IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 148

Originating Summonses Nos 73–78 and 431 of 2020

In the matter of Section 211B of the Companies Act (Cap 50, 2006 Rev Ed)

And

In the matter of Section 211E of the Companies Act (Cap 50, 2006 Rev Ed)

(1) Design Studio Group Ltd
… *Applicant in OS 73/2020*

(2) Design Studio Asia Pte Ltd
… *Applicant in OS 74/2020*

(3) DSG Manufacturing Singapore Pte Ltd
… *Applicant in OS 75/2020*

(4) DSG Asia Holdings Pte Ltd
… *Applicant in OS 76/2020*

(5) DSG Projects Singapore Pte Ltd
… *Applicant in OS 77/2020 and 431/2020*

(6) Design Studio (China) Pte Ltd
… *Applicant in OS 78/2020*

GROUNDS OF DECISION

[Insolvency Law] — [Super-priority financing] — [Roll-up]

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19 February, 28 May 2020

23 July 2020

Aedit Abdullah J:

Introduction

1 These brief grounds of decision explain my decision to allow an application to grant super-priority to a debt arising from rescue financing under s 211E of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act"). The application was not opposed, but I am of the view that issuing these grounds may assist counsel and parties in similar cases in future, at least to indicate possible lines of reasoning. I will also touch briefly on related applications for sealing orders.

Background

2 The first applicant, Design Studio Group Ltd, is the holding company of the second to sixth applicants (collectively the "DSG Group").[1] The DSG Group is collectively involved in the construction, upgrading, and interior fit-out industries.[2] The six applicants had previously filed HC/OS 73/2020–78/2020 and obtained moratoriums pursuant to s 211B of the Companies Act. They sought extensions of these moratoriums in the present case (via HC/SUM 1770/2020–1773/2020, 1775/2020 and 1776/2020).[3] Only one creditor objected, while 49 creditors supported the extension.[4] Having considered what was before me, I was satisfied that the moratoriums previously granted should be extended, though for a shorter period of four months rather than the six months sought.[5] The issue concerning the moratoriums will not be further discussed herein.

3 The primary focus of these grounds of decision is the fifth applicant's application under HC/OS 431/2020 for super-priority to be given to the debt arising from rescue financing to be provided by the DSG Group's sole secured lender, Hongkong and Shanghai Banking Corporation ("HSBC"), and the first applicant's major shareholder, Depa United Group PJSC ("DEPA").[6] The

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1 Luke Furler's affidavit dated 20 January 2020 ("LFA 20012020") at para 7 and Annex 2

2 LFA 20012020 at para 7

3 Certified Minutes dated 28 May 2020 ("Certified Minutes") at pp 1 to 2

4 Certified Minutes at p 2

5 Certified Minutes at p 5

6 HC/OS 431/2020; Certified Minutes at p 5; Fifth applicant's submissions in HC/OS 431/2020 dated 26 May 2020 ("5AS") at Glossary

application was originally made only under s 211E(1)(*b*) of the Companies Act,[7] which would grant the rescue financing debt priority over all unsecured debts, and preferential debts specified in ss 328(1)(*a*) to (*g*) of the Companies Act. However, at the hearing, the applicants sought leave to seek, as an alternative, an order under s 211E(1)(*a*) of the Companies Act, which provided for the rescue financing debt to be treated as part of the costs and expenses of winding up, should the company be wound up;[8] I granted leave for this alternative application.[9]

4 The fifth applicant and HSBC also applied under HC/SUM 1867/2020 and HC/SUM 1911/2020 for sealing orders pertaining to certain documents,[10] which will be discussed further below.

The fifth applicant's arguments

5 The fifth applicant argued that the requirements under ss 211E(1)(*a*) and/or 211E(1)(*b*) of the Companies Act were met, and that the court should grant super-priority to the debt arising from the proposed financing.[11]

6 First, the intended financing fell under the definition of "rescue financing" under s 211E(9) of the Companies Act,[12] as it was necessary for the

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7 HC/OS 431/2020

8 Certified Minutes at p 5

9 Certified Minutes at p 5

10 HC/SUM 1911/2020; HC/SUM 1867/2020

11 5AS

12 5AS at para 4(a)

survival of the fifth applicant and the DSG Group as going concerns; it would allow the restructuring process to continue, by injecting urgently needed funds.[13]

7 Although the financing would be a "roll-up", this did not disqualify it from being considered as rescue financing.[14] A roll-up refers to the practice of using newly input post-petition finances to pay off existing pre-petition debt, such that the pre-petition debt is effectively paid off and "rolled up" into the super-priority post-petition debt.[15] The US courts in numerous cases have approved rescue financing loans containing roll-ups,[16] such as in *In re Lyondell Chemical Company, et al* 402 BR 596 (Bankr, SDNY, 2009) ("*Lyondell*"). The fifth applicant noted that there were objections in the US to roll-ups, but distinguished them, as the objections were due to a US-specific statutory priority scheme which applies to reorganisation (or restructuring) proceedings under US law, and would not apply in Singapore as Singapore's statutory scheme of creditor priorities only applies in the context of a liquidation and not a scheme of arrangement.[17]

8 In addition, roll-ups should not be disqualified from constituting "rescue financing" as:[18] s 211E(9) of the Companies Act imposes no such restriction; the statutory framework for rescue financing is meant to be flexible; and the court in *Re Attilan Group Ltd* [2018] 3 SLR 898 ("*Attilan*") held that s 211E(9) does not prohibit a rescue financier from stipulating conditions for the grant of

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13 5AS at paras 4(a), 8 to 14

14 5AS at para 19

15 5AS at para 15

16 5AS at para 15

17 5AS at para 18

18 5AS at para 19

rescue finance. Endorsement of the roll-up in this case would not amount to endorsement of all roll-ups as each rescue financing offer has to be considered on its own facts.[19] In the present case, the roll-up should not disqualify the loan from constituting rescue finance as not all of the loan was refinance – part of it would be fresh working capital.[20]

9 Second, the factors supporting the exercise of the court's discretion to grant super-priority, as set out in my previous decision in *Attilan*, were met. Reasonable attempts had been made to secure financing from alternative sources which would not require conferring of super-priority, but these were unsuccessful.[21] There were no alternative financing options or better offers.[22] The terms of the proposed rescue financing were fair, reasonable and adequate; they were negotiated in good faith, at arm's length, and with the exercise of sound and reasonable business judgment.[23] The rescue financing was in the best interests of the DSG Group and its creditors.[24]

HSBC's arguments

10 HSBC supported the application to grant the debt arising from the rescue financing super-priority status,[25] and submitted as follows.

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19 5AS at para 19

20 5AS at para 19

21 5AS at paras 4(b), 20 to 26

22 5AS at paras 4(b), 20 to 26

23 5AS at paras 4(c), 31 to 37

24 5AS at paras 4(c), 28 to 30

25 HSBC's submissions dated 22 May 2020 ("HS") at paras 1 and 57

11 First, the proposed financing constitutes rescue financing under s 211E(9) of the Companies Act.[26] It is necessary for the survival of the fifth applicant as a going concern, and necessary to achieve a more advantageous realisation of its assets than on a winding up.[27]

12 Although the proposed rescue financing would be a roll-up, such roll-ups are permitted under s 211E as they can fall within the scope of "rescue financing" under s 211E(9), and such an interpretation would promote the policy objectives undergirding the rescue financing regime, which is to incentivise financial institutions to provide rescue financing to distressed companies.[28] A restrictive interpretation of "rescue financing" is not needed as super-priority is discretionary and the court can consider a multitude of factors to decide whether to grant super-priority to rescue financing.[29]

13 In addition, debts from roll-ups have been given super-priority status in US cases such as *Lyondell* ([7] *supra*).[30] The factors considered by the court in *Lyondell* in deciding whether to grant super-priority to a roll-up debt were similar to those in *Attilan* ([8] *supra*).[31]

14 Although the present case did not involve cross-collateralisation, it was pointed out for completeness that US courts have allowed cross-collateralisation

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26 HS at para 57

27 HS at para 58

28 HS at para 48

29 HS at para 48

30 HS at paras 9 and 14

31 HS at paras 10 to 11

in some limited circumstances.[32] Cross-collateralisation refers to the granting of the debtor's assets as collateral for both the new and pre-existing loans.[33] In cross-collateralisation cases, the factors applied to determine if super-priority should be granted were similar to the factors applied in roll-up cases.[34]

15 Although there were US cases prohibiting cross-collateralisation, the reasons for the objections were not applicable in Singapore given the different language of s 211E as compared to the relevant US provision.[35] Section 364 of the Bankruptcy Code 11 USC (US) was interpreted to allow super-priority only for post-petition debts, whereas s 211E(1)(*b*) of the Companies Act allows super-priority for debts "obtained or to be obtained", and would include pre-petition debt.[36] Further, US has a statutory priority scheme for reorganisations, whereas Singapore does not, as the statutory priority provisions in s 328 of the Companies Act only apply in winding up situations.[37] Alternatively, these decisions should not be followed in Singapore.[38]

16 Second, the fifth applicant would not have been able to obtain rescue financing from any party unless super-priority was given.[39] This fulfils the requirement under s 211E(1)(*b*) of the Companies Act.[40]

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32 HS at para 17

33 HS at para 15

34 HS at para 15

35 HS at paras 17, 35 to 36

36 HS at paras 35 to 36

37 HS at paras 39, 42 to 45

38 HS at para 17

39 HS at para 68

40 HS at para 68

17 Third, the court should exercise its discretion to grant the super-priority as:[41] the fifth applicant has been unable to find financing on more favourable terms from other sources; the proposed financing arrangement was negotiated in good faith and at arm's length; the terms were fair, reasonable and adequate in light of the circumstances; and no creditors have opposed the application.

The Decision

18 I was satisfied that super-priority should be granted to the debt under s 211E(1)(*b*), for the reasons that follow.

Requirements to grant super-priority

Section 211E

19 Section 211E is titled "Super priority for rescue financing", and allows the court to make various orders which have the general effect of giving the debt arising from rescue financing priority over existing debts. The fifth applicant applied for super-priority under ss 211E(1)(*a*) and 211E(1)(*b*), which read:

> **Super priority for rescue financing**
>
> **211E.**—(1) Where a company has made an application under section 210(1) or 211B(1), the Court may, on an application by the company under this subsection, make one or more of the following orders:
>
> (*a*) an order that if the company is wound up, the debt arising from any rescue financing obtained, or to be obtained, by the company is to be treated as if it were part of the costs and expenses of the winding up mentioned in section 328(1)(*a*);
>
> (*b*) an order that if the company is wound up, the debt arising from any rescue financing obtained, or to be obtained, by the company is to have priority over all

41 HS at para 72

> the preferential debts specified in section 328(1)(*a*) to (*g*) and all other unsecured debts, if the company would not have been able to obtain the rescue financing from any person unless the debt arising from the rescue financing is given the priority mentioned in this paragraph;
>
> …

20 A s 211E(1)(*a*) order treats the rescue financing as part of the costs and expenses of the winding up, whereas a s 211E(1)(*b*) order gives the rescue financing priority over unsecured debts and the statutory preferential debts in insolvency. In the latter case, only secured debt would have priority over the rescue financing.

Mandatory requirements to grant super-priority

21 The mandatory requirements to grant super-priority under ss 211E(1)(*a*) or 211E(1)(*b*) are as follows (see also *Attilan* ([8] *supra*) at [53]):

(a) An application must have had been made for a scheme meeting under s 210(1), or a moratorium under s 211B(1) of the Companies Act;

(b) The proposed financing must constitute "rescue financing" under s 211E(9) of the Companies Act; and

(c) It must be that the company would not have been able to obtain the rescue financing from any person unless the debt arising from the rescue financing is given the priority mentioned in the provision (only a requirement under s 211E(1)(*b*) but not s 211E(1)(*a*); see *Attilan* at [61]).

22 These requirements must be fulfilled before the court can determine whether to exercise its discretion to grant super-priority. The requisite standard of proof is that the applicant must satisfy the court on a balance of probabilities

that there is a basis for the matters raised in the affidavit to satisfy the above requirements (*Attilan* at [57]).

Discretionary requirements to grant super-priority

23 Even if the mandatory requirements are met, the court has discretion to determine whether to grant super-priority. Although s 211E is silent on the factors that the court should consider in exercising its discretion (*Attilan* at [67]), legislative intent, committee reports and US cases provide some guidance as to the factors that the court ought to consider in this inquiry. I had previously enumerated some of these factors in *Attilan* (at [65] to [67]). I remain satisfied that these factors are material, but a definitive statement would have to await a contested hearing.

(1) Parliamentary debates

24 The rescue financing scheme in s 211E of the Companies Act was introduced in 2017 via s 22 of the Companies (Amendment) Act 2017 (No 15 of 2017). In the Second Reading of the Companies (Amendment) Bill (Bill No 13/2017) ("Bill") (*Singapore Parliamentary Debates, Official Report* (10 March 2017) vol 94 ("Second Reading"), the Senior Minister of State moving the Bill explained that the objective of the super-priority scheme is to facilitate rescue financing, to allow viable companies to be able to restructure.[42] Mr Edwin Tong, a member of the Insolvency Law Review Committee,[43] caveated that super-priority is allowed only in appropriate circumstances,[44] that new lending

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42 HSBC's Bundle of Authorities dated 22 May 2020 ("HBOA") at Tab 6, p 41

43 HBOA at p 43

44 HBOA at p 46

should create new value for the company, and that courts are called upon to assess the viability of the purpose behind the proposed financing:[45]

> … the Bill also introduces safeguards which will be scrutinised and policed by the Courts. It is only allowed in appropriate circumstances and the court must be satisfied that there is "adequate protection" given to an existing security interest holder. This, as the Senior Minister of State mentioned, draws inspiration from the US Chapter 11 model. The rationale for the above safeguard was that new lending should create new value for the company such that it is in a position to protect the interests of the security holder, whether by cash payments or by providing another form of security. In this way, the Courts are called upon to "assess the viability of the purpose behind the proposed financing".
>
> The Bill facilitates rescue financing for distressed companies, whist [*sic*] also managing any entailing risks. The US experience in Chapter 11 proceedings has been that rescue financings are invariably value enhancing and are usually associated with a higher probability of successful recovery. I hope that, with these amendments, the same will be seen in Singapore.

25 It can be seen from this that Parliament intended that the courts ensure that super-priority is only granted in meritorious and appropriate cases. From the above, it may be gleaned that the court should consider if:

(a) the restructuring is viable and has a good probability of success;

(b) the proposed financing is for a viable purpose and the new lending will be put to good use;

(c) the new lending would create new value for the company;

(d) there is adequate protection given to existing security interest holders; and

(e) the risks entailed can be managed.

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45 HBOA at p 46

(2) Committee reports

26 The rescue finance provisions introduced in 2017 were based on recommendations by the Committee to Strengthen Singapore as an International centre for Debt Restructuring in its *Report of the Committee to Strengthen Singapore as an International centre for Debt Restructuring* (20 April 2016) ("2016 Restructuring Report") and by the Insolvency Law Review Committee in the *Report of the Insolvency Law Review Committee* (2013) ("2013 ILRC Report"). These reports provide some guidance on the relevant factors that the court should consider.

27 The 2013 ILRC Report raised certain concerns about super-priority, at para 69 at pp 110 to 111:

> (1) Rescue proceedings often fail to successfully rehabilitate the insolvent company. However, given their super-priority status, if the new financiers are fully secured, they may have little incentive to carry out costly screening or monitoring of the insolvent borrower and may allow over-investment in riskier (even negative NPV) projects. Consequently, other creditors may end up suffering even greater losses once the rescue proceedings fail. This harm may be particularly pronounced in schemes of arrangement, where the management of the company remains in control of the insolvent company and there are greater incentives for equity holders of insolvent companies to advocate shifting into riskier, negative NPV projects.
>
> (2) In times of corporate trouble, it may be difficult for the court to predict in advance that the proposed rescue funding is likely to aid the body of creditors rather than prejudice them. In urgent cases, it may also be difficult to make a commercially informed judgment in the time available.
>
> (3) The expenses involved in a contested court application for approval for super-priority rescue financing may negate the value of that financing for many smaller companies.
>
> (4) The claims of other trade or other creditors who continue to deal with the company will be subordinated to the super-priority claim by the new lenders. Accordingly, these other creditors may become more wary of entering into post-commencement dealings with the company.

…

28 Despite these concerns, the 2013 ILRC Report went on to recommend that super-priority be allowed, but proposed that "the risk of abuse can be adequately dealt with by recourse to the courts, which are capable of determining the appropriateness of granting super-priority" (at para 71 on p 112).

29 The 2016 Restructuring Report also noted that there should be "sufficient safeguards to ensure that existing secured creditors are not unfairly prejudiced", and that "the interests of pre-existing secured lenders [must be] adequately protected" (at p 20). Although these concerns were directed more at super-priority liens, found in ss 211E(1)(*c*) and 211E(*d*) of the Companies Act, I was of the view that they can be adapted to provide guidance for super-priority under ss 211E(1)(*a*) and 211E(1)(*b*). In addition, the 2016 Restructuring Report noted that "rescue financing often amounts to a small portion of the total debt and any prejudice caused to existing secured lenders must be balanced against the possibility that the rescue financing may improve restructuring prospects substantially" (at p 20).

30 The two reports hence support that the court should consider the following factors in exercising its discretion (some overlap with those already stated above at [25]):

(a) the proportion of the new rescue finance to the total debt;

(b) the probability that rescue financing would improve restructuring prospects;

(c) whether existing creditors will be unfairly prejudiced;

(d) whether the interests of existing creditors are adequately protected; and

(e) how the rescue finances are planned to be used and whether there is a risk of over-investment in risky projects.

(3) US cases

31 Finally, as I had noted in *Attilan* ([8] *supra*) at [50] to [51], US cases may provide some guidance as to the factors the court should consider in exercising its discretion, since the rescue financing provisions in the Companies Act were adapted from the Bankruptcy Code 11 USC (US). At [65] and [66] of *Attilan*, I discussed several US cases and distilled the following factors that the court should consider:

(a) Whether the proposed financing is in the exercise of sound and reasonable business judgment;

(b) Whether the financing is in the best interests of the creditors;

(c) Whether the terms of the financing agreement are fair, reasonable, and adequate in light of the circumstances of the debtor and proposed lender;

(d) Whether the financing agreement was negotiated in good faith and at arm's length between the debtor, on the one hand, and the agents and the proposed lender, on the other hand;

(e) Whether there are no better offers, bids, or timely proposals before the court;

(f) Whether no alternative financing is available on any other basis, and whether the applicant had shown evidence of reasonable attempts at trying to obtain financing without resorting to super-priority (*Attilan* at [61]); and

(g) Whether the financing is necessary to preserve the assets or is necessary for the continued operation of the business.

32 This had been *obiter* in *Attilan* as the application there failed on the sole ground that the applicant failed to show that reasonable efforts had been made to obtain financing without super-priority (at [62] and [67]).

(4) Conclusion on the factors to be considered

33 Looking at the factors distilled from the various sources, I found that they were largely consistent and could be summarised into the following four main factors:

(a) Creditor's interests: whether the other creditors will be unfairly prejudiced from the arrangement, or whether the arrangement will be beneficial to them. This involves weighing of the risk to creditors against the possible benefit to them, to determine what would be in their best interests. The court should also assess whether creditors are adequately protected, and whether the risks entailed can be managed. The degree of creditor opposition can also be considered.

(b) Viability of restructuring: whether there is a good probability that the restructuring will succeed. The court should assess how the rescue finances are proposed to be used, whether it would create new value for the company, whether stable returns are expected, or whether they would be used in risky investments.

(c) Alternative financing: whether better financing proposals are available. The court should consider if there were better proposals, offers or bids before the court, in particular, whether there were proposals which would not require super-priority. The court should also assess if the applicant had made reasonable efforts to procure such offers. Evidence of such reasonable attempts can include failed negotiations with other potential lenders; however, it is not necessary to show that financing was sought from every possible source.

(d) Terms of proposed financing: whether the terms were reasonable and in the exercise of sound business judgment. The court should assess the terms and conditions of the financing to consider if it was made in good faith, was for a proper purpose, and is fair, reasonable and adequate.

34 It bears emphasis that these factors are not conditions or requirements, but merely considerations that the court should take into account (*Attilan* at [61], [65] to [67]). I also reiterate that as these proceedings were uncontested, a definitive statement on the non-statutory factors would have to await a contested hearing (at [23] above).

Issues

35 As mentioned above at [2], the fifth applicant had made an application for a moratorium under s 211B(1) of the Companies Act, fulfilling the first requirement. The remaining issues to be determined were:

(a) Whether the proposed financing constitutes "rescue financing" under s 211E(9) of the Companies Act;

(b) Whether it is appropriate for the court to exercise its discretion in favour of the application; and

(c) Whether the fifth applicant would not have been able to obtain rescue financing unless super-priority is given (a requirement under s 211E(1)(*b*)).

Whether the proposed financing constitutes rescue financing

36 Rescue financing for the purposes of s 211E of the Companies Act is defined in s 211E(9) as such:

> … "rescue financing" means any financing that satisfies either or both of the following conditions:
>
> > (*a*) the financing is necessary for the survival of a company that obtains the financing, or of the whole or any part of the undertaking of that company, as a going concern;
> >
> > (*b*) the financing is necessary to achieve a more advantageous realisation of the assets of a company that obtains the financing, than on a winding up of that company;
> >
> > …

37 I was satisfied that the proposed financing arrangement constitutes rescue financing.

38 As stated above at [3], the proposed financing was to be provided by DEPA and HSBC to the fifth applicant, pursuant to a term sheet that was executed by DEPA and HSBC on 30 March 2020.[46] The lenders were to finance an aggregate sum of S$62.08 million: S$12.08 million from DEPA and S$50

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46 Luke Furler's affidavit dated 23 April 2020 ("LFA 23042020") at para 31

million from HSBC.[47] Out of this, S$3.7 million would be paid to DEPA for certain existing liabilities it had provided to the first applicant,[48] and S$10.7 million would be to fund repayment of any amounts due to HSBC from the original HSBC overdraft facility.[49] Part of the S$50 million from HSBC would also be used to repay any amounts owed by the fifth applicant to HSBC.[50] An additional S$7.8 million would be used to fund any maturing trade finance indebtedness of the fifth applicant.[51] S$2.7 million would be allocated as fresh working capital to fund the fifth applicant,[52] and S$30.0 million would be allocated to issue and renew performance bonds and/or guarantees for existing and new construction projects.[53]

39 I accepted the arguments of the fifth applicant and HSBC that this proposed financing was necessary for the survival of the fifth applicant as a going concern. The DSG Group's expected average monthly burn rate for April and May 2020 was expected to exceed the amount it possessed in its bank accounts by almost S$800,000.[54] Fresh capital was needed to fund its business.[55] There were also bonds worth a total of almost S$6 million which needed to be renewed in order for DSG Group to continue performing under its project

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47 LFA 23042020 at paras 32.2 to 32.4

48 LFA 23042020 at para 32.7

49 LFA 23042020 at para 32.8

50 LFA 23042020 at para 32.8

51 LFA 23042020 at para 32.8

52 LFA 23042020 at para 32.7

53 LFA 23042020 at para 32.8

54 HS at para 60; LFA 23042020 at para 18

55 HS at para 60; LFA 23042020 at para 18

contracts.[56] This would be addressed by the proposed financing.[57] The Chief Restructuring Officer of the DSG Group has also opined that if HSBC did not provide the proposed financing, the DSG Group would most certainly need to file for liquidation.[58]

40 Alternatively, I also accepted the arguments of the fifth applicant and HSBC that the proposed financing was necessary to achieve a more advantageous realisation of the assets of the fifth applicant than on a winding up.[59] According to the further in-depth liquidation analysis of the DSG Group conducted by the Chief Restructuring Officer, there was a predicted return of only between nil and no more than 3.94 cents to the dollar to unsecured creditors in a liquidation scenario.[60] There would be hefty liquidator's costs of administering the liquidation, which was estimated to be around S$1.3 million to S$2.2 million,[61] and a long delay of at least two years to finalise the liquidations before distributions can be made to creditors.[62] In contrast, the proposed financing would enable the continued performance of project contracts and, in a scheme scenario, was estimated to enable unsecured creditors to receive an interim distribution of up to 8.12 cents to the dollar by the third quarter of 2020.[63] Overall, creditors were expected to be paid more quickly and

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56 LFA 23042020 at para 19; HS at para 61

57 HS at para 62; LFA 23042020 at para 32.8

58 HS at para 64; LFA 23042020 at paras 1 and 32.10

59 HS at para 65

60 Luke Furler's affidavit dated 21 April 2020 ("LFA 21042020") at para 25

61 LFA 21042020 at para 26.5

62 LFA 21042020 at para 26.5

63 HS at para 66; LFA 21042020 at para 27.1

to receive more recovery in a scheme as compared to in a liquidation of the DSG Group.[64]

Whether a roll-up arrangement can constitute rescue financing

41 However, since the proposed financing would be a roll-up ([7] above), there is a question of whether roll-ups are disqualified from constituting rescue financing under s 211E(9) of the Companies Act, given that the new funds would be used to pay off pre-existing debt. This requires interpreting s 211E(9) to determine whether it incorporates a general prohibition against roll-ups, or whether roll-ups can constitute rescue-financing if they meet the other requirements in s 211E(9).

42 The plain reading of "rescue financing" in s 211E(9) is sufficiently broad to encompass roll-ups, as roll-ups constitute a form of financing, and will fall under the definition in s 211E(9) as long as they are necessary for the survival of the company as a going concern, or necessary for a more advantageous realisation of its assets as compared to winding up. No express mention is made of any prohibition of roll-ups.

43 This finding is also consistent with my earlier finding in *Attilan* ([8] *supra*) that there is nothing in the language of s 211E(9) that prohibits a rescue financier from stipulating conditions in the grant of its rescue finance (at [54]), which, in the case of roll-ups, would be the condition that part of the new finance be used to repay earlier debts.

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64 LFA 21042020 at para 28

44 There is no legislative intent to prohibit all roll-ups from constituting rescue financing. As noted in the speech and debate in the Second Reading, the purpose of the rescue finance provisions was to facilitate, incentivise and encourage rescue financing in order to aid ailing companies (see also [24] above).[65] Roll-ups similarly achieve the purpose of incentivising rescue financiers to aid ailing companies by allowing even the rescue financier's previous debt to be accorded super-priority. This would hence encourage and facilitate even more rescue financing and is in line with the legislative intent.

45 Nevertheless, it is also not the legislative intent for all roll-ups to be regarded as rescue financing. The Senior Minister of State in the Second Reading defined rescue financing as consisting of new loans and additional financing (see also *Attilan* at [77]):

> Rescue financing consists of new loans which provides working capital during the restructuring. Without rescue financing, a viable company may be unable to restructure, but lenders may be reluctant to provide additional financing to troubled companies.

Similar remarks were made by Mr Edwin Tong (above at [24]) where he stated that the new lending should create new value.

46 Hence, not all loans should be regarded as rescue financing, but only loans which are additional and provide new value. In the case of roll-ups, only roll-ups which ultimately create some new value for the company should be regarded as rescue financing. The terms and conditions of each roll-up have to be scrutinised on a case by case basis. New funds which are almost entirely used to repay old debts create little new value, and are not roll-ups which should be

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65 HBOA at pp 41 to 46

regarded as rescue financing. The amount of new funds put in as new value should not merely be a miniscule or token amount. If this was the case, it may show a lack of *bona fides*, justifying a refusal by the court to exercise its discretion in favour of the application. Instead, the nature of the incoming financing should be that it provides support for the company in the restructuring and leads to some benefit for it. The amount of new funds that must be pumped in cannot be stated with any meaningful precision in the abstract, but would need to be considered against the circumstances of the specific case. In essence, there must be real benefit by the provision of the roll-up financing, and not a mere trifle or something fanciful.

47 This is consistent with my finding in *Attilan* at [77] that subsequent financing made pursuant to an existing obligation in an agreement would not qualify as rescue financing as such prior commitment should be treated simply as part of the existing debt. However, if the subsequent financing, although premised on the previous agreement, was optional in nature, then it could qualify as rescue financing.

48 For completeness, it is also noted that there does not seem to be anything in the 2016 Restructuring Report or the 2013 ILRC Report which would have influenced the interpretation of s 211E of the Companies Act concerning roll-ups.

49 In conclusion, s 211E contains no general prohibition of roll-ups, and roll-ups can constitute rescue financing, provided that they meet the requirements of s 211E(9). As such, my findings at [38] to [40] above that the present proposed financing meets the requirements of s 211E(9) and constitutes rescue financing remained unaffected even though the proposed financing would be a roll-up.

Whether the court should exercise its discretion to grant super-priority

50 Aside from the factors that the court should consider in exercising its discretion to grant super-priority, which have been set out at [33] above, different or additional factors may also need to be considered when dealing with a roll-up.

Additional factors to consider in a roll-up

51 As noted, US cases may provide some guidance on this. In the US, roll-ups have been allowed in some cases such as *Lyondell* ([7] *supra*) (see [(a)(ii)] and [8]), *In re Radioshack Corporation, et al* 15-10197 (BLS) (Bankr, Delaware, 2015) (see [1.2] and [1.4]),[66] and *In re Tronox Incorporated, et al* 09-10156 (ALG) (Bankr, SDNY, 2009) (see [5] and [6]).[67]

52 While allowed in some instances, roll-ups continue to attract concerns (see for example, Adam J. Levitin, *Business Bankruptcy: Financial Restructuring and Modern Commercial Markets* (Wolters Kluwer, 2nd Ed, 2018) ("*Business Bankruptcy*") at p 406; and Frederick Tung, "Financing Failure: Bankruptcy Lending, Credit Market Conditions, and the Financial Crisis" 37 Yale J. on Reg (forthcoming, 2020) at pp 2, 4, 10, 20, etc). One evident concern is that roll-ups "not only raise the priority of the pre-petition loan, but they raise it to the highest possible level: paid in full" (*Business Bankruptcy* at p 406). This effectively allows a pre-existing creditor to have its pre-petition debt repaid first, and also have its post-petition debt repaid in priority to other existing creditors, leapfrogging over their backs to get to the

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66 HS at para 14; HBOA at Tab 10, pp 198 to 200

67 HS at paras 10 and 14; HBOA at Tab 14, pp 275 to 281

front of the queue for assets upon liquidation, with possibly no or little benefit to the rest. The unequal treatment of the creditors thus looms large in a roll-up application.

53 Thus, one factor that the court should especially consider in exercising its discretion to grant super-priority to roll-ups is the extent to which other unsecured creditors are likely to benefit or be prejudiced if super-priority were to be permitted (see also Richard M. Hynes & Steven D. Walt, "Inequality and Equity in Bankruptcy Reorganization" (2017–2018) vol 66 Kansas Law Review 875 at pp 884 to 885).[68]

54 Although the interest of the creditors is already a factor that has to be considered in all s 211E(1) applications (see [33] above), in a roll-up, special note should be given to the interests of the specific creditors who were previously prioritised equally or above the pre-petition debt, but who will now be prioritised below or equal to the post-petition debt.

55 The other factors considered by the US courts in a roll-up seem to be similar to the factors listed at [33] above that would be generally considered for all s 211E(1) applications, and need no special consideration (see for example *Lyondell* ([7] *supra*) at [5]).[69]

56 Finally, as stated above at [14] to [15], HSBC made reference to US cases on cross-collateralisation, and the factors applied in those cases to guide the exercise of the court's discretion. However, as the present case did not involve cross-collateralisation, it was not necessary for me to consider those

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68 HBOA at pp 374 to 375; HS at para 12

69 HS at para 10

cases. Whether cross-collateralisation would qualify as rescue financing is a question left for another day.

Applying the factors to the facts

(1) Alternative financing

57 I was satisfied that reasonable efforts had been undertaken to obtain financing that was not conditional on super-priority being conferred ([9] and [16] above).

58 The Chief Restructuring Officer in his affidavit testified that he had engaged a reputable independent global financial services firm to seek potential lenders that would be willing to offer financing to the DSG Group.[70] The firm approached a number of their clients, but only five expressed interest, with high return expectations.[71] In contrast, the present proposed financiers offered much lower interest rates and fees which no other financiers have been able to match.[72]

59 In light of this, I was satisfied that there was a *bona fide* and genuine attempt at obtaining other funding, and that this attempt was not simply a *pro forma* exercise. I therefore found that this factor was satisfied and weighed in favour of granting super-priority. In addition, since this factor was a mandatory requirement in the case of s 211E(1)(*b*) (see [21] and [35] above), I also found that the statutory requirement was made out.

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70 LFA 23042020 at para 23

71 LFA 23042020 at paras 26 to 28; HS at para 73

72 LFA 23042020 at para 32.21

(2) Terms of proposed financing

60 I found that the terms of the proposed financing were fair, reasonable and adequate.[73] Although some amount would go to repaying the existing debts, the majority of the money would constitute new funding which could be used to create new value. Further, as mentioned above, it had relatively low interest rates and fees, as compared to the other offers.

61 The difficult current environment, with a dearth of willing financing, as well as the need for performance guarantees to be given to allow the business to run, showed that the proposed financing was indeed in the exercise of sound and reasonable judgment. There was nothing to show that any undue commercial advantage was being obtained.

62 Although DEPA was the ultimate holding company of the fifth applicant and HSBC was the sole secured creditor,[74] I did not consider that these existing relationships with the lenders stood in the way of approval being given. There was nothing in the terms that showed that the other creditors were being taken advantage of, or that the financing parties were gaining any advantage that was disproportionate or unduly favourable. Taking all of these factors into account, I was of the view therefore that there was, in the circumstances, nothing untoward about the rescue financing.

(3) Viability of restructuring

63 For the same reasons stated at [38] to [39] above, I found that the proposed financing was viable. The fresh capital and new facilities would allow

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73 HS at para 76

74 LFA 20012020 at Annex 2

the DSG Group to continue work and take up new projects to keep the group as a going concern. It would also allow a more advantageous realisation of assets than on a winding up (see [40] above). It may in fact be the only viable possibility, given that financing had largely dried up because of the ongoing virus pandemic. The fifth applicant pointed to the fact that *Lyondell* ([7] *supra*) was decided in the aftermath of the 2008 sub-prime failures,[75] which was similar to the present economic climate in the wake of COVID-19. There was force to these arguments.

(4) Creditors' interests

64 I did not find that there was any undue harm or prejudice that would be visited upon the other creditors. HSBC was already the sole secured creditor of the fifth applicant,[76] and the roll-up thus did not serve primarily to allow it to jump ahead of any of the other creditors.

65 I also found that the proposed financing would be in the creditors' best interests. As mentioned at [39] to [40] above, without such continued operations, the scheme would not be viable, and other creditors would probably not have much to look forward to except liquidation. There was a possibility of a nil return to the unsecured creditors in a liquidation scenario. The proposed financing made the scheme viable and it is estimated that unsecured creditors could receive an interim distribution by the third quarter of 2020 ([40] above).

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75 5AS at para 17

76 LFA 23042020 at para 33.4

66 It was also significant that none of the creditors put up any opposition to the terms of the proposed financing.[77]

Conclusion on super-priority

67 As the mandatory statutory requirements were fulfilled, and the non-statutory factors all pointed in favour of the exercise of discretion, I granted super-priority in favour of the proposed rescue financing pursuant to s 211E(1)(*b*) of the Companies Act.[78] Since this was the primary order sought, there was no need to make an order for the alternative remedy sought under s 211E(1)(*a*).

Sealing orders

68 As stated above at [4], sealing orders were sought in respect of certain documents, in order to protect the identity of the financial services firm, potential financiers, and their proposed quotations.[79] Redacted versions of these documents with the confidential details blacked out were made available to the other creditors. No opposition was mounted against the applications for sealing orders. Hence, I granted the sealing orders sought.[80]

69 There is a need to protect commercially sensitive information in restructuring, which the courts have to balance against the need for transparency in court proceedings. The public's need for access to restructuring proceedings may be perceived as less pressing than in other types of cases, such as criminal

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77 HS at para 79

78 HC/ORC 2753/2020

79 LFA 23042020 at paras 24, 27 to 28

80 HC/ORC 2752/2020; HC/ORC 2754/2020

matters, but restrictions should not be placed as a matter of course without good justification. Such transparency is especially important for the creditors as a whole. It should be remembered that restructuring proceedings are still court processes rather than private arbitration.

Conclusion

70 For the reasons above, the roll-up was permitted, and sealing orders granted. Neither application was opposed; it will have to be seen how the law in this area should develop further.

Aedit Abdullah
Judge

Chua Sui Tong and Wong Wan Chee (Rev Law LLC)
for the applicant.