the Van Duzer Affidavit but also (a) had weeks earlier spoken to at least one journalist to deny that his family was buying up Notes, and (b) was admittedly aware that he should have disclosed the employment relationship of the Taiwanese Noteholders if he was aware of it, I am satisfied that if he did know of the Taiwanese Noteholders' employment connection with the APP Controlling Shareholders when he signed his Affirmation on November 6, 2003, he wilfully made a statement that he knew to be false in the first sentence of paragraph 4 of that Affirmation.

167. And my fundamental factual finding is that I am satisfied, to the standard proof that the law requires for allegations of fraud and dishonesty, that Mr. Widjaja perjured himself by deliberately and falsely stating that that the APP Controlling Shareholders "*are not affiliated to or otherwise connected with any of the creditors, including the Supporting Noteholders, who voted in favour of the Scheme, other than BII, whose connection with to the APP Controlling shareholders is disclosed in the Notes*."

Factual findings: did Mr. Widjaja, in his evidence taken on commission in Singapore, admit to deliberately and falsely stating that the APP Controlling Shareholders were not "affiliated or otherwise connected with any of the creditors…other than BII"?

168. I am assisted in reaching the above findings by the following portion of Mr. Widjaja's evidence. If his evidence is to be accepted as a whole, he made the Affirmation in good faith not just on his own behalf but on behalf of his brothers as well. He was aware of the suspicions in the market place about who owned the bonds, indeed the Affidavit he was responding to exhibited at least two articles broadly consistent with the allegations made in the Van Duzer Affidavit. He was aware that connections such as were subsequently revealed to exist ought to have been disclosed. He was also aware that the APP Group had hundreds of thousands of employees, and involved multiple companies. If he did not already know who the Taiwanese Noteholders were, the idea that he and he alone would be likely to be aware of all affiliations with the Controlling Shareholders is clearly preposterous. How could he honestly sign the Affirmation without checking with anybody else, especially persons such as BCG or Nomura, not to mention the officers of the Company most intimately involved in the mechanics of the Scheme process, to identify who the unknown Noteholders were? While being cautious when answering more marginal questions, Mr. Widjaja, when pressed, stated:

> *"Q. And is it your evidence that you have never discussed with your brother Teguh who these noteholders are?*
>
> *A. Yes, correct.*
>
> *Q .And is it your evidence, then, that APP did not know -- not you personally, but is it your evidence, to the best of your knowledge, that APP did not know in November 2003 that 150 people employed in Indonesia allegedly invested their own money in these bonds?*
>
> *A.* **I -- I didn't know because I was in -- in China at the time, and I did not question APP, whether they are the shareholders -- they are related to the shareholders. So I just give the statement that they are not affiliated to the shareholders.**
>
> *Q. I think I am going to have to have -- put that question again, because I don't believe I got an answer to it. We'll take it slowly. I'll just see where it was.*
>
> *(Interpretation continues)*
>
> *Can we have that on the record, please? If -- it should be on the record.*
>
> *A. (In English) yes, translator can. (Interpretation continues).* **At that time I didn't know whether APP has a relationship or not. I just made the statement whether this people, the 150 staff here -- oh, whether**

this -- all of these creditors has affiliates -- affiliation to the -- with the -- the shareholders or not." [emphasis added]

169. This evidence, in my judgment, represents an express admission that the deponent deliberately made an Affirmation (a) expressly stating that none of the creditors including the Taiwanese Noteholders were affiliated to or otherwise connected with the Controlling Shareholders, and (b) implicitly stating that he knew this to be true because he knew the identity of all of the creditors and had confirmed the absence of any relevant connections, in circumstances where he (c) admittedly had actual knowledge that the implicit statement in (b) was false, and (d) was deliberately and dishonestly reckless as to whether the express statement in (a) was true or false. As indicated above when dealing my approach to Mr. Widjaja's evidence generally, I take this into account as undermining his general credibility, since the Plaintiffs did not expressly rely on recklessness in support of their secondary case on fraud, and allegations of fraud must be pleaded with particularity.

170. What justification can there be for Mr. Widjaja deliberately signing his Affirmation without taking reasonable steps to determine the truth of what he was affirming? The fact that he was in China was not an adequate explanation, because he was admittedly in touch with his lawyer by fax and telephone. He obviously knew on November 6, 2003 that he making his Affirmation for use by this Court at the sanction hearing which the Objectors were opposing based on the Van Duzer Affidavit. He also obviously knew that he was making a positive assertion of fact on behalf of not just himself, but all of the APP Controlling Shareholders as well. He further must have known that he was positively representing to the Court that (a) he and the APP Controlling Shareholders had after the Court Meeting (a) investigated whether "*any creditors*" voting in favour of the Scheme had any connections with them, and (b) disclosed the only connection which had been found, that being their relationship with BII. The purpose of the Affirmation, on its face, was to respond to the Van Duzer Affidavit, which for present purposes essentially asserted that the Objectors (a) did not know who the creditors voting in favour were, and (b) suspected that they had undisclosed affiliations. The crucial sentence in the Widjaja Affirmation, it must be remembered, reads as follows:

> " *The APP Controlling Shareholders are* **not affiliated to or otherwise connected with any of the creditors**, *including the Supporting Noteholders,* **who voted in favour of the Scheme, other than BII, whose connection** *with to the APP Controlling shareholders* **is disclosed in the Notes**." [emphasis added]

171. I view his admission that he made the above statement in his Affirmation without checking what the true position was as supporting my primary finding that Mr. Widjaja actually knew of this statement's falsity in that he actually knew of the connection which did in fact exist between 88% in number and nearly 19% in value of all creditors who voted and the APP Controlling Shareholders. I believe that the truth must be that Mr. Widjaja made his Affirmation without checking who the largest bloc of supporting creditors were because he already knew who they were. If he had, as he testified, carefully read the list of supporting creditors and not checked with anybody else, he would (if acting honestly) have disclosed that PT Amantara Securities was an affiliated party. His unconscious admission of perjury by recklessness would not, in my view, have been made unless Mr. Widjaja was seeking to conceal what he considered, in light of the Plaintiffs' pleaded case of actual knowledge, was the relevant allegation of fraud.

172.

Legal and factual findings: was the failure to disclose the employee status of the Taiwanese Noteholders material?

173. In my view, having regard to the applicable test for materiality in this context, the filing of evidence falsely stating that no undisclosed connections existed between creditors supporting the Scheme and the APP Controlling Shareholders, when 88% in number and nearly 19% in value of all creditors who voted on the Scheme (both in favour and against) were in fact employees of companies controlled by those Controlling Shareholders, was obviously material.

174. The Widjaja Affirmation and the first sentence of paragraph 4 in particular, probably tipped the scales in favour of the making of the Order in two respects. Firstly, it provided positive evidence to rebut the Objectors' mere suspicions that the Widjajas had undisclosed connections which (a) compromised the integrity of the vote, and (b) were motivated by their desire to exercise more control after the restructuring than had been previously admitted. This was an important basis for the Court rejecting the application for an adjournment to allow the suspicions to be investigated. If the adjournment had been granted, the employment relationship between the Taiwanese Noteholders and the APP Controlling Shareholders might well have been discovered before the Order was made. While the adjournment was in part refused because the Company submitted that there was urgency based on pressure from the Chinese Banks, the weight given to the urgency argument would undoubtedly have been less if there was uncertainty about the validity of the vote, which the relevant portions of the Widjaja Affirmation helped to dispel. Secondly, the relevant averments in the Widjaja Affirmation responded substantively to the complaints made about the lack of adequate disclosure in the Explanatory Statement about the level of control the Widjajas would exercise after the Scheme was implemented.

175. The Defendant has sought to argue that the crucial issue was whether or not the statutory majorities were met, if one subtracts the votes of the Taiwanese Noteholders. On this basis, the Scheme would still have been approved. In my view this is too simplistic a test in that it suggests that the Court might not reasonably be expected to have insisted (a) that a revised Explanatory Statement be sent out disclosing the omitted connection and (b) that a fresh meeting should be held after creditors had been informed of the offending non-disclosure. The Plaintiffs rightly point out that it is entirely possible that, if the creditors were all armed with such fresh information, the Scheme might not have been approved. Not only might the Objectors have been able join other previously supporting creditors to their cause, but if the Taiwanese Noteholders were disqualified, and the Pershing Objectors elected to vote individually, a majority in number might well have voted against the Scheme.

176. I find that if it had been discovered at the sanction hearing that some 88% in number and nearly 19% in value of creditors voting had undisclosed connections with the APP Controlling Shareholders, this would have changed the entire basis on which the Order was made. In my Judgment dated November 24, 2003 setting out my Reasons for sanctioning the Scheme, I dealt with the undisclosed affiliations issue as follows:

> "*58. One of the main challenges facing promoters of schemes of arrangement is ensuring that the proposed scheme cannot be impugned on the grounds that the classes are improperly constituted. This is often problematic. In the present case, however, the attack is not launched on the decision to have one class of creditors-all unsecured creditors-as such. Rather,* **the suggestion is that certain unspecified creditors because of their affiliations with the Controlling Shareholders (or, perhaps, because they**

are Controlling Shareholders) have conflicting interests which disqualifies them from voting in the same class as "independent" creditors.

59. **This point was, on its face, plainly arguable. If it could be established that a significant number of creditors were not voting in the interests of creditors, but really to advance shareholder interests, this would constitute grounds for declining to sanction the Scheme.** *The press speculation that the controlling Shareholders may have been buying notes with a view to protecting their interests in the Scheme does provide a basis for genuine suspicions in this regard. And the bare denial of these allegations, combined with the Company's use of the cloak of confidentiality obligations as a basis for not disclosing the identities of the beneficial noteholders, was not the most impressive of responses. Was the application of the Objectors to order the Company to disclose the identity of the Supporting Noteholders, and adjourn the sanction hearing in the interim, not a reasonable one?*

60. **The real question is whether what amounted to no more than mere suspicions were sufficiently cogent to warrant refusing and/or delaying the sanction, and possibly derailing the Scheme. It was obvious that the Company's position was that no conflict of interest existed. One of the Controlling Shareholders filed an Affirmation to this effect**..." [emphasis added]

177. Despite the fact that the Plaintiffs have conceded that the classes were not improperly constituted, if the true status of the Taiwanese Noteholders had been discovered at the sanction stage, the Court having manifestly placed considerable weight on the fact that the Company appeared to have bent over backwards to give proper disclosure, this would have potentially resulted in the Order not being made. The Widjaja Affirmation was clearly relied upon to a significant extent, even though I went on to say later in my judgment that my decision was also influenced by the following facts : (a) the Objectors had not been able to substantiate their suspicions, (b) the separate class argument appeared to lack substance, because the APP Controlling Shareholders and the creditors had broadly common interests, and (c) publicity had been given to the suspicions complained of, yet independent creditors (Third Bloch Affidavit) had apparently nevertheless still been willing to vote in favour of the Scheme.

178. The second main point raised by the Objectors was to criticise the Explanatory Statement. Here again, the conviction that the Company had been acting in good faith, and given full disclosure of the degree of control the Controlling Shareholders would exercise, was certainly material to the rejection of this ground for refusing to sanction the Scheme:

"

69. **Since full disclosure was made that the Controlling Shareholders would continue to wield some influence together with creditors under the Scheme, and in the absence of any credible evidence that a significant percentage of creditors have concealed affiliations with the Controlling Shareholders, the inevitable conclusion must be that the information given was adequate.** *In any event, it is not any deficiency in information supplied that is fatal to a scheme being approved. The basic requirement is, as the Objectors' own authorities make clear, that "the person called to vote on it is to be able to exercise a reasonable judgment on whether the*

> *scheme is in his interest, [and the explanatory materials must contain] an explanation of how the scheme will affect him commercially": Re Allied Domecq plc [2000] 1 BCLC 134 at 143."* [emphasis added]

179. Again, the fact that the Company had concealed the fact that the APP Controlling Shareholders controlling interest would be nearly twice what it had been disclosed to be could potentially have provided further grounds for the Order being refused, and a fresh meeting convened. The fraud on the Court was, in my judgment, clearly material to the making of the Order.

180. Accordingly, the Order sanctioning the scheme and awarding the costs of the sanction hearing to the Company and against the Objectors is liable to be set aside.

Findings: should the Court exercise its discretion to set aside the November 7, 2003 Order in whole or in part?

181. Mr. Hargun's submissions as to the legal morass that would be created if the Order were to be set aside and the Scheme effectively unwound were compelling. The Company would be returned to a state of insolvency and, despite various transfers of Notes and/or shares that may have taken place since the Order was made, the shares issued would have to be cancelled and (if this is legally possible) the cancelled Notes would have to be reissued.

182. The Plaintiffs, before the issuance of these proceedings, initially sought to turn the suspected fraud revealed by the Apfel Letter to their commercial advantage by requiring the Defendant to arrange a favourable purchase of their Notes. The Defendant complained that they did not allow sufficient time for such a purchase to be worked out, but the Plaintiffs can hardly be criticised for bringing to the Court's notice the fact that the Order was obtained by fraud. In my view, it was far more creditable for the Plaintiffs to bring the present action than, as it were, to seek to profit from the Defendant's fraud. Their real difficulty is that in the peculiar context of an application to set aside an order sanctioning a scheme of arrangement which impacts upon the rights of numerous third parties, it is almost impossible to make out a convincing case for setting aside the Order, with a view to doing justice between the limited parties before the Court.

183. If the Order is set aside in full and the Scheme effectively declared to be of no legal effect, the consequences for third parties are unimaginably complex but unarguably detrimental. The options facing the creditors would be essentially (a) to place the Company into liquidation, and risk what the Scheme was designed to avoid, namely the ring-fencing by the Chinese banks of the assets of the operating subsidiaries; or (b) to implement a fresh Scheme. Either scenario would unleash a tidal wave of costly legal manoeuvrings, not just involving the company and its shareholders/creditors, but also at the operating company level, not to mention throughout the APP Group as a whole. In *Fletcher-v-Royal Automobile Club Ltd.* [1999] 1 BCLC 331, Neuberger J observed:

> "*The fact that the result of setting aside may be inconvenient or worse, the fact that the result of setting aside may cause innocent third parties to suffer, and the fact that the party seeking to set aside may be able to obtain alternative relief, are all matters which may (and, indeed, I think, normally would) go to the court's discretion as to whether to set aside…"*[35]

[35] Transcript, page 10.

184. Mr. Woloniecki was unable to advance any compelling or convincing benefit which would accrue to the Plaintiffs if the Scheme was unwound, which would justify unleashing the incalculably prejudicial effects for third parties of unwinding the Scheme. The best he could do was to take up the suggestion from the Bench that third parties likely to be affected (in essence the shareholders or former creditors) should be given an opportunity to be heard before the Court decides the appropriate relief. Mr. Hargun responded that it would be undesirable for the viability of the Scheme to be cast into doubt, a submission with considerable merit to it.

185. It is, therefore, necessary to have regard to the extent to which the fraud, which I have found was committed on this Court to obtain the Order, seriously requires the entire Scheme to be unwound. The Plaintiffs are not seeking an award of money damages to be set aside on the basis that the Defendant has been unjustly enriched. Their original complaints in the Scheme Proceedings were threefold: (a) the Scheme should not be sanctioned because it was possible that persons who should have voted in a separate class because of affiliations with the Controlling Shareholders had secretly voted, (b) inadequate disclosure was given of the interest of the controlling Shareholders and the voting power they would enjoy under the Scheme, and (c) no reasonable creditor would approve the Scheme. Of these three complaints, the fraud which has now been proved would have supported complaints (a) (in part) and (b). It would not have supported ground (c) at all, because the Scheme was, fundamentally, a commercially reasonable Scheme. And, perhaps more importantly still in the present regard, the Scheme could still have been approved if the Taiwanese Noteholders' votes are not taken into account.

186. In my judgment, the most likely outcome if the Defendant had disclosed the true position at the sanction hearing is that the Defendant would have been directed to convene a fresh meeting with an amended Explanatory Statement, but that the Scheme would ultimately, albeit possibly on a fresh application, have been approved. It is also noteworthy that the Plaintiffs/Objectors took no steps to challenge, by way of appeal, the Order on its merits. While I accept, with the benefit of hindsight, that they cannot reasonably have been expected to reveal the facts which the Company admitted to BCG in June, 2004, it seems to me that the November 7, 2003 finding that the Scheme was a reasonable one is not diminished by the present result. The main injustice is that independent creditors approved the Scheme under a misapprehension as to the degree of management power that the Controlled Shareholders were retaining, in circumstances where it is possible that it might have been approved. This private injustice, as between the parties and those more widely affected by the Scheme, is clearly limited in that, irrespective of the level of control the APP Controlling Shareholders will wield, there has never been any plausible alternative option for maximizing the former creditors' prospects for a return on their investment.

187. In any event, having ascertained the true position by the present proceedings, the Plaintiffs are now in a better position, together with other independent shareholders, to ensure that the Company is properly run. In addition, they have alternative remedies as minority shareholders, should the affairs of the Company be run in an oppressive manner. I contemplated such remedies, albeit then blissfully unaware that my confidence in the *bona fides* of the Company[36] was misconceived, in my Reasons for the Order:

> "*80. Again, on these facts, it is impossible to rationally conclude that that the Scheme was one that no reasonable creditor would have approved. Nor indeed was it possible for me to justify adjourning the sanction hearing to afford the Objectors an opportunity to make further inquiries with*

[36] In terms of its apparently forthright disclosure of all controlling Shareholder interests.

> *a view to substantiating their suspicions and concerns about possible affiliations between Supporting Noteholders and the Controlling Shareholders and/or APP*. **Should facts later emerge which bear out their concerns, I am satisfied that adequate alternative remedies will be available to them, including the right to seek to adduce fresh evidence on appeal, the usual minority shareholder rights, and the ability to seek regulatory action against the Company**. *An awareness of these options did influence my rejection of Mr. Kessaram 's adjournment and discovery applications, but having considered the matter more fully, I am no less convinced that the underlying merits of the Scheme are sound and that the Company's management have at all material times acted in the best interests of the Company as a whole.*" [emphasis added]

188. For these reasons, I would decline to set aside the Order in full, there being no arguable case for suggesting that the benefits of so doing would outweigh the demonstrable prejudice to third parties. In these circumstances, the need to hear from third parties does not arise. Justice clearly requires, however, that the costs element of the Order should be set aside, and the costs of the November 7, 2003 hearing awarded to the Objectors (to the extent that their identity does not completely overlap with the Plaintiffs), on an indemnity basis.

189. This result should not in way be seen as seeking to diminish the gravity, in public justice terms, of the serious fraud which has been perpetrated on this Court. This Court on a regular basis implements schemes of arrangement based on a company's representations that the voting process has been fair and that material conflicts of interest have been disclosed. Where the directing minds of exempted companies and the voting creditors and/or shareholders are located in distant parts, far beyond the jurisdiction of this Court, the risk of fraud is no doubt greater than when all relevant parties are within the convenient reach of this Court. There is an obvious public interest in protecting the integrity of Bermuda as a financial centre, by deterring persons in distant parts from harming other persons in distant parts, and utilizing this Court as an unwitting instrument of fraud.

190. While self-interest may to some extent have motivated the Apfel Letter, and indeed the commencement of the present proceedings, both BCG and the Plaintiffs are to be commended for resisting the easy option of letting sleeping dogs lie. Because, looked at on a purely pragmatic basis, no substantive loss was sustained by the Plaintiffs (save as regards the costs of the sanction hearing) as a result of the fraud. The main motivating factors behind the perjured evidence, it is fair to point out, do not appear to be any particular desire to deprive the creditors of what is rightfully theirs. Rather, the perjured evidence seems to have been motivated by pride in a family business and the resultant fear of the loss of power which would inevitably flow for the Widjajas from the debt-for-equity restructuring.

191. Subject to hearing Counsel, my provisional view is that the Plaintiffs must have their costs of the present action, to be taxed, if not agreed, on an indemnity basis and to be payable forthwith, in the event of any appeal by the Defendant. The Plaintiffs have substantially succeeded in proving that the Order sanctioning the Scheme was obtained by a deliberate fraud committed on this Court. It surely does not lie in the Defendant's mouth to complain that this is an unjust result.

Summary

192. The following subsidiary issues were resolved as follows. Firstly, the Plaintiffs' claim for damages for the tort of deceit was summarily dismissed. Secondly, the records prepared by Ms. Amy Hsu of telephone calls made by BCG, the claims tabulation agents of the Company, were ruled to be admissible as to the truth of their contents, on hearsay grounds. And, thirdly, the Defendant's estoppel defence was dismissed, essentially on the grounds that it was not supported on the evidence.

193. The Plaintiffs' primary fraud claim was the allegation that the Order sanctioning the Scheme made by this Court on November 7, 2003 was procured by fraud, in that the Widjaja Affirmation falsely stated that none of the creditors had any undisclosed affiliations or other connections with the APP Controlling Shareholders. The true position was that 150 Taiwanese Noteholders who voted in favour of the Scheme were not the true beneficial owners of the Notes, the APP Controlling Shareholders were. This claim failed.

194. The Plaintiffs' secondary and alternative fraud claim was that the Widjaja Affirmation was equally false, because the Affirmant and the Company knew that 150 Taiwanese Noteholders, who constituted nearly 90% in number and 19% in value of all creditors who voted at the meeting to consider the Scheme, were managers employed in the APP Indonesian operating subsidiaries, and were accordingly known to be "*affiliated to or otherwise connected with*" the APP Controlling Shareholders. This claim was proved, to the high standard that the law requires for proof of allegations of fraud. The Court was invited by the Company at the Scheme sanction hearing to positively rely on the truth of the crucial averments in the Widjaja Affirmation and to reject as mere suspicions the Objectors' complaints that the Scheme should not be sanctioned because, inter alia, the APP Controlling Shareholders had not honestly disclosed the voting power they would exercise as shareholders of the restructured Company. The proven fraud was clearly material to the Court's decision to sanction the Scheme, even though it was not demonstrated that the Scheme would never have been approved.

195. The Defendant convincingly argued that seeking to unwind a scheme of arrangement more than three years after it has been implemented would lead to unimaginable legal complexities and will likely cause considerable prejudice to a wide array of third parties, beyond the already broad range of parties directly affected by the Scheme. It is clear that, even if the offending votes were not counted, the Scheme would still have been approved. But, the real damage caused by the fraud is that those creditors who did approve the Scheme acted on a false basis, and very arguably might not have approved the Scheme if given another chance to vote with the knowledge that they had initially been deceived. Nevertheless, the proven fraud does not destroy the entire commercial *raison d'etre* of the Scheme, and no credible viable alternative was advanced by the Plaintiffs.

196. Since the former creditors, now shareholders, have alternative remedies available to them if the Company is managed in an unacceptable manner, in my judgment this Court's discretion must be exercised against setting aside the entire November 7, 2003 Order. However, the costs element of that Order, must clearly be set aside so that the Defendant does not benefit financially as a direct result of having deliberately misled the Court. The costs of that hearing are awarded to the Objectors (who are all affiliates of the Plaintiffs) on a full indemnity basis. No criticism is any way directed at either the Company's local or overseas lawyers or BCG, who in my judgment were as much deceived by their clients as was this Court.

197. I will hear Counsel, if needs be, as to costs. However, my strong provisional view is that the Plaintiffs should have their costs of the present action on a full

indemnity basis, to be taxed if not agreed, and payable forthwith in the event of any appeal.

Dated this 25th day of May, 2007

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KAWALEY J.