Re TT International Ltd
[2010] SGHC 177

Case Number : Originating Summons No 92 of 2009 (Summons No 6449 of 2009)

Decision Date : 17 June 2010

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Alvin Yeo SC, Chan Hock Keng, Chang Man Phing, Tan Yee Siong and Cheng Caline (WongPartnership LLP) and Nish Shetty (Cliffordchance LLC) for TT International Limited; Lee Eng Beng SC, Low Poh Ling (Rajah & Tann LLP) for Oversea-Chinese Banking Corporation Limited, Commerzbank Aktiengesellschaft Singapore Branch, Cooperatieve Centrale Raffeisen-Boerenleenbank BA (trading as Rabobank International) Singapore Branch, Raiffeisen Zentralbank Österreich AG (RZB-Austria) Singapore Branch and ABN AMRO Bank NV Singapore; Ashok Kumar and Kevin Kwek (Stamford Law Corporation) for KBC Bank NV Singapore Branch, DZ Bank AG Deutsche Zentral-Genossenschaftsbank Frankfurt am Main Singapore Branch, PT Bank Negara Indonesia (Persero) TBK, ICICI Bank Ltd Singapore Branch, Indian Bank Singapore Branch and BNP Paribas Singapore Branc; Lek Siang Pheng and Tang Jin Sheng (Rodyk & Davidson LLP) for Bank of China Limited Singapore Branch, Bank of Taiwan Singapore Branch, The Bank of Tokyo-Mitsubishi UFJ Ltd Singapore Branch, DBS Bank Ltd, RHB Bank Berhad Singapore Branch, Natixis (formerly known as Natexis Banques Populaires) Singapore Branch, Sumitomo Mitsui Banking Corporation Singapore Branch, VTB Singapore Branch, Habib Bank Limited, The Bank of East Asia Limited, Malayan Banking Berhad and Bangkok Bank Public Company Limited.Doris Chia and Aveline Chan (David Lim & Partners) and Raymond Chan (TSMP Law Corporation, instructed) for Ho Lee Construction Pte Ltd; Peter Sim and Khoo Boo Han (Sim Law Practice LLC) for 17 of the 25 Multicurrency Medium Term Notes Noteholders; Edwin Tong and Kenneth Lim (Allen & Gledhill LLP) for nTan Corporate Advisory Pte Ltd.

Parties : Re TT International Ltd

Companies – Schemes of arrangement

[LawNet Editorial Note: The appeals to this decision in Civil Appeals Nos 44 of 2010 and 47 of 2010 were allowed by the Court of Appeal on 13 October 2010. See [2012] SGCA 9.]

17 June 2010

Judith Prakash J:

1 This was an application by TT International Limited ("the Company") for an order pursuant to s 210(3) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") approving the scheme of arrangement dated 9 September 2009 and modified by an addendum dated 28 September 2009 ("the Scheme") as approved at a 16 October 2009 meeting of the scheme creditors so as to be binding upon the Company and the scheme creditors.

2 I made an order approving the Scheme. One group of bank creditors ("the Opposing Bank Creditors") and Ho Lee Construction Pte Ltd ("Ho Lee Construction") opposed the making of the order. I now give the reasons for my decision.

Background facts

Leading up to the Scheme

The Company's business

3 The Company was incorporated in Singapore on 19 October 1984 as a private limited company. Having been converted into a public company in May 2000, the following month it was listed on the Main Board of the SGX-ST under its present name, TT International Limited.

4 The Company is principally engaged in the business of trading and distribution of consumer electronic products. Thus, the main value of the Company's business is in its trade receivables, inventory and distribution networks in various countries. The Company has various subsidiary companies (the Company and its subsidiaries are referred to collectively as "the Group") in jurisdictions around the world, including Australia, South Africa, Poland, France, United Arab Emirates and Nigeria.

Financial troubles

5 The Company started facing financial difficulty in the later part of 2008 as a consequence of the global financial crisis. The resultant economic slowdown and weakened investor confidence in stock markets worldwide led to steps being taken by banks and financial institutions to pull back credit facilities and the Company was not spared. By 31 October 2008, some $83m of the Company's bank facilities had been cancelled or frozen. This had an adverse impact on the Group's existing working capital structure and the Company was forced to call for a moratorium on debt repayment.

6 By their very nature, the Group's main business activities required high work capital; credit facilities were essential for its business operations. The Company did not manage to obtain new facilities to replace those which had been cancelled or frozen. This led to cash flow problems and consequential difficulties in servicing its borrowings and other obligations. Some of the Company's bank creditors declared an event of default in respect of their facility agreements entered into with the Company, recalled their facilities and demanded repayment of the sums due. The financial pressure on the Company was compounded by its trade creditors' threats or commencement of legal proceedings against it to recover sums owed to them.

Actions taken by the Company

7 By the end of October 2008, the Company had realised that it needed to focus its strategy on:

(a) improving cash to be generated from sale of substantial stocks and receipts from receivables;

(b) implementing cost control and operational efficiency measures; and

(c) restructuring its liabilities to creditors.

To those ends, on 31 October 2008, the Company appointed nTan Corporate Advisory Pte Ltd ("nTan") as an independent financial advisor to the Group and WongPartnership LLP ("Wong P") as its

legal advisor.

8 That same day, the Company held an informal creditors' meeting to seek the support of the bank creditors to allow a standstill of repayment of amounts owing to them pending a consensual restructuring of its operational activities and financial arrangements. Subsequently, the Company announced a standstill of repayment of debts pending such consensual restructuring, save for amounts owing to those trade creditors which were essential for the continuation of the Company's day-to-day business activities.

Leave to propose the Scheme and stay of all proceedings against the Company

9 Pursuant to s 210(1) of the Act, the Company applied for and received approval from the court on 29 January 2009 to call a meeting of its creditors for it to propose a scheme of arrangement for the creditors' consideration. This meeting was to be held by 29 July 2009.

10 On 21 July 2009, the Company applied for and was granted an extension of time to call the meeting by 21 October 2009.

11 The Company also successfully sought a court order restraining the commencement or continuation of proceedings against it pending the court's approval of the proposed scheme of arrangement.

The proposed Scheme

Notice to Scheme Creditors

12 On 9 September 2009, the documents relating to the Scheme ("Scheme documents") were despatched by prepaid post to all creditors who had claims against the Company as at the Ascertainment Date, *viz*, 31 July 2009 ("Scheme Creditors"). The Scheme documents informed the Scheme Creditors that the meeting to consider the Scheme ("the Meeting") would be held on 16 October 2009. The Scheme documents comprised the following:

(a) the Scheme dated 9 September 2009, to which was appended the Company's Annual Report 2009 and its Quarterly Financial Report for the period ended 30 June 2009;

(b) the explanatory statement containing information required to be furnished under s 211 of the Act; and

(c) the proxy form for use at the Meeting.

13 Pursuant to the 29 January 2009 court order, notice of the Meeting was advertised on 14 September 2009 in the Straits Times newspapers.

14 On 28 September 2009, the Company issued an addendum ("the Addendum") to the Scheme documents and despatched it by prepaid post to the Scheme Creditors. The Addendum was advertised in the Straits Times on 30 September 2009. The amendments set out in the Addendum related chiefly to the process of proof of debt. Pursuant to the Addendum, the last date and time for

lodgement of proof of debt was extended from 28 September 2009 at 5 pm to 6 October 2009 at 5 pm and the particulars of the consideration referred to in the proof of debt were changed.

Main features of the Scheme

15 The salient features of the Scheme are as follows:

(a) A complete moratorium is imposed on any action against the Company by any of its creditors until the Scheme is terminated.

(b) A restructuring plan will take place under the supervision of nTan ("the Scheme Manager").

(c) The Company will accumulate cash by continuing its trading and distribution operations, selling non-core assets and businesses, inventories and collecting receivables. Cash will also be obtained from the operations of the Group's subsidiaries by collecting dividend payments to the Company and repayment of inter-company balances wherever possible. A sum of $30m from such accumulated cash will be applied by the Company and the Scheme manager towards deleveraging the claims against the Company.

(d) Under the supervision of the Scheme Manager, the Company will pursue a deleveraging exercise through a "reverse dutch auction" on terms and timing that the Scheme Manager deems appropriate. Under this exercise, Scheme Creditors will be invited to offer their claims, at a discount, to be retired using those monies. The Scheme Creditors offering the highest discount will be retired first.

(e) With respect to the remaining debt at the end of the deleveraging exercise, once the Company's operations have been stabilised, a reasonable determination can be made on the level of debt the Company can sustain ("Sustainable Debt"). This has been determined as at the Ascertainment Date to be a sum of $150m with reference to projected cash flows, working capital and capital expenditure requirements and estimated interest costs of the Group. The Sustainable Debt will be structured as revolving facilities or term loan facilities.

(f) The remaining debt, if any, will be considered not sustainable by the Company ("Non-sustainable Debt") and will be converted into redeemable convertible bonds ("RCB") to be issued to the Scheme Creditors on a *pari passu* basis.

(g) The Company will grant a fixed and floating charge over all the assets of the Company in favour of the Scheme Creditors.

(h) The Scheme Creditors will be repaid in accordance with the restructuring plan.

16 The Company duly convened the Meeting on 16 October 2009 and the Scheme Creditors voted on the Scheme. As the Scheme Manager required more time to complete the review and assessment of the proofs of debt filed in respect of the Scheme, the chairman of the Meeting ("the Chairman") could not report the results of the Meeting immediately. On the Company's application, the court granted an extension of time for the Chairman to report the results of the Meeting to the court by 17 December 2009.

Results of the Meeting

17 In a report dated 17 December 2009 ("the Chairman's Report"), the Chairman stated that

84.81% of the Scheme Creditors attending in person or by proxy, representing 75.06% of the value of debts owing to the Scheme Creditors, had voted in favour of the Scheme. In tabular form, the results as reported are as follows:

	Number of Scheme Creditors	**Admitted value of the Scheme Creditors' Claim SGD'million**
Scheme Creditors present and voting at the Meeting (inclusive of proxies)	79	485.39
Scheme Creditors voting in favour of the proposed Scheme of Arrangement	67	364.34
Scheme Creditors voting against the Proposed Scheme of Arrangement	12	121.05
Scheme Creditors abstaining from voting on the proposed Scheme of Arrangement	4	17.43

Rejection of claims by the Scheme Manager

18 The Scheme provides at cl 4.4 for the proofs of debt to be reviewed and assessed by the Scheme Manager and for the Scheme Manager to admit or reject any claim or part of any claim after such review and assessment. Under cl 4.6, creditors whose claims are rejected in whole or in part may request the Company to commence court proceedings for the adjudication of their claims.

19 By way of letters from the Scheme Manager dated 15 December 2009 ("Notices of Rejection"), the 16 creditors whose claims were rejected in part were informed of the rejection of their claims. The Company received responses from six such creditors. Of these only one, Ho Lee Construction, still requires the Company to commence adjudication proceedings for final determination of its claim.

Appointment of PricewaterhouseCooper

20 On 12 January 2010, the Opposing Bank Creditors' solicitors, Rajah & Tann LLP ("R&T"), wrote to the Company's solicitors, Wong P, to seek information and documents on the Scheme and the Scheme Manager's review and assessment of the proofs of debt. On 29 January 2010, Wong P furnished R&T with some of the information requested.

21 On 4 February 2010, the Company appointed PricewaterhouseCoopers LLP ("PWC") to review the assessment of the proofs of debt undertaken by the Scheme Manager. The Company informed its bank creditors via email on 5 February 2010 of PWC's appointment. Incidentally, PWC was the independent special accountant appointed on behalf of the bank creditors on 4 December 2008 to advise them on the restructuring of the Company. PWC rendered its report on 12 February 2010 ("PWC Report").

Application for court's approval of the Scheme

22 Equipped with the results from the Meeting, the Company applied for the court's approval of the Scheme under s 210(3) of the Act so as to make it binding upon the Company and the Scheme Creditors.

23 The Opposing Bank Creditors, namely ABN AMRO Bank NV, Commerzbank Aktiengesellschaft Singapore Branch, Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International) Singapore Branch, Oversea-Chinese Banking Corporation Limited and Raiffeisen Zentralbank Österreich AG Singapore Branch, objected to the Company's application for the court's approval of the Scheme on the following grounds:

(a) The Company had not shown that the Scheme has been properly passed by the requisite 75% in value of each class of Scheme Creditors in accordance with s 210(3) of the Act. The basis and quantum of a number of the claims which were admitted or rejected by the Company for voting on the Scheme (and in respect of which votes supporting the Scheme were cast) were unclear and difficult to accept;

(b) Certain Scheme Creditors ought to have been divided into different classes for the purpose of voting;

(c) The votes of parties who are related to the Company should not have been given the same weight as the votes of unrelated Scheme Creditors; and

(d) The Company had been evasive and reluctant to disclose information relating to the claims of the Scheme Creditors and the review process adopted by the Company in determining their entitlement to vote at the Meeting.

24 Ho Lee Construction also voted against the Scheme and opposed the application. It was the main contractor for building works valued at $226m. It had commenced works under the main contract in March 2008 and suspended the works in October 2008 under instructions from the superintending officer ("SO") from Jurong Consultants Pte Ltd ("Jurong Consultants"). Ho Lee Construction disputed the partial rejection by the Scheme Manager of its claim of more than $84m in its proof of debt on the ground that the Scheme Manager did not act properly, fairly, or with *bona fides*. It submitted that two alternative courses of action should be carried out before the court approves the Scheme:

(a) Its claim against the Company should be adjudicated first; or

(b) The Scheme Manager should appoint an SO to assess and certify Ho Lee Construction's claims for loss and expenses arising from the termination of its employment.

The issues

25 Under s 210 of the Act, there are three stages in the process by which a scheme of arrangement becomes binding on a company and scheme creditors. First, there must be an application to the court under s 210(1) of the Act for an order that a meeting or meetings be summoned. Second, the scheme proposals are put to the meeting and approved by the requisite majority in number and value of the creditors present and voting in person or by proxy. Both of these stages have been completed for the purposes of this present application.

26 If approved at the meeting, there must be a further application to the court under s 210(3) to obtain the court's approval of the scheme of arrangement. In *Re Hawk Insurance Co Ltd* [2001] 2 BCLC 480 ("*Hawk Insurance*"), Chadwick LJ observed that at this third stage, the court is concerned (at [12]):

> (i) to ensure that the meeting or meetings have been summoned and held in accordance with its previous order, (ii) to ensure that the proposals have been approved by the requisite majority of those present at the meeting or meetings and (iii) to ensure that the views and interests of those who have not approved the proposals at the meeting or meetings (either because they were not present or, being present, did not vote in favour of the proposals) receive impartial consideration.

27 As it was common ground that the Meeting was summoned and held in accordance with the court orders dated 29 January and 21 July 2009, the issues that arose for consideration in this application were as follows:

> (a) Whether the Scheme had been approved by the requisite majority in number and value of the Scheme Creditors voting in person or by proxy at the Meeting; and
>
> (b) Whether there had been such lack of transparency on the Company's part that the Scheme should not be considered fair and reasonable to the Scheme Creditors as a whole.

General principles

Purpose of s 210

28 A reminder of the rationale behind schemes of arrangement is useful. In *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2008] 3 SLR(R) 121 ("*Oriental Insurance*"), at [31]—[47], the Court of Appeal helpfully summarised the legislative history and purpose of s 210 of the Act. At [38], V K Rajah JA cited with approval Street J's summary of the purpose behind the equivalent Australian provision in *Re Norfolk Island And Byron Bay Whaling Co Ltd* (1969) 90 WN (Pt 1) (NSW) 351, at 354:

> The section is intended to provide machinery (i) for overcoming the impossibility or impracticability of obtaining the individual consent of every member of the class intended to be bound thereby [ie, by the scheme of arrangement], and (ii) for preventing, in appropriate circumstances, a minority of class members frustrating a beneficial scheme. As Younger J. said in 1917 [in In re Guardian Assurance Company [1917] 1 Ch 431 at 441] of the corresponding English section [viz, s 120 of the Companies (Consolidation) Act 1908 (c 69) (UK)], in terms later quoted by Astbury J. in In re Anglo-Continental Supply Co. Ltd. [[1922] 2 Ch 723]: "Its purpose is strictly limited; it does not confer powers; its only effect at any time is to supply, by recourse to the procedure thereby prescribed, the absence of that individual agreement by every member of the class to be bound by the scheme which would otherwise be necessary to give it validity." [emphasis added]

29 Rajah JA observed (at [40]) that a leading local commentary on company law shares the same view. In *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell Asia, Rev 3rd Ed, 2005), the authors write (at para 16.2):

> Section 210 provides for schemes of arrangement to be binding on creditors and members alike after the requisite approval by the specified majority and upon confirmation by the court. This

> section obviates the need for a messy and complicated series of negotiations with a view to obtaining the unanimous approval of the members or creditors to a novation or assignment or other variation of their rights. A scheme of arrangement may be proposed where it is desired to adjust members' or creditors' rights inter se, or to reorganize the share capital of the company, or in the case of a group, its reconstruction or merger. In particular, recourse to s 210 is often made when it [is] desired to compromise creditors' claims against an insolvent company. [emphasis added]

Role of the court

30 The approval of the court is not a mere formality: see *Buckley on the Companies Acts* Vol 2 (Dame Mary Arden and Dan Prentice, gen eds) (LevisNexis UK, Issue 17, July 2009) ("*Buckley*") at para 425.53. Before the court approves of a scheme, it must be satisfied in respect of three matters. In *Oriental Insurance*, Rajah JA summarised what these are (at [43]):

> (a) The court must be satisfied that the statutory provisions have been complied with. For example, the court must be satisfied that the resolution is passed by the requisite statutory majority at a meeting of the company's creditors or members (as the case may be) duly convened and held in accordance with the court order convening the meeting.
>
> (b) The court must be satisfied that those who attended the meeting were fairly representative of the class of creditors or the class of members (where applicable), and that the statutory majority did not coerce the minority in order to promote interests adverse to those of the class whom the statutory majority purported to represent.
>
> (c) The court must be satisfied that the scheme is one which a man of business or an intelligent and honest man, being a member of the class concerned and acting in respect of his interest, would reasonably approve.

Requisite majority achieved at the Meeting

31 As mentioned above at [23], the Opposing Bank Creditors set out several grounds of contention to impugn the Company's claim that the requisite majority under s 210 had been achieved at the Meeting. I was not persuaded by the Opposing Bank Creditors' contention but was of the view that the requisite majority under s 210 had been achieved at the Meeting.

Different classes for voting

32 The starting point in elucidating the test for whether the Scheme Creditors should have been grouped into different classes for the purpose of voting must be Bowen LJ's dicta in *Sovereign Life Assurance Company v Dodd* [1892] 2 QB 573, at 583:

> The word "class" is vague, and to find out what is meant by it we must look at the scope of the section, which is a section enabling the Court to order a meeting of a class of creditors to be called. It seems plain that we must give such a meaning to the term "class" as will prevent the section being so worked as to result in confiscation and injustice, and that *it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest*. [emphasis added]

33 In *Hawk Insurance*, Chadwick LJ developed the test a little further, holding that (at [23]):

> [T]he relevant question at the outset is: between whom is it proposed that a compromise or arrangement is to be made? Are the rights of those who are to be affected by the scheme proposed such that the scheme can be seen as a single arrangement; or ought the scheme to be regarded, on a true analysis, as a number of linked arrangements?

His Lordship further stated (at [26]):

> The scheme proposed may be regarded as a single arrangement with those creditors whom it is intended to bind if, but only if, the rights of those creditors are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

34 In *UDL Argos Engineering & Heavy Industries Co Ltd & Others* v *Lo Oi Lin & Others* [2001] 3 HKLRD 634 ("*UDL Argos*"), Lord Millett NPJ considered the principles upon which creditors should be grouped into classes for the purpose of a scheme of arrangement in different common law jurisdictions and concluded that (at [17]):

> There is a notable degree of consistency in this line of authority. The principle upon which the classes of creditors or members are to be constituted is that they should depend upon the similarity or dissimilarity of their rights against the company and the way in which those rights are affected by the Scheme, and not upon the similarity or dissimilarity of their private interests arising from matters extraneous to such rights.

Contingent creditors

35 Entitlement under the Scheme in relation to contingent claims is governed by cl 6.5 as follows:

> 6.5.1 In the event that any Contingent Claim (or part thereof) was admitted in accordance with Clause 4.4(i) above or was or is adjudicated in favour of the relevant Contingent Creditor in accordance with Clause 4.8 above, and thereafter is Crystallized within the period commencing on the Effective Date until the fifth anniversary of the Effective Date, the relevant Contingent Creditor's entitlement under the Scheme in relation to such Contingent Claim (or part thereof) shall be deemed to accrue from the date of such Crystallization of such Contingent Claim (or part thereof); and
>
> 6.5.2 In the event that any Contingent Claim has not Crystallized by the fifth anniversary of the Effective Date, the relevant Contingent Creditor shall be deemed to irrevocably, unconditionally and permanently waive its rights to claim any amount of such Contingent Claim from the Company, and such waived Contingent Claims shall be deducted from the Sustainable Debt and Non-sustainable Debt accordingly.

36 The Opposing Bank Creditors submitted that the Scheme purports to treat contingent claims differently from vested claims. Contingent claims which do not crystallise within the first five years of the Scheme will not receive any benefits under the Scheme. Therefore, contingent creditors should not be included in the same class as creditors with vested claims who had real interests and rights to the benefits of the Scheme from its inception.

37 The Company's position was that the terms of the Scheme apply equally to all Scheme Creditors. As they are all treated equally under the Scheme and have equivalent rights vis-à-vis the Company, the Meeting was properly convened with all the Scheme Creditors voting in the same class.

38 In *Hawk Insurance*, Chadwick LJ was of the view that (at [30]):

> [I]t would not necessarily follow, in every case, that the treatment under the scheme of vested and contingent rights, …, will be so dissimilar that the holders of those rights must be regarded as persons in different classes in the context of the question 'with whom is the compromise or arrangement made'. In each case the answer to that question will depend upon analysis (i) of the rights which are to be released or varied under the scheme and (ii) of the new rights (if any) which the scheme gives, by way of compromise or arrangement, to those whose rights are to be released or varied. It is in the light of that analysis that the test formulated by Bowen LJ in order to determine which creditors fall into a separate class—that is it to say, that a class 'must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest'—has to be applied.

39 The rights of the contingent creditors arise largely out of the corporate guarantees granted by the Company in relation to loans made by those creditors to subsidiaries of the Company. Those contingent claims will crystallise when the subsidiaries default on their loans and the corporate guarantees are then called upon. If they do not crystallise within the first five years of the operation of the Scheme, they will be deemed to have been extinguished as against the Company.

40 Under the Scheme, these contingent creditors had to submit their proofs of debt along with the creditors with vested claims. These proofs were all subject to assessment by the Scheme Manager and fell to be admitted or rejected on the same objective basis. Hence, under the Scheme, if and when the contingent claims crystallise, the contingent creditors would enjoy the same rights as those creditors with vested claims, *viz*, to bid in the reverse dutch auction, obtain distributions from the Sustainable Debt and be issued RCB under the Non-Sustainable Debt.

41 In the explanatory statement, the Company disclosed that the rationale for the Scheme was to restructure its liabilities and propose a system of repayment so that it could get out of the financial rut of being unable to meet all its liabilities as and when they fell due. In assessing the totality of its liabilities, the Company factored in all its contingent liabilities as well. In this context, taking a broad view of what constitutes a class of creditors, I found that the rights of the contingent creditors were not so dissimilar as to make it impossible for them to consult with the other Scheme Creditors. The contingent creditors were a sophisticated group of creditors who were well able to assess the advantages and risks involved. A broad view in this regard will enable costs to be limited, a relevant factor in a case such as the present where the sum available to creditors is limited and there is a perceived common interest in early resolution.

42 The date of accrual of the contingent claims, as well as the possibility of extinguishment of the same after five years of the operation of the Scheme, do not make the rights of the contingent creditors sufficiently dissimilar to the rights of the other Scheme Creditors such that they should be prevented from voting in the same class. Given the financial difficulties the Company was in, the possibility that the Company would not be able to meet its liabilities to the contingent creditors when those fell due was a real one. The contingent creditors had an interest in common with the other Scheme Creditors to assess the advantages and risks of the Scheme in order to achieve the objectives of the Scheme which are:

(i) to avoid a compulsory winding up of the Company and to enable the business of the Company to continue as a going concern;

(ii) to enable Scheme Creditors to realise a higher return than otherwise possible in a compulsory winding up;

(iii) to prevent a scramble for the assets of the Company by the Scheme Creditors;

(iv) to ensure an orderly distribution of monies to the Scheme Creditors; and

(v) to allow the Company to recover its debts.

Overall, the Scheme can be seen as a single arrangement involving all the Scheme Creditors rather than a series of linked arrangements.

Related parties

43 According to the Chairman's Report, Scheme Creditors holding a total debt value of $364.34m voted in favour of the Scheme. Of this, $130.61m was held by Scheme Creditors who are either subsidiaries or substantial shareholders of the Company:

Scheme Creditor	Admitted claim (S$ million)
KBC Bank NV Singapore Branch	24.61
Julia Tong	6.17
Aki Habara Electric Corporation Japan, Ltd	0.02
Akira Corporation Pte Ltd	86.97
E&E Wholesale Pte Ltd	0.76
International Tradelogistics Pte Ltd	0.79
IT-Kauppa Oy	0.04
Poya Communication Pte Ltd	0.36
Tainahong Trading Ltd	4.95
TT International (Aus) Pty Ltd	0.05
TT International Tradepark Pte Ltd	4.70
TT Middleeast FZE	0.67
Substantial shareholders	0.52
Total	**130.61**

44 The Opposing Bank Creditors cautioned that the votes of these related creditors, which totalled 36% in value of the supporting vote, should be treated with great reservation as they had interests which were not shared by the general body of Scheme Creditors.

45 Furthermore, the Opposing Bank Creditors pointed out that Sng Sze Hiang and Julia Tong—Chief Executive Officer and Executive Director of the Company respectively—had filed claims worth $0.26m and $6.17m respectively against the Company. Both their claims were admitted in full and they had voted in support of the Scheme. They collectively hold around 44% of the shares in the Company. Under the Scheme, they have right of first refusal to purchase the RCB as well as the shares in the Company into which the RCB may be converted. The explanatory statement explained that this was to prevent the dilution of their interests in the Company. They play a critical role in the Group's businesses and operations and their continued involvement in the Company was significant to ensuring

the support for the Scheme of the Group's key creditors and to the success of the Scheme itself. As a result of these vested interests, the Opposing Bank Creditors submitted that Sng Sze Hiang and Julia Tong should have voted in a different class or, alternatively, that the weight attached to their votes should be discounted significantly.

46 It is clear from the authorities that related party creditors need not constitute a separate class of creditors for voting purposes simply because they are related parties: see *Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd* [2003] 3 SLR(R) 629 ("*Wah Yuen*"), at [13]. The Court of Appeal in that case explained that (at [13]):

> This is because "the test is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights. The fact that individuals may hold divergent views based on their private interests not derived from their legal rights against the company is not a ground for calling separate meetings": *UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin*.

In both *Re Jax Marine Pty Ltd* [1967] 1 NSWR 145 and *Re Landmark Corporation Ltd* [1968] 1 NSWR 759, Street J held that related parties to the company seeking court approval for a scheme of arrangement could vote as members of the class of unsecured creditors. In *UDL Argos*, Lord Millet NPJ held that (at [33]):

> The contention that internal creditors should have been treated as a separate class is contrary to the decisions in *Re Jax Marine Pty Ltd* [1967] 1 NSWR 145 and *Re Landmark Corporation Ltd* [1968] 1 NSWR 759 which were in accordance with principle and which I have no doubt were rightly decided.

47 However, notwithstanding that related parties' votes may be counted towards the supporting vote, I am entitled to attach less weight to their views in my overall decision whether to approve the Scheme because of their special interest in the Company and the Scheme. In *Re Chevron (Sydney) Ltd* [1963] VR 249, Adam J held that (at 255):

> In so far as members of a class have in fact voted for a scheme not because it benefits them as members of the class but because it gives them benefits in some other capacity, *their votes would of course, in a sense, not reflect the view of the class as such although they are counted for the purposes of determining whether the statutory majority has been obtained at the meeting of the class*. [emphasis added]

In *UDL Argos*, Lord Millett NPJ further observed (at [27]):

> The Court will decline to sanction a Scheme unless it is satisfied, not only that the meetings were properly constituted and that the proposals were approved by the requisite majorities, but that the result of each meeting fairly reflected the views of the creditors concerned. *To this end it may discount or disregard altogether the votes of those who, though entitled to vote at a meeting as a member of the class concerned, have such personal or special interests in supporting the proposals that their views cannot be regarded as fairly representative of the class in question*. [emphasis added]

48 On the facts, I was satisfied that these related parties were entitled to vote in the same class as all the other Scheme Creditors. They had rights against the Company which were similar to those of the other unsecured Scheme Creditors. Like the other Scheme Creditors, they had to submit proofs of debt subject to the admission or rejection of the Scheme Manager. As regards Sng Sze Hiang and

Julia Tong's votes, I noted that they had both voluntarily waived 50% of the dividends due and payable to them. Their right of first refusal to the RCB under the Scheme may cause them to have an additional private interest in supporting the vote, but I did not find that it would disqualify them from voting in the same class as the other unsecured Scheme Creditors as that interest is not derived from their legal rights as shareholders claiming unpaid dividends from the Company.

Substantial shareholders

49 The admitted claims by the substantial shareholders who voted in favour of the Scheme total $537,991, the breakdown of which is as follows:

Shareholder	Admitted claim (S$)
Koh Pau Moy	15,338
Sng Sze Hiang	255,964
Zeng Xiaohui	13,356
Daw May Yee @ Htout Kyain	11,700
Philip Securities Pte Ltd	11,458
June Yap Choon Hong	30,230
Sng Chiap Guan @ Seng Ah Tee	7,909
Kim Leng Tee Investments Pte Ltd	5,616
Hong Leong Finance Nominees Pte Ltd	49,402
Mayban Nominees (S) Pte Ltd	30,002
Novena Holdings Limited	81,814
Citibank Nominees Singapore Pte Ltd	15,535
DBS Nominees Ltd	9,667
Total	**537,991**

50 These claims pertain to unpaid dividends declared by the Company on 30 October 2008 at a rate of 0.2 cents per share. PWC verified the dividends claimed in the proofs of debt against a list of the Company's shareholders and their respective shareholdings as at 30 October 2008 and computed the amount owing to each shareholder. It found no basis to disagree with the amounts admitted in respect of the proofs submitted by these shareholders.

51 The Opposing Bank Creditors referred to s 250(1)(*g*) of the Act which provides that dividends declared by a company, being debts owed to members in their capacity as members of the company, constitute deferred debts in the order of distribution of assets in the course of the company's liquidation. Therefore, according to the Opposing Bank Creditors, shareholders who are owed unpaid dividends should be placed in a separate class for the purposes of voting.

52 They also relied on dicta by Lord Browne-Wilkinson in *Soden v British & Commonwealth Holdings Plc* [1998] AC 298 where his Lordship stated that (at 324):

> The principle is not "members come last:" a member having a cause of action independent of the statutory contract is in no worse a position than any other creditor. The relevant principle is that the rights of members *as members* come last, i.e. rights founded on the statutory contract are, as the price of limited liability, subordinated to the rights of creditors based on other legal causes of action. The rationale of the section is to ensure that the rights of members as such do not compete with the rights of the general body of creditors.

The House of Lords in that case was dealing with the question whether any damages ordered to be paid to a member of a company for misrepresentation by the company inducing the purchase of its shares would constitute a sum due to that member in its character of a member by way of dividends, profits or otherwise within the meaning of s 74(2)(*f*) of the UK Insolvency Act 1986. Apart from the fact that that precise question was not before me, the scheme of arrangement on the facts of that case provided that the scheme assets would be distributed *pari passu* between the scheme creditors broadly on the same basis as if the company were in liquidation. The features of the Scheme on the present facts made it clear that the Company's assets were not to be distributed on the same basis as if the company was in liquidation.

53 Crucially, I found that s 250(1)(*g*) would apply only "on a company being wound up", given that the relevant portions of s 250 state:

> Liability as contributories of present and past members
>
> 250.—(1) *On a company being wound up*, every present and past member shall be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the costs, charges and expenses of the winding up and for the adjustments of the rights of the contributories among themselves, subject to subsection (2) and the following qualifications:
>
> …
>
> > (g) a sum due to any member in his character of a member by way of dividends, profits or otherwise shall not be a debt of the company payable to that member in a case of competition between himself and any other creditor not a member, but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves.
>
> [emphasis added]

The Company was *not* being wound up via the Scheme. I appreciated that s 210(1) provides that an arrangement may be proposed between a company and its creditors in the case of a company being wound up but that was not the case here. As stated above at [42], one of the objectives of the Scheme was precisely to avoid a compulsory winding up of the Company and to enable the business of the Company to continue as a going concern. Therefore, the concern of s 250(1)(*g*) to ensure that the rights of members as such do not compete with the rights of the general body of creditors was not relevant to my consideration.

54 Since PWC found no reason to impugn the admitted claims of these shareholders, I found that they were ordinary unsecured creditors like the other Scheme Creditors and were entitled to vote in the same class at the Meeting.

Basis and quantum of admitted and rejected claims

The Opposing Bank Creditors' submissions

55 In their submissions, the Opposing Bank Creditors highlighted that the Scheme was approved by a very slender margin of $297,500 worth of admitted claims. They noted that the amounts of debt stated in the Chairman's report had been rounded to the nearest $10,000 and that this may have affected the accuracy of the stated margin of approval. More importantly, the Opposing Bank Creditors contended that the voting result would go the other way as long as a very small amount of supporting Scheme Creditors' claims had been wrongly admitted or a very small amount of dissenting Scheme Creditors' claims had been wrongly rejected.

56 These objections were denied by the Company. In an affidavit filed by Tong Jia Pi Julia on 23 February 2010 ("Julia Tong's 7th Affidavit") after the hearing of the application, an email from nTan dated 19 February 2010 was exhibited. That email clarified that the relevant percentages of supporting and opposing creditors were computed based on the exact value of the debts, *ie*, to the last cent, admitted and voted and not based on amounts that were rounded up or down. In preparing its report, PWC had obtained documents submitted in support of the proofs of debt, checked the mathematical accuracy of the claim(s) submitted in each proof and reconciled the claim(s) in each proof to source documents supporting the claim(s) on a test basis as appropriate. The numbers in the PWC Report were indeed calculated based on the exact value of the debts and were not rounded off.

57 The Opposing Bank Creditors also pointed out that there had been an overall steep increase in claims under the Scheme. Although the explanatory statement stated at para 4.5 that the "total liabilities of the Company (including contingent liabilities) are estimated to be in excess of S$400 million as of 31 July 2009", the total admitted value of the Scheme Creditors' claims was $502.82 million.

58 Further, they contended that there had been partial rejection of the claims of certain Scheme Creditors who voted against the Scheme and the admission of the full claims of certain Scheme Creditors who voted in favour of the Scheme for reasons which were not apparent to them. They submitted that on the face of the Chairman's Report, the information packages and other known facts, these issues in relation to the Company's admission and rejection of claims warranted further justification and explanation by the Company. Despite their requests, the Company had purportedly refused to provide the necessary clarification.

59 In particular, the Opposing Bank Creditors raised doubts about the following claims.

(1) Bank of East Asia Limited ("BEA")

60 BEA voted against the Scheme. It filed a proof of debt for $14.12m but only $7.23m of which was admitted by the Company. From the PWC report it appeared that it was BEA's contingent claim under the corporate guarantee provided by the Company which had been rejected. The guarantee was issued for a loan made by BEA to Dai-Ichi Pte Ltd ("Dai-Ichi"), a wholly-owned subsidiary of the Company. This rejection was premised on the fact that the security held by BEA over the properties owned by Dai-Ichi was worth more than the amount it owed to BEA. No valuation reports were exhibited.

61 At the 21 July 2009 hearing for extension of deadline for the convening of the Meeting, the Company tendered a list of the Company's creditors and the values of their respective claims to show the support given by the majority of the Company's creditors for its application for extension of time to convene the Meeting. In that list, BEA's claim was stated to be worth $13,979,925. According to

the Opposing Bank Creditors, this was inconsistent with the rejection of BEA's claim under the corporate guarantee provided by the Company.

62 To my mind, the statement by the Company of BEA's claim at the 21 July 2009 hearing was not inconsistent with the Scheme Manager's eventual rejection of part of its claim. The Scheme Manager was clearly not bound by the Company's representation of the quantum of BEA's claim in the course of an application for extension of deadline for the convening of the Meeting.

63 Furthermore, under the Scheme, it is for the aggrieved Scheme Creditor whose claims have been rejected in whole or in part (*ie*, BEA in this case) to request the Company to commence proceedings for the adjudication of such claim by the court under cl 4.6 of the Scheme. The Opposing Bank Creditors, through their solicitors, had asked for information on such proceedings from BEA but the latter was not agreeable to disclosing such information. In any event, Treasure Plus Limited has since bought over the debt from BEA and has expressed its support for the Scheme so it was unlikely that the rejected part of its claim would be the subject of adjudication.

64 Moreover, there was no reason not to accept PWC's view that the rejection of BEA's contingent claim was reasonable. Its loan to Dai-Ichi was secured by six properties held under the name of Dai-Ichi, which security had already been enforced by BEA. Based on an auction report by Jones Lang LaSalle dated 28 August 2009, BEA had sold two properties for a total of $2.95m. PWC had estimated that the other two properties in the same vicinity were worth $3.45m. For the remaining two properties, Jones Lang LaSalle indicated a forced sale value of $605,000 in a 3 March 2009 valuation report. The estimated value of the four as-yet unsold properties was in excess of the outstanding loan owed by Dai-Ichi.

65 Therefore, I dismissed the Opposing Bank Creditors' objections as to the rejection in part of BEA's claim against the Company.

(2) Akira Corporation Pte Ltd ("Akira")

66 A wholly-owned subsidiary of the Company, Akira lodged a proof of debt against the Company for $86.97m and its claim was admitted in full, making it the largest single Scheme Creditor, holding 17.77% of the total value of the claims of the Scheme Creditors admitted by the Company for the purposes of voting at the Meeting.

67 The PWC report states that Akira has present and contingent claims against the Company under a licence agreement for use of the AKIRA trade mark and a distribution agreement but does not exhibit these agreements. The Opposing Bank Creditors submitted that if Akira was entitled to charge substantial amounts for the use of the AKIRA trade mark, this would constitute a valuable intangible asset for Akira. Yet, in the balance sheet forecast of Akira provided by the Company to bank lenders on 25 May 2009, and in the unaudited balance sheets of the Group as at 31 March 2009, no value was ascribed to the AKIRA trade mark as an asset under "intangibles". The Opposing Bank Creditors noted further that in information packages distributed by the Company to its bank lenders, the Company had represented that Akira's claim against the Company was $5.155 million as at 31 March 2009. Thus, there appeared to have been an "astronomical increase" in Akira's claim against the Company between 31 March 2009 and 31 July (the Ascertainment Date) that same year.

68 Thus, the Opposing Bank Creditors submitted that Akira's claim at the very least appeared suspect, and at its highest appeared to have been manufactured by the Company to add a substantial and critical amount of supporting vote to the Scheme. Therefore, Akira's claim with respect to royalties and fees for the licensing of the AKIRA trade mark could not be accepted at face

value and must be fully and properly proved by Akira and the Company.

69 According to the Opposing Bank Creditors, the Company had never previously mentioned that it had licensing arrangements with Akira or that substantial amounts would be owed under such licensing arrangements. Searches at the Intellectual Property Office of Singapore ("IPOS") revealed that it was Aki Habara Electric Corporation Pte Ltd ("AHEC") instead of Akira which owned the trade mark.

70 However, in a 29 January 2010 letter from Wong P to R&T, it was stated that:

> For Akira, the sums submitted in their Proof of Debt arise out of claims relating to:-
>
> a) goods and services supplied to the Company;
>
> b) royalties and fees in relation to the use of the trade mark "AKIRA" and other private labels licensed to the Company and
>
> c) the Company being a distributor for Akira of consumer electronic products on a worldwide basis.

Moreover, Julia Tong's 7th Affidavit exhibited two licensing agreements, both dated 1 June 2007. The first was between AHEC and Akira, the former licensing the use of the AKIRA trade mark to the latter. The second involved Akira's sub-licensing the use of the same trade mark to the Company. The salient clauses of the second licensing agreement read as follows:

> WHEREAS:-
>
> ...
>
> (ii) [Akira] is desirous of permitting the [Company] to use the Trade Mark and other private labels (hereinafter referred to as "Private Labels"), including manufacturing, sourcing and distributing products bearing the Trade Mark and Private Labels, in the countries as defined below in **Clause 1** (hereinafter referred to as the "Territory") in respect of all goods for which the Trade Mark is or shall be registered.
>
> ...
>
> NOW IT IS HEREBY AGREED AS FOLLOWS:-
>
> ...
>
> 3. The [Company] undertakes to use the Trade Mark and Private Labels upon the Products and sell the Products in strict accordance with the specifications laid down, directions given and information supplied by [Akira] from time to time and to use the Trade Mark and Private Labels in relation only to the Products.
>
> ...
>
> 9. In consideration of the right granted under this Agreement, the [Company] shall pay royalties to [Akira] for the use of the Trade Mark and Private Labels from the effective date of this Agreement. Royalties shall be calculated based on the Net Purchase Price of each Products [*sic*] purchased by the [Company] from the Supplier by applying the following rates:

(a) 2% of the Net Purchase Price for each item of the Products for the first 10 (ten) years;

(b) 3% of the Net Purchase Price for each item of the Products for the subsequent years.

The royalties shall be calculated based on the total Product purchased as at the last day of March of every calendar year and shall account for purchases made under this Agreement. The [Company] shall account to and pay [Akira] the royalties due within 30 days from the first day of April of each calendar year. Any payment under this Agreement which is not made on the date specified therein, shall accrue interest at the rate of 12% (twelve per cent) per year.

71 According to the PWC Report, the Company had entered into a distribution agreement dated 1 June 2007 with Akira ("the Distribution Agreement"), which expires on 31 May 2027. Akira's claims under the Distribution Agreement were divided into two parts:

(a) Unpaid compensation owing to Akira as a result of the Company's inability to meet the guaranteed profits for the year ended 31 March 2008 and the minimum purchase targets up to the Ascertainment Date pursuant to the Distribution Agreement; and

(b) Based on the fact that the Company had historically failed to meet its minimum purchase targets, a contingent claim for compensation for shortfalls of the minimum purchase targets after the Ascertainment Date. This was computed on the basis of actual purchases after the Ascertainment Date and Akira's estimates of how much the Company would have purchased over the remaining lifespan of the initial five year period. Akira had applied a 90% discount to the estimated purchases to arrive at the amount claimed in its proof of debt.

72 On the basis of these documents, I was satisfied that Akira's claims had indeed arisen out of claims relating to goods and services supplied to the Company, royalties and fees in relation to the use of the AKIRA trade mark and other private labels and the Company's distribution for Akira of consumer electronic products on a worldwide basis, as stated in Wong P's 29 January 2010 letter to R&T (see [70] above). This was borne out by the breakdown of Akira's claim in the PWC Report:

Item	**Amount Admitted (S$)**
Purchase of goods and services	
Outstanding amounts owing for purchase of goods as at Ascertainment Date	11,125,804
Outstanding amounts owing for services rendered as at Ascertainment Date	114,172
Licence Agreement	
Contractual royalties payable under Licence Agreement	
(a) As at Ascertainment Date	10,110,073
(b) Contingent claim payable up to 31 May 2027	13,411,256
Distribution Agreement	
Contractual fees payable under Distribution Agreement	

(a) As at Ascertainment Date	38,921,659
(b) Contingent claim payable up to 31 March 2012	13,284,777
Total	**86,967,741**

73 To ascertain the contingent claims by Akira, PWC performed various scenario analyses on the variables used by Akira in its estimates of future purchases. In fact, PWC observed that Akira's application of a discount rate of 90% in their claims resulted in claim amounts lower than PWC's computations in the scenario analyses.

74 While the figures in the Company's balance sheets as at 31 March 2009 referred to by the Opposing Bank Creditors in this regard did raise some questions as to why they did not fully reflect the Company's indebtedness to Akira resulting from the licensing arrangements, I noted that these *unaudited* balance sheets were subject to the disclaimer that "[n]o reliance shall be placed for any purpose whatsoever on [the] information provided or on its completeness or accuracy".

75 Therefore, I was not persuaded by the Opposing Bank Creditors' suggestion that Akira's claim against the Company was "manufactured" to add weight to the votes supporting the Scheme. I concurred with PWC's view that it was reasonable for the Scheme Manager to admit Akira's claim in full.

(3) St George Bank Limited ("St George Bank")

76 St George Bank made a claim of $27.8m against the Company that was admitted in full. It voted in favour of the Scheme.

77 The amount claimed represented a contingent claim arising out of a guarantee issued by the Company to St George Bank dated 30 May 2008 in respect of banking facilities provided by St George Bank to TEAC Australia Pty Ltd ("TEAC"), an Australian subsidiary of the Company.

78 PWC had reviewed the facility agreement between TEAC and St George Bank dated 15 May 2008. The facilities consisted primarily of a Revolving Multi-Option Facility (for A$20m) with several other facilities for A$3.3m such as Currency Exposure Management facility, Visa Business Card facility and Master Asset Finance Facility. The total guaranteed amount of A$23.3m was converted to S$27,796,900 based on the interbank cross rate as at the Ascertainment Date as published in the Business Times on 3 August 2009, in accordance with cl 4.1(i) of the Scheme.

79 The Opposing Bank Creditors submitted that it was unreasonable for the Company to value St George Bank's claim as being for the full amount of the credit facility since the Company would be liable on the corporate guarantee only if TEAC failed to pay St George Bank. To my mind, such a valuation was perfectly justifiable under the Scheme. Under cl 6.3, any creditor with contingent claims against the Company is required to lodge a proof of debt in respect of its *whole claim* against the Company, *including the amounts of any contingent claims*. This includes creditors that have been granted a corporate guarantee by the Company in respect of the indebtedness of any subsidiary of the Company (see cl 6.6). It is then for the Scheme Manager under cl 4.4 to decide whether to admit such claim, and if so, in whole or in part.

80 The Opposing Bank Creditors also objected to the admission of St George Bank's claim on the basis that whereas a deduction was made on account of the value of BEA's security, no such

deduction was made in this case. It is likely that the security that St George Bank had was in the form of charges (fixed or floating) over assets that excluded real property. Since the whole purpose of the Scheme was to enable the Company to carry on its business operations albeit through restructuring, it would not make commercial sense for all parties involved if St George Bank were to enforce its security—which BEA had already done by taking possession of the six properties held under the name of Dai-Ichi—such that the Company would not be in a position to deal freely with its assets. In my view, the Scheme Manager was not bound to employ the same policy with respect to all contingent claims against the Company and the nature of and circumstances surrounding the security for BEA's and St George Bank's claims were different.

81 Therefore, I concurred with PWC's view that the Scheme Manager's admission of St George Bank's contingent claim in full could not be faulted.

(4) Ascendas Real Estate Investment Trust ("Ascendas")

82 Ascendas filed a claim for $53.8m which was fully admitted.

83 In March 2004, TT International Tradepark Pte Ltd ("Tradepark"), a subsidiary of the Company, had sold its property at 10 Toh Guan Road ("Toh Guan Road Property") to Ascendas in a sale and leaseback transaction. The lease is for the period from 5 March 2004 to 4 March 2014. The Company issued a corporate guarantee for payment obligations of Tradepark under the lease to Bermuda Trust on 5 March 2004 ("Lease Guarantee").

84 The breakdown of Ascendas's claim against the Company is set out as follows in the PWC Report:

Item	**Amount admitted (S$)**
Future rent for the remaining term of the lease from 1 August 2009 to 4 March 2014	35,887,594
Future land rent and sublet fees payable	3,727,777
Future property tax payable	3,270,680
Other amounts payable for property maintenance, insurance, utilities, *etc*.	10,916,935
Total	**53,802,986**

85 PWC examined the lease and the Lease Guarantee and ascertained that:

(a) the future rent of $35,887,594 was based on rent set out in the lease and in the relevant period; and

(b) the future land rent and sublet fees to the tune of $3,727,777, future property tax of $3,270,680 and other amounts for $10,916,935 were estimates as they have not been incurred.

These estimates have been verified by PWC against historical expenses incurred by the Company and were determined to be reasonable estimates of the Company's future liability for the same.

86 Therefore, I rejected the Opposing Bank Creditors' suggestion that there were "compelling grounds" to question the admission in full of Ascendas's $53.8m claim.

(5) First Capital Insurance Limited ("First Capital")

87 First Capital filed a proof of debt for $6.86m which was admitted by the Company. First Capital voted in favour of the Scheme.

88 Under the terms of the lease between Tradepark and Ascendas dated 5 March 2004, Tradepark is under an obligation to provide a security deposit amounting to $6,860,000. Tradepark had procured First Capital to issue an insurance guarantee on 1 July 2008 to Ascendas in performance of its obligation to provide the security deposit. The insurance guarantee was provided by First Capital to Bermuda Trust, which acts as trustee to Ascendas. In return, the Company entered into an indemnity agreement with First Capital on 1 July 2008.

89 The Opposing Bank Creditors contended that the security deposit should be deducted from Ascendas's claim as was done in the case of BEA's claim. This was a mistaken contention. What was rejected in BEA's claim was the entire corporate guarantee because in the Scheme Manager's assessment the value of the security held by BEA was greater than the amount guaranteed by the Company. That security stood on a completely different footing from the security deposit alluded to here. The Opposing Bank Creditors referred me to a 12 November 2008 announcement by Ascendas that predated the Ascertainment Date and an 18 January 2010 press release by Ascendas that referred to Ascendas's potential use of security deposit from an unnamed "previous anchor tenant" as "bridging income". Apart from these, there was no evidence before me that suggested that Tradepark had not defaulted on its rental or lease obligations or that the security deposit has not been used to offset any negative impact on Ascendas's financial results.

90 In any case, it was crucial to note that the security deposit amount was not part of the Lease Guarantee by the Company to Ascendas. As explained above at [88], the claim by First Capital against the Company arose from the 1 July 2008 indemnity agreement in consideration for the insurance guarantee issued by First Capital to Ascendas for Tradepark's obligation to provide that security deposit. It was clear that the Opposing Bank Creditors' fears of "double counting" were unfounded since Ascendas's claim against the Company did not include the $6.86m claimed by First Capital.

91 Thus, my view was that First Capital's claim was reasonably admitted.

Ho Lee Construction's objections

92 I turn next to Ho Lee Construction's objections owing to the rejection of the greater part of their claim against the Company. Ho Lee Construction wanted the hearing of the Company's application to be deferred pending the proper adjudication of its claim.

93 In the PWC Report, the breakdown of the admitted and rejected parts of Ho Lee Construction's claim against the Company was provided as follows:

Item	Amount submitted in proof of debt (S$)	Amount admitted (S$)	Amount rejected (S$)
Interest over certified sums	923,333	787,094	136,239
Claims for work done (with GST)	22,231,172	21,970,164	261,008
Costs of adjudication (with GST)	7,331	6,821	510
Loss incurred for purchase of steel reinforcement bar	964,142	0	964,142
Damages payable to sub-contractors and suppliers due to termination	26,860,439	0	26,860,439
Loss of profit suffered due to termination	33,556,433	0	33,556,433
Storage charges for materials	20,304	5,650	14,654
Total	**84,563,154**	**22,769,729**	**61,793,425**

94 PWC had examined the documentation supporting Ho Lee Construction's claim and concluded that for each head of claim, the amount rejected by the Scheme Manager was reasonable:

(a) In an adjudication determination dated 11 November 2008, Ho Lee Construction was awarded $13,458,793 and interest at 5% on outstanding sums which remained unpaid from that date. PWC's computation of the interest pursuant to this adjudication determination showed that the interest claimed should have been $787,094 for the period between 11 November 2008 and 31 July 2009. Thus, that amount was correctly admitted instead of the $923,333 claimed.

(b) $21,970,164 was admitted under its claims for work done because this sum consisted of the sum certified by Jurong Consultants and a sum in respect of works that had already been surveyed as part of the certification process but not yet formally certified. The amount of $261,008 was rejected due to lack of support by sufficient evidence.

(c) The claim for loss incurred for purchase of steel reinforcement bars was rejected in full because there was insufficient documentary evidence that showed the actual loss suffered by Ho Lee Construction with regard to any purchase of the steel reinforcement bars specifically for the Company's projects.

(d) In support of its claim for damages payable to sub-contractors or suppliers due to termination of the works, Ho Lee Construction had submitted a worksheet listing amounts payable to individual sub-contractors and copies of certain agreements entered into, but the worksheet amounts did not match the amounts stated in the agreements. There was also no actual claim submitted by the sub-contractors against Ho Lee Construction accompanying the proof of debt. Hence, the claim did not seem to be properly supported.

(e) The claim in excess of $33m in respect of loss of profit was only supported by a worksheet by Ho Lee Construction on the forecasted profit, without any detailed supporting documents to support the amounts set out in that worksheet.

95 Since the Scheme Manager's rejection of Ho Lee Construction's claims was upheld by PWC's independent review and verification, I found that the Scheme Manager had acted in a *bona fide* manner in assessing its claims.

96 Bearing in mind the general principles that the purpose of a scheme of arrangement under s 210 of the Companies Act is to obviate the need for messy and complicated proceedings with a view to obtaining the unanimous approval of the creditors to a variation of their rights, and that a minority of creditors should not be allowed to frustrate a beneficial scheme to the detriment of the majority, I was minded to defer final determination of Ho Lee Construction's claims against the Company until after the Scheme had obtained this court's approval. To my mind, this was the most reasonable course of action and would not necessarily occasion prejudice or injustice to Ho Lee Construction.

97 As I considered that the Scheme Manager had acted reasonably and with *bona fides* in rejecting part of Ho Lee Construction's claim, the computation of the weight of Ho Lee Construction's vote against the Scheme should not be impugned. Thus, for the purposes of ascertaining whether the requisite majority had been obtained at the Meeting, the Scheme Manager's partial rejection of Ho Lee Construction's claim could not be faulted. The Scheme Manager's duty to assess the claims presented in the proofs of debt objectively should only extend to examining the claims on the basis of the supporting documentation provided by the Scheme Creditors. I found that this had been carried out fairly and reasonably by the Scheme Manager.

98 Under the Scheme, such rejection does not affect Ho Lee Construction's entitlement to its claim once that has been finally determined by judicial adjudication. Clause 4.8 of the Scheme provides that:

> If proceedings are commenced … and the Disputed Amount of the relevant creditor's Claim or any part thereof is determined to be payable pursuant to a final and non-appealable judgment or order overturning the rejection of such Disputed Amount ("the **Adjudicated Amount**"), such creditor's entitlement under the Scheme in relation to the Adjudicated Amount shall be deemed to accrue from the Effective Date, …, and any costs awarded in its favour in the proceedings shall be deemed to be part of the Adjudicated Amount, Provided That such creditor's entitlement should not include any entitlement in respect of a Contingent Claim for so long as it is not Crystallized.

99 It was Ho Lee Construction's evidence that the determination of its claims for losses suffered, expenses incurred and lost profits would require the assistance and technical expertise of qualified professionals such as a Quantity Surveyor or Architect who are familiar with disputes in the construction industry. The Company's position was that there were other grounds on which to challenge Ho Lee Construction's claim apart from its main failure to provide sufficient documentation to substantiate its proof of debt. I was in no position to assess the strength of the parties' contentions and a proper determination thereof required a full judicial or arbitral process. To my mind, this requirement militated against deferring the court's approval of the Scheme to after a final non-appealable judicial determination of Ho Lee Construction's claim against the Company. Such a judicial process may well prove to be protracted and would unduly delay the restructuring process of the Company via the Scheme to the detriment of the general body of Scheme Creditors. The more practical step forward was, in my judgment, to accept the Scheme Manager's rejection of Ho Lee Construction's claim for the purpose of ascertaining the requisite majority, leaving it open to Ho Lee Construction to resort to the adjudication process to determine its final entitlement under the Scheme.

100 My views in this regard were fortified by Lai Kew Chai J's decision in *Re Baring Futures*

(Singapore) Pte Ltd (in compulsory liquidation) and another action [2002] 1 SLR(R) 191 to sanction the scheme of arrangement before the liability of the company in question, Baring Futures (Singapore) Pte Ltd, to one of its creditors, Deloitte & Touche Singapore, had been finally determined.

101 Insofar as the Opposing Bank Creditors' concern over whether the requisite majority had been achieved at the Meeting was founded on the alleged lack of transparency over the admission and rejection of claims and the Company's debts, such lack of transparency is better dealt with in assessing the *bona fides* of the related parties' votes or merits of the Scheme. This is in keeping with the Court of Appeal's approach in *Wah Yuen* (at [18]):

> [A]s much as we shared Singapore Cables' concern over Wah Yuen's lack of transparency over its related party debts, we were of the opinion that it was better dealt with when the *bona fides* of the related parties' votes or the merits of the proposed scheme were assessed. *If it were a condition precedent that a company had to satisfy each creditor of the genesis and extent of all of its debts before the scheme could be put to the vote, the entire process would be cumbersome and administratively inconvenient, especially when the scheme might itself already provide for a procedure for the adjudication of claims for voting purposes (as it did in this case)*. Any remaining concerns, therefore, were better dealt with on a discretionary basis. [emphasis added]

Fair and reasonable scheme

Duty to give full information

102 In making an assessment on the question whether the proposed Scheme is one that "an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve" (*In re Dorman, Long and Company Limited* [1934] 1 Ch 635, per Maugham J at 657), it is essential to ensure that the company has fulfilled its duty to "make full and fair disclosure of all material facts known to them or reasonably accessible to them which is relevant for the creditors to know" (*Re Pheon Pty Ltd* (1986) 11 ACLR 142 ("*Pheon*"), per White J at 155).

103 Section 211(1) of the Act stipulates the information that is required to be included in the Explanatory Statement sent to creditors prior to the Meeting:

> **Information as to compromise with creditors and members**
>
> **211**. —(1) Where a meeting is summoned under section 210, there shall —
>
> (a) with every notice summoning the meeting which is sent to a creditor or member, be sent also *a statement explaining the effect of the compromise or arrangement and in particular stating any material interests of the directors, whether as directors or as members or as creditors of the company or otherwise, and the effect thereon of the compromise or arrangement in so far as it is different from the effect on the like interests of other persons*; and
>
> (b) in every notice summoning the meeting which is given by advertisement, be included either such a statement or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of such a statement.
>
> [emphasis added]

104 Apart from these statutory requirements, it is an independent principle of law that the creditors should be put in possession of such information as is necessary to make a meaningful choice: *Wah Yuen*, at [24]. In the case of a company facing imminent insolvency, that "choice" is usually said to be "between adopting the scheme on the one hand and looking to their chances upon liquidation on the other" (*Pheon*, per White J at 144).

105 What kind of information should the Scheme Creditors be furnished with? In *Pheon*, a case involving a scheme of arrangement for an insolvent trading trust company, White J observed (at 147):

> What a creditor needs to have is *information which bears upon his chances of obtaining a better deal than the one presently being offered under the scheme*. The creditor needs to have in his possession *sufficient facts to enable him to make a sensible commercial judgment in his own interests* whether it is better to go along with the scheme or take his chance of getting say 20 cents, 30 cents, 40 cents etc in the dollar. He needs information which is peculiarly within the knowledge of the Lamberts who were the controlling minds behind the trading trustee, the unit trust, and Zilon as promoter of the scheme and trustee of the discretionary trust. [emphasis added]

In *Re Heron International NV and others* [1994] 1 BCLC 667 ("*Heron*"), Sir Donald Nicholls VC was of the opinion that (at 672):

> The second principal head of complaint relates to the absence of sufficient information to enable a creditor to exercise a reasonable judgment on whether the schemes are in his interest or not. An explanation of the effects of the schemes requires an explanation of how the schemes will affect a bond holder or creditor commercially. He needs to be given such up to date information as can reasonably be provided on what he can expect if the group were to go into liquidation and as to what he can expect under the schemes.

The Opposing Bank Creditors' complaints

106 In their submissions, the Opposing Bank Creditors contended that the Company had not been providing reliable, accurate and comprehensive information on the actual and expected liabilities proposed to be restructured under the Scheme. In particular, they complained that the Company had been uncooperative and evasive with regard to their requests for more information on the claims of Scheme Creditors. The Chairman's Report merely exhibited a list of Scheme Creditors, the amount that each Scheme Creditor claimed and the corresponding amount admitted by the Company, and the manner in which the claim was voted. It did not set out any information on the nature of the claims admitted by the Company or the basis on which the claims were rejected or admitted. According to the Opposing Bank Creditors, the Chairman's Report contained no material on which they could ascertain for themselves that the Company had applied correct and consistent principles in deciding how much of a claim to admit.

The Company's provision of information

107 The Company averred that since the beginning of its restructuring, it had taken pains to put its creditors in possession of such information as to allow them to make an informed choice as to the Scheme and to address their queries on the same. During the one year leading up to the Meeting, the Company had met extensively with all its creditors and their advisors to understand their concerns and address their queries in relation to the Scheme. It had presented, discussed and disseminated information packages containing financial information relating to the Company and details of the Scheme. Quarterly audited financial statements were also announced periodically on the SGX website.

108 Apart from that, the Company and its creditors had been corresponding via email and telephone and through meetings with key bank and other creditors to obtain their feedback, comments and queries in relation to the Scheme. The Company averred that the Scheme in its present form incorporated to the fullest extent possible the comments and requests of a significant number of the creditors.

109 To ensure that the process of assessment and review of the creditors' claims for voting purposes was carried out objectively, the Company had delegated that task to the Scheme Manager. Pursuant to the Scheme, the Company had informed creditors whose claims had been rejected in part of such rejection and invited them to request the Company to commence proceedings to adjudicate their claims. Furthermore, those claims which had been rejected in part were reviewed by an independent third party, PWC, who confirmed that there were reasonable bases for such rejection and that the quanta rejected for such claims were reasonable.

110 It must be borne in mind that the extent of the information required to be supplied depends on the facts of the particular case: see *Heron*, at 672. In *Heron*, Nicholls VC held that (at 672-673):

> On one or two points the information provided can fairly be criticised but (subject to what I shall say) in each instance, when firmly challenged and further information was provided in affidavit evidence, *the further information seems to me not to be information which would have caused any assenting creditor to have changed his view or any abstaining creditor to have voted against the schemes*. [emphasis added]

Thus, the crucial question was whether the further information requested by the Opposing Bank Creditors would have caused any Scheme Creditor voting in favour to change its view or any abstaining Scheme Creditor to vote against the Scheme.

111 In *Wah Yuen*, the Court of Appeal withheld its approval for the proposed scheme of arrangement because it found that (at [37]) "the creditors were not in a position to assess the fairness and reasonableness of the scheme". In that case, whilst counsel for Wah Yuen (the company proposing the scheme) emphasised repeatedly that the court-appointed scheme administrator KPMG had assessed the company's estimated realisable value vis-à-vis each creditor to be 15% under the proposed scheme, as opposed to 0.4% in a liquidation scenario, the Court of Appeal found that that estimated realisable value in a liquidation scenario was not reliable as it was based on unaudited information. The Court of Appeal observed that (at [37]):

> This meant that the creditors could not determine whether the returns under the proposed scheme were *in fact* greater than what they could expect in a liquidation. **It may well be that a proper verification of the related party debts would reveal that the related party debts did not in fact exist to the extent currently represented**. In such a scenario, the returns to the creditors in a liquidation would be larger than that currently estimated. It was also possible that Wah Yuen could have made preferential payments to its related parties. These payments could be clawed back in a liquidation and channelled to other creditors. [emphasis in original in italics; emphasis added in bold]

112 After reconciling the claims in each proof of debt to source documents supporting the claims and considering the reasonableness of the quantum of the claims submitted in the proofs, PWC, whose independence and qualification the Opposing Bank Creditors have not called into question, was satisfied that reasonable grounds existed for the amounts which were rejected and admitted. Thus, on the present facts, proper verification of the related party debts revealed that they did exist to the extent represented in the proofs of debt. Even if the Scheme Creditors had been provided with the

documentation supporting the proofs of debt filed by parties such as Akira and St George Bank, it was my view that that further information would not have affected the vote of the abstaining Scheme Creditors or those who voted in favour of the Scheme.

113 In *Re Horizon Knowledge Solutions Pte Ltd* [2004] SGHC 270 ("*Horizon*"), the company proposing the scheme of arrangement had not furnished its creditors with information pertaining to the proposed reverse takeover of its parent company by a third party. Lai Siu Chiu J held that (at [36]) this was a "material factor which should have been told to the creditors to enable them to make an informed decision on whether to accept the scheme". In *Horizon*, despite repeated requests by one of the opposing creditors, no details were provided on the related creditors' debts and the parent company's debts. It was in that context that Lai J held (at [36]) that information pertaining to the parent company's accounts, the company's audited accounts and related creditors' debts should have been provided at or before the creditors' meeting, when requested.

114 In *Re Econ Corp Ltd* [2004] 1 SLR(R) 273, the company proposing the scheme of arrangement had withheld information of its parent company's extensive losses from its creditors. Lai Siu Chiu J held that (at [75]) such information may well have affected the outcome of the voting had it been known by the creditors at the meeting. In that regard, Lai J held that (at [76]) the opposing creditors were entitled to know the state of the company's finances as well as that of the parent company before they decided whether the returns under the scheme of arrangement proposed were in fact greater than what they could expect to recover in a liquidation.

115 On the present facts, the Company had responded to queries from R&T on behalf of the Opposing Bank Creditors relating to the claims by Akira and St George Bank. In its 29 January 2010 letter, Wong P had explained the bases for the claims by Akira and St George Bank, as well as the claims for unpaid dividends by shareholders, without reproducing the documentation supporting their proofs of debt which was requested by R&T in a 12 January 2010 letter. I do not read the authorities as laying down the strict rule that so long as any opposing creditor asks for the supporting documentation for each proof of debt, the Company must of necessity provide the requested information in that form or else risk denial of the court's approval of the scheme of arrangement by dint of lack of transparency.

116 In the instant case, several unrelated creditors were satisfied with the information provided by the Company. At the hearing, counsel for a group of bank creditors representing some $89m worth of claims (which were not impugned by the Opposing Bank Creditors) informed me that their clients were satisfied with the way the Company had dealt with the Scheme and therefore voted in favour of the same. The Company had engaged independent advisers on three levels, the Scheme Manager, its legal advisers A&G and PWC, all of whom were satisfied with the process by which the Scheme came to be approved by the majority of Scheme Creditors.

117 Out of the 25 holders of Multicurrency Medium Term Notes ("MTN") worth $36.25m in total, 17 holders submitted proofs of debt in respect of $35.25m worth of MTN. All 17 voted in favour of the Scheme. At the hearing, counsel for the 17 MTN holders submitted that the exact figures of the claims were better left to professionals; if pin-point accuracy was required in examining each proof of debt, the process would be long and arduous and ultimately render the Scheme impractical. That would defeat the purpose of the Scheme which provided an avenue for the Company in difficulty to get back on its feet and resume normal operations as quickly as possible.

118 Even apart from Scheme Creditors' satisfaction with the information provided by the Company, I considered that the information which the Opposing Bank Creditors claimed to be lacking could be found in the 2009 Annual Report of the Company, made available to the Scheme Creditors as Appendix

8 to the Scheme. In particular:

(a) The Company stated at note 27 to the financial statements that as at 31 March 2009, the Company had contingent liabilities amounting to $69,730,000 in terms of unsecured guarantees to banks in respect of credit facilities granted to its subsidiaries. Out of that amount, $36,434,000 had been utilised by the subsidiaries. Thus, even though the Company had not provided particulars of its contingent liabilities to St George Bank and BEA specifically, it had provided sufficient details to enable the Scheme Creditors to become aware of the state of finances of the Company and its subsidiaries.

(b) In that same note, the Company had provided some information pertaining to an unsecured guarantee to a third party in respect of a subsidiary's lease commitments, including rent and other sums payable arising from a sale and leaseback transaction entered into on 5 March 2004. These were disclosed in note 26 to the financial statements as part of the Group's operating lease commitments. Thus, information pertaining to the Lease Guarantee issued to Ascendas was provided to the Scheme Creditors.

(c) In the same Annual Report, information relating to the unpaid dividends claimed was also disclosed. At note 29 to the financial statements, relating to dividends, the Company stated that:

> A one-tier tax exempt ordinary final dividend of 0.20 cents per share amounting to $1,633,000 was declared in respect of the financial year ended 31 March 2008. The net dividend payable after the 50% dividend entitlement renounced by two majority shareholders was $1,200,000. …
>
> As at 31 March 2009, the net dividend of $1,200,000 has not been paid to the entitled shareholders and has been recognised in other payables of the Group and the Company.

It is clear from the portion of the notes just quoted that the Company had indeed disclosed information pertaining to the shareholders and the fact that the dividends declared on 30 October 2008 had not been paid as at 31 March 2009.

119 Therefore, I was of the view that there was no lack of transparency on the part of the Company. It had provided sufficient accurate information with regard to its assets and liabilities and those of its subsidiaries to enable the Scheme Creditors to make an informed choice between the Scheme and taking their chances at liquidation.

120 Having found that the Company had not been remiss in terms of the information provided to the Scheme Creditors, I had no difficulty in coming to the view that the Scheme was one which an intelligent and honest man of business, acting in respect of his interest as a member of the class of Scheme Creditors, would reasonably approve. There was no indication that the statutory majority had coerced the minority in order to promote interests adverse to those of the class whom the statutory majority purported to represent. All the claims were submitted to the Scheme Manager for his admission, or rejection, as the case may be. PWC had reconciled all the rejected claims with the supporting documentation and found reasonable bases for their rejection. The independence and credibility of both the Scheme Manager and PWC had not been impugned. The Company had called for meetings with the MTN holders, who hold 7.23% in value of the total claims, and sought to clarify their queries and provide requested information. Indeed, the Company was paying for legal representation of the MTN holders in these proceedings.

121 I was also impressed by the fact that a number of the Scheme Creditors who had either voted against the Scheme or not voted at the Meeting, whose claims amounted in aggregate to $58.8m, had at the hearing expressed support for the Scheme.

122 As a general rule, if the creditors are acting on sufficient information and with time to consider what they are about, and are acting honestly, they are much better judges of what is to their commercial advantage than the court can be: see the Court of Appeal decision of *In re English, Scottish and Australian Chartered Bank* [1893] 3 Ch 385, per Vaughan Williams J at 409. I had already found that the procedural and voting requirements of s 210 had been met, and that the Company had furnished the Scheme Creditors with sufficient information. I had also found no good reason to question the *bona fides* of the Company or the Scheme Creditors—even the related creditors—who voted in favour of the Scheme. For that reason, there was also no real need for me to attach less significance to the views of the related creditors. Therefore, I accepted the view of the majority of the Scheme Creditors that the Scheme was to their commercial advantage.

123 At para 9.1 of the explanatory statement, the Company estimated that the successful implementation of the Scheme should allow each Scheme Creditor to receive 71 to 100 cents to the dollar over time and would allow Scheme Creditors who retire their claims pursuant to the terms of the reverse dutch auction to receive up to 20 cents to the dollar in respect of such claims. This was in contrast to the situation in the event of liquidation: based on the current financial position of the Company and the Group, liquidation may provide only a return of 9 to 13 cents to the dollar for the Scheme Creditors. Given that the Company had provided ample information to the Scheme Creditors in order for them make an informed choice in favour of the Scheme, it was my judgment that an honest and intelligent man in the class of Scheme Creditors acting in his own interests would find the Scheme fair and reasonable and approve of it.

Conclusion

124 I accordingly approved the Scheme subject to minor non-substantive modifications to the definition of "Effective Date" and the timelines for the reverse dutch auction.