IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 29

Civil Appeal No 99 of 2018

Between

(1) Pathfinder Strategic Credit LP
(2) BC Investment LLC

… *Appellants*

And

Empire Capital Resources Pte Ltd

… *Respondent*

Civil Appeal No 100 of 2018

Between

Empire Capital Resources Pte Ltd

… *Appellant*

And

(1) Pathfinder Strategic Credit LP
(2) BC Investment LLC

… *Respondents*

In the matter of High Court Originating Summons No 392 of 2017

Between

Empire Capital Resources Pte Ltd

... *Applicant*

And

(1) Pathfinder Strategic Credit LP
(2) BC Investment LLC

... *Respondents*

JUDGMENT

[Companies] — [Schemes of arrangement] — [Disclosure]
[Companies] — [Schemes of arrangement] — [Third party liability]
[Companies] — [Schemes of arrangement] — [Classification of creditors]
[Companies] — [Schemes of arrangement] — [Abuse of process]

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Pathfinder Strategic Credit LP and another v Empire Capital Resources Pte Ltd and another appeal

[2019] SGCA 29

Court of Appeal — Civil Appeal Nos 99 and 100 of 2018
Sundaresh Menon CJ, Judith Prakash JA and Steven Chong JA
14 September, 23 November 2018, 28 January 2019

30 April 2019 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 Before us are cross-appeals by Empire Capital Resources Pte Ltd ("Empire Capital"), the applicant-company, which is seeking leave to hold a creditors' meeting to vote on a proposed scheme of arrangement ("the Proposed Scheme"), and by Pathfinder Strategic Credit LP and BC Investment LLC (collectively, "the Minority Creditors") who oppose the leave application. The matter was first heard by a High Court judge ("the Judge"), who granted leave for Empire Capital to convene the creditors' meeting despite various objections put forward by the Minority Creditors, but took the position that the creditors should be grouped into two classes for the purpose of voting on the Proposed Scheme. In CA/CA 99/2018 ("CA 99"), the Minority Creditors appeal against

the Judge's decision to grant leave for the creditors' meeting to proceed, and in CA/CA 100/2018 ("CA 100"), Empire Capital appeals against his decision that the creditors should be separated into two classes.

2 The determinative issue that arises in these appeals is the extent of disclosure that is required of an applicant-company under s 210(1) of the Companies Act (Cap 50, 2006 Rev Ed) ("CA") at the time it applies for leave to convene a creditors' meeting in order to consider a proposed scheme. Three other issues concerning the validity of third party releases under a scheme of arrangement, the proper classification of creditors, and abuse of process, also arise for consideration.

3 We heard the parties on 14 September 2018 and adjourned the appeals upon an indication by Empire Capital that further disclosure might be made in order to assist the creditors' consideration of the Proposed Scheme. Thereafter, following a case management conference held on 23 November 2018, we heard the parties again on 28 January 2019. Having considered the evidence and the oral and written submissions, we now deliver our judgment.

Background

The parties

4 The applicant in the present case is Empire Capital, an investment holding company incorporated in Singapore in 2006 with a paid-up share capital of S$2. Empire Capital is a member of the Berau group of companies ("the Berau Group"), which is based in Indonesia and is one of the world's largest coal producers. According to the audited consolidated accounts of the Berau

Group released in 2014 ("the Audited Accounts 2014"), Empire Capital was valued at US$2,000 at that time.

5 Apart from Empire Capital, three other entities within the Berau Group are primarily relevant in these appeals:

(a) PT Berau Coal Energy Tbk ("BCE"): This is the holding company incorporated in Indonesia, which occupies the apex of the Berau Group. It was previously listed on the Indonesian stock exchange, but apparently it was de-listed in 2017 as a result of non-compliance with certain financial reporting obligations. BCE is not registered with the Accounting and Corporate Regulatory Authority of Singapore for the purpose of establishing a place of business or carrying on business in Singapore.

(b) PT Berau Coal ("Berau Coal"): This is the main operating entity of the Berau Group, holding the licenses and concessions under which the group operates its coal mining and exporting business. It was incorporated in Indonesia in 1983.

(c) Berau Capital Resources Pte Ltd ("BCR"): This is a company incorporated in Singapore in 2010 with a share capital of S$2. It appears to have been established for the purpose of raising debt-based financing for the benefit of BCE.

6 Empire Capital is a wholly owned indirect subsidiary of BCE and a direct subsidiary of Berau Coal.

7 Based on the Audited Accounts 2014, as at the end of the financial year 2014, more than four years ago, the Berau Group had total assets of around US$1.77bn and total liabilities of around US$1.82bn. It also employed 1,311 employees.

8 The only creditors who took an active position in the appeals are the Minority Creditors who oppose Empire Capital's application. The Minority Creditors are the ultimate beneficial owners of certain notes to be compromised under the Proposed Scheme (see [13] below), and they are represented in these proceedings by their shared investment manager, Argentem Creek Partners LP.

The relevant liabilities

9 The Proposed Scheme seeks to compromise two sets of notes issued by BCR and BCE respectively on behalf of the Berau Group.

10 The first set is the guaranteed senior secured notes issued in 2010 by BCR for an aggregate sum of US$450m at a fixed interest rate of 12.5% per annum due for maturity on 8 July 2015 ("the 2015 Notes"), pursuant to an indenture dated 8 July 2010. The Bank of New York Mellon ("NY Mellon") acted as the trustee for and on behalf of the noteholders ("the 2015 Noteholders"). There are more than 30 security documents attached to this note issuance, the most significant of which is the Cash and Accounts Management Agreement ("CAMA") that prescribes a payment and accounts mechanism in accordance with which the Berau Group is obliged to pay and hold all revenue and receipts from the sale of coal for the benefit of the 2015 Noteholders. The 2015 Notes are also guaranteed by various entities in the Berau Group, including BCE, Berau Coal, and Empire Capital. BCR lent the money it raised under the

2015 Notes to BCE to fund its capital expenditures and refinance its existing indebtedness.

11 The second set refers to the guaranteed senior secured notes issued in 2012 by BCE for an aggregate sum of US$500m bearing a fixed interest rate of 7.25% per annum due for maturity on 13 March 2017 ("the 2017 Notes"), pursuant to an indenture dated 13 March 2012. NY Mellon also acted as the trustee for these noteholders ("the 2017 Noteholders"). Save for certain distinct CAMA accounts, the security package for the 2017 Notes largely overlaps with that for the 2015 Notes. Further, except for the exclusion of BCR, the 2017 Notes are guaranteed by the same guarantors as the 2015 Notes.

12 Collectively, the two note issuances effectively securitise the Berau Group's future receivables in coal production in exchange for immediate liquidity. It is not disputed that, as at January 2016, the 2015 and the 2017 Notes were the only material external financial indebtedness of the Berau Group. Notably, Empire Capital, as the applicant before us, is a guarantor of both the 2015 and the 2017 Notes but not the issuer of either.

13 Out of US$799,872,000 in aggregate outstanding principal under the 2015 and the 2017 Notes, the Minority Creditors collectively hold notes with a face value of around US$112,190,000 in the following proportions:

(a) 25.28% of the outstanding principal under the 2015 Notes;

(b) 4.91% of the outstanding principal under the 2017 Notes; and

(c) 14% of the aggregate outstanding principal under the 2015 and the 2017 Notes.

The context of the application

14 In July 2015, following a crash in global coal prices that occurred sometime in the period 2014 to 2015 and amid several public bouts of management infighting, the Berau Group faced severe financial difficulties and could not fulfil its repayment obligations when the 2015 Notes matured. The default on the 2015 Notes in turn triggered a cross-default of the 2017 Notes.

15 Thereafter, several applications were filed in Singapore and the US with the common broad aim of restructuring the liabilities of the group. The purpose and characterization of some of these applications are contested, but for present purposes, the proceedings in Singapore may be summarised as follows:

(a) In July 2015, BCR commenced HC/OS 630/2015 seeking a moratorium under s 210(10) of the CA to restrain proceedings against members of the Berau Group in order to facilitate a restructuring of the group's liabilities. At that time, the restructuring plan was premised on a US$150m facility that was to be extended to the group through its (then new) ultimate majority shareholder, Asia Coal Energy Ventures Limited ("ACE"). An initial 6-month moratorium was granted by the High Court in July 2016. Thereafter, the facility was terminated due to a winding up petition being taken against ACE, and the restructuring plan could no longer be implemented as initially proposed. In January 2016, BCR applied for an extension of the moratorium and put forward a revised restructuring plan. Following discussions between the parties and arguments made before the High Court, the extension application was dismissed in March 2016.

(b) In June 2016, BCR applied in HC/OS 550/2016 to be placed under judicial management. At the same time, BCE applied in HC/OS 551/2016 for a moratorium under s 210(10) of the CA. According to the Berau Group, it was working towards developing a restructuring plan that might prove acceptable to its creditors.

(c) In November 2016, the Berau Group was ready to put forth a new restructuring proposal for consideration by its creditors.

Accordingly, BCR and BCE withdrew HC/OS 550/2016 and HC/OS551/2016 and commenced HC/OS 1175/2016 and HC/OS 1180/2016 respectively, under s 210(1) of the CA seeking leave to convene a creditors' meeting to consider the new proposal. However, these proceedings were discontinued prior to the final hearing when it seemed that the proposed scheme would fail as a result of creditor opposition.

16 On 9 April 2017, Empire Capital filed the present application under s 210 of the CA seeking, amongst other things, leave to convene a creditors' meeting to consider the Proposed Scheme and, if they thought fit, to approve it with or without modification. This is the Berau Group's fourth set of restructuring proceedings in Singapore. While all prior applications were filed by BCR and BCE in respect of the 2015 and the 2017 Noteholders separately (thereby contemplating that these noteholders should vote in different classes), the present application is the first to be filed by Empire Capital as a guarantor of those notes, and the first to propose putting all the noteholders into a single class of creditors.

The Proposed Scheme

17 As is evident from the foregoing, the restructuring proposal put forward by the Berau Group has changed quite significantly over time. As it stands, the essential terms of the Proposed Scheme are as follows:

(a) All liabilities under the 2015 and the 2017 Notes are to be fully and finally extinguished and released. This includes the liabilities of BCE, BCR, and the co-guarantors. To that end, all accrued and unpaid interest, principal, and other amounts accrued or payable under the 2015 and the 2017 Notes will have to be waived by the noteholders.

(b) In consideration for the discharge of liabilities under the 2015 and the 2017 Notes, Berau Coal will issue new notes on a dollar-for-dollar basis ("the New Notes") with the following terms:

(i) These will reach maturity in 10 years from the date of issuance, and bear interest at LIBOR plus 1%.

(ii) They will be guaranteed by BCE but with no other security or credit support or cash and/or account management.

(iii) They will be governed by the laws of the state of New York, US.

(iv) They may be redeemed by Berau Coal "in its sole and absolute discretion" at any time in whole or in part without penalty or premium.

(c) BCE and/or Berau Coal intend to utilise excess proceeds from the group's operations to redeem the New Notes (or any part thereof) through reverse Dutch auctions "in a financially efficient manner".

(d) All sums in the CAMA accounts (in an amount of not less than US$47m) held in respect of the existing Notes will be released to Berau Coal for use as the working capital of the Berau Group.

18 Information relating to the Proposed Scheme was provided by the Berau Group in the following documents:

(a) an explanatory statement, in accordance with s 211 of the CA ("the Explanatory Statement");

(b) a letter from the board of Empire Capital ("the Board Letter");

(c) instructions to noteholders, account holders, and intermediaries, including a "Questions and Answers" section; and

(d) the terms of the Proposed Scheme, including appendices such as instructions on how to vote and participate, a notice of the creditors' meeting, and an information memorandum.

19 According to the Explanatory Statement, the overall objectives of the Proposed Scheme are (a) to provide the creditors with better recovery than in the event of a liquidation, and (b) to enable the Berau Group as a whole to continue as a going concern (at para 2.1). Further, the Board Letter states that the board "considers the [Proposed] Scheme to be in the best interests of the Scheme Creditors, the Berau Group and the stakeholders of the Berau Group" (at para 2.3) and urges the creditors to vote in favour of the Proposed Scheme for the following reasons:

(a) the creditors stand to recover less in the event of a liquidation than under the Proposed Scheme;

(b) there is otherwise a danger that some individual creditors will commence enforcement action against members of the Berau Group thereby prejudicing the interests of the other creditors and the value of the group as a whole; and

(c) the inability of the Berau Group to operate as a going concern without the Proposed Scheme is "likely" to result in the Indonesian Government revoking Berau Coal's licenses to maintain its mining operations in Indonesia.

Issues on appeal

20 Before we set out the Judge's decision on the application and the arguments that are made on appeal, it is helpful to set out the four main issues before us for context. These are:

(a) What is the extent of a company's disclosure obligation at the stage where leave to convene a creditors' meeting is sought under s 210(1) of the CA and whether, in this case, proper and sufficient financial information has been disclosed by Empire Capital?

(b) What are the limits of the court's jurisdiction under s 210(1) of the CA where the proposed scheme purports to release liabilities between the company's creditors and third parties? This issue arises because the Proposed Scheme is put forward by Empire Capital as a guarantor and it contemplates the compromise and release of the liabilities of the primary obligors, BCR and BCE, under the 2015 and the 2017 Notes.

(c) How should the creditors be classified for the purpose of scheme meetings, and in this case, whether the 2015 and the 2017 Noteholders can properly be classified as a single class of noteholders for the purpose of voting on the Proposed Scheme? This issue arises because the Minority Creditors hold *more* than 25% of the outstanding debt under the 2015 Notes, and *less* than 25% of the outstanding principal amount of the 2017 Notes or of the aggregate amount outstanding under both Notes (see [13] above). Thus, while they *would not* have a veto right if the 2015 and the 2017 Noteholders were classed together, they *would* have a veto right in respect of the class of 2015 Noteholders if the noteholders were separately classed, assuming all else remains constant.

(d) Whether the present application amounts to an abuse of process by Empire Capital to prevent or delay legitimate enforcement on the 2015 and the 2017 Notes, especially in light of the history of restructuring applications commenced by the Berau Group?

Decision below

21 On 19 February 2018, the Judge delivered his decision in *Re Empire Capital Resources Pte Ltd* [2018] SGHC 36 ("the Judgment"), in which he allowed the creditors' meeting to be convened for the Proposed Scheme to be considered and voted upon, but held that the 2015 and the 2017 Noteholders should be grouped into two separate classes.

22 The Judge held that, as a general starting point, the court is primarily concerned at the leave stage with the proper exercise of its power to grant leave to convene a creditors' meeting. It may properly consider issues such as those relating to the classification of creditors, whether there is a realistic prospect of the proposal being approved, whether there has been an abuse of process, and the scope and jurisdictional validity of the scheme (at [34]–[37]). However, at

this stage, the court would not generally consider the merits of the scheme as that is left to the creditors to determine at the scheme meeting (at [36]).

23 The issues before the Judge were substantially the same as those before us on appeal. In this regard, the Judge's main holdings were as follows:

(a) In relation to the issue of disclosure, if there is "woefully inadequate information", the meeting ought not to be called as the circumstances would indicate a lack of *bona fides* (at [89]). But in this case, any deficiency did not go that far. Importantly, the Minority Creditors could not complain about inadequate disclosure because they were themselves not prepared to share with the other creditors an independent expert report which they had produced and relied on as evidence against the Proposed Scheme (at [90]).

(b) In relation to third party releases, s 210 of the CA is broad enough to cover the release of claims against third parties (at [59]). However, there must be a "nexus or connection" between the company's debt and the third party's debt that is sought to be released (at [65]). What amounts to a sufficient connection cannot be laid down with any precision: a wholly unconnected debt would certainly fail (at [65]), but where one is a guarantee for the other, a sufficient connection would generally be found (at [61]). In the present case, there was nothing objectionable in including third party releases against the co-guarantors in the Berau Group as part of the Proposed Scheme.

(c) In determining the proper classification of creditors, the main issue is whether the difference in rights or returns between the creditor groups is such that they cannot reasonably be expected to deliberate as a group (at [80]). In this case, while there may be some difference in returns to the 2015 and the 2017 Noteholders, that was not sufficient to preclude them from being in a single class (at [80]). However, the third party releases were a material distinguishing factor: "while the creditors may have a common element in the form of the guarantee by the applicant-company, as well as other commonalities, the fact that the creditors have other rights exercisable against different entities, would seem on its own to call for separation into different classes" (at [81]). Hence, the 2015 and the 2017 Noteholders should be separately classed.

(d) In relation to the issue of abuse of process, while some of the previous proceedings could have been avoided, there was nothing that amounted to an abuse of process by either side (at [96]). The fact that a number of related applications may have been filed previously is not in itself a bar, since there may be various reasons behind such applications, not all of which might be sinister or indicative of bad faith (at [96]).

Submissions on appeal

24 In CA 99, the Minority Creditors submit that the Judge should not have granted leave for the creditors' meeting to be convened on the basis of three distinct grounds:

(a) In relation to the issue of disclosure, Empire Capital, as well as the Berau Group, has not disclosed sufficient financial information for the creditors to make a properly informed decision about the Proposed Scheme.

(b) In relation to the issue of third party releases, the court has no power under s 210(1) of the CA to grant leave for a creditors' meeting where the proposed scheme requires the company's creditors to release third party debts that are not necessary to effect the proposed compromise or arrangement between the company and its creditors. On the facts, because Empire Capital is only a guarantor and *not* the primary obligor in respect of the 2015 and the 2017 Notes, the releases given under the Proposed Scheme to third parties – namely, the primary obligor and the other co-guarantors in respect of the same debts – are not necessary for the restructuring of Empire Capital and thus fall outside the scope of the court's statutory powers.

(c) The present application is an abuse of process. There have been four separate rounds of restructuring proceedings over six separate applications commenced by the Berau Group since 2015. Each of these has either been refused by the courts or voluntarily withdrawn at the last minute.

25 In CA 100, Empire Capital submits that the Judge erred in ordering that the meeting should proceed with two separate classes of creditors for two main reasons. First, Empire Capital argues that there is sufficient commonality of interest between all of the noteholders for them to vote in a single class. Second, in any event, it submits that the Judge's concerns regarding third party releases (see [23(c)] above) can be remedied by Empire Capital forgoing the release of BCR under the Proposed Scheme. With this modification to the proposal, the

Judge's concern would be addressed and all noteholders should hence be allowed to vote in a single class.

26 We will elaborate further on the parties' submissions where appropriate as part of the analysis below.

Our decision

An overview on schemes

27 A scheme of arrangement is a statutory mechanism for the implementation of a transaction between a company and its members or creditors. In recent years, for various reasons, it has become an increasingly popular tool for companies seeking to effect a debt restructuring. These reasons include the fact that it permits the debtor to remain in control of the company, and further permits a statutory majority of the company's creditors to impose their views even over the objections of a minority group of dissentients. For the same reasons, safeguards to protect the interests of the minority creditors, and of the creditors as a whole, are especially important.

28 In Singapore, the regime for schemes of arrangement is provided for in Part VII of the CA. Significant changes have been introduced to this regime with the recent amendments to the CA in 2017, and more changes are afoot with the Insolvency, Restructuring and Dissolution Act 2018 expected to come into effect in due course. So far as the present application is concerned, it is filed pursuant to s 210(1) of the CA, the material part of which reads as follows:

> Where a compromise or an arrangement is proposed between –
>
> (*a*) a company and its creditors or any class of them;

> …
>
> the Court may, on the application in a summary way of any person referred to in subsection (2), order a meeting of the creditors … or a class of such persons, to be summoned in such manner as the Court directs.

The term "person" is defined in s 210(2) as including the applicant-company under s 210(1) of the CA.

29 The principles and considerations underlying the court's decision on whether to grant leave to convene a creditors' meeting pursuant to s 210(1) are not prescribed by statute and have largely been developed by case law. From the case law as it stands, the following propositions may be gleaned:

(a) At the leave stage, the company should present a restructuring proposal "not necessarily ready for presenting to the creditors to be voted upon but with sufficient particulars to enable the court to assess that it is feasible and merits due consideration by the creditors when it is eventually placed before them in detailed form" (*Re Kuala Lumpur Industries Bhd* [1990] 2 MLJ 180 at 182).

(b) Issues that will be considered at the leave stage generally relate to the court's jurisdiction (see *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd and another appeal* [2012] 2 SLR 213 ("*TT 1*") at [57]–[67]). However, other matters that will lead the court to subsequently refuse to sanction a scheme should also be brought to the court's attention (see *Re T&N Ltd and others (No 3)* [2007] 1 BCLC 563 ("*T&N 3*") at [19]). Therefore, issues that should be raised and considered at the leave stage include:

(i) Classification of creditors, and in this regard, "[a]ny issues in relation to a possible need for separate meetings for different classes of creditors ought to be unambiguously brought to the attention of the court" (*TT 1* at [62]).

(ii) Whether there is a realistic prospect of the proposed scheme receiving the requisite approval of the creditors, as the court "should not act in vain in granting the application for meetings to be convened" (*TT 1* at [64]).

(iii) Any allegation of an abuse of process by the applicant-company: "…given the inherent jurisdiction of the court to ensure that its processes are not improperly invoked, an order under s 210(1) would be refused if it is shown that the application amounts to an abuse of process" (*Re Punj Lloyd Pte Ltd and another matter* [2015] SGHC 321 at [26]).

(c) Importantly, the company bears a duty of disclosure at the leave stage, in that, amongst other things, it must "unreservedly disclose all material information" to assist the court in determining how the creditors' meeting is to be conducted (*TT 1* at [62]).

(d) Other aspects of the court's inquiry at the leave stage include:

(i) that the court should generally not consider the merits and reasonableness of the proposed scheme, as these are issues that should be left for the creditors to decide (*TT 1* at [63]); and

(ii) that as time is ordinarily of the essence in restructuring matters, the leave application "should be heard on an expedited basis" (*TT 1* at [62]).

30 Assuming that leave is granted and the creditors' meeting is duly convened, under the present s 210(3AA) read with s 210(3AB) of the CA, a proposed scheme is binding on the company and its creditors if the following conjunctive requirements are satisfied:

(a) unless the court orders otherwise, more than 50% in number of the creditors present and voting either in person or by proxy at the creditors' meeting agree to the proposed scheme;

(b) more than 75% in value of the creditors present and voting either in person or by proxy agree to the proposed scheme; and

(c) the proposed scheme is approved by the court.

31 In this judgment, we have used "the leave stage" to refer to the time of the application under s 210(1) of the CA for leave to convene a creditors' meeting to consider and vote on the proposed scheme, and the term "the sanction stage" to refer to the time of the subsequent application where court approval is sought of a scheme passed by the requisite majority of creditors.

Issue 1: Disclosure obligations at the leave stage

32 Of the four issues we have set out above (at [20]), the issue of sufficiency of the financial disclosure by Empire Capital is of foremost importance in the present appeals.

Background

33 Some context is necessary before we proceed to the analysis proper. When the appeals first came before us in September 2018, the financial disclosures made by Empire Capital were contained in the scheme documents set out above (see [18]). At that time, the only information that was disclosed related to the financial situation of the Berau Group and its members up to 31 December 2014, which was almost four years prior to the appeal hearing. The information memorandum explained that Empire Capital had provided as much as was legally permissible under Indonesian law:

> The latest audited consolidated financial information available to the Noteholders as of and for the year ended December 31, 2014 has been audited by the Group's independent public accountants for that year. No financial information is available after that date... This Information Memorandum does not contain financial information with respect to Berau Coal, Berau Coal Energy or the Berau Group for the period subsequent to December 31, 2014 by reason of the fact that such financial information cannot be provided as a matter of applicable Indonesian law and regulation. As a public company in Indonesia that is subject to the rules, regulations and policies of OJK, the Berau Group is prevented from releasing material financial information until such time as management can be wholly satisfied as to the accuracy thereof and that there would be no material omissions in such information. The management of the Berau Group is not satisfied that it is currently in a position to comply with these laws and regulations since it continues to review and investigate the financial condition and statements of the Group and affiliates …

34 We had some initial concerns with the extent of the financial disclosure made by Empire Capital. We thus raised them at the first hearing on 14 September 2018 and invited counsel to address us on this issue. Thereupon, despite its earlier indication that it had disclosed all that it was permitted to under Indonesian law, counsel for Empire Capital informed us that the Berau

Group was prepared to make further disclosure. Accordingly, we gave Empire Capital time and directed it to make such further disclosure of "information that presents a true and fair view of the financial position and operations of the group to the most recent date possible".

35 Accordingly, on 31 December 2018, Empire Capital filed an affidavit disclosing "all material financial information that is available to it", including the following:

(a) Consolidated Statements of Profit and Loss and Other Comprehensive Income of Berau Coal as at 31 December 2017 and as at 30 June 2018;

(b) Balance sheet of Berau Coal as at 30 June 2018;

(c) Consolidated Statement of Cash Flow of Berau Coal for the period ended June 2018;

(d) Summary of tax payment for the year ended 31 December 2017, and the tax receipt from the Directorate General of Taxation of the Republic of Indonesia with respect to this payment;

(e) Details of Property, Plant and Equipment of Berau Coal as at 30 June 2018;

(f) Details of Restricted Cash of Berau Coal as at 30 June 2018;

(g) Balance in BCE and Berau Coal's respective CAMA accounts as at 30 June 2018;

(h) Business forecast for 2019, with some explanation as to the basis of the forecast, the likely difficulties, and the factors that might affect the Berau Group's operations; and

(i) Other information such as the relevant regulations in the coal industry, the Berau Group's corporate social responsibility projects, and the number of employees of Berau Coal in Indonesia as at June 2018.

36 We pause to note that despite the title or description of the documents which might suggest that a more comprehensive set of financial accounts had been made available, in fact the financial statements disclosed were unaudited and most of them were less than a page in length with sparse details.

37 Empire Capital also exhibited an updated position assessment by Deloitte & Touche Corporate Finance Pte Ltd ("Deloitte"), the financial advisor engaged by the Berau Group, which provided an explanation of Deloitte's estimation of returns to creditors in a liquidation scenario and under the Proposed Scheme based on the disclosed financial information of the group. According to the assessment, the rates of recovery were estimated to be as follows:

	Under the Proposed Scheme (Net Present Value)	**Liquidation**	
		Upper	**Lower**
2015 Notes			
Discount rate of 9.74%	63.7%	15.5%	11.7%
Discount	44.3%	14.1%	10.7%

rate of 15.0%			
2017 Notes			
Discount rate of 9.74%	63.7%	12.7%	8.7%
Discount rate of 15.0%	44.3%	11.5%	7.9%

38 The discount rate of 9.74% used to estimate the net present value of the expected future recoveries under the 2015 and the 2017 Notes was derived based on the weighted average original contractual interest rates under the notes. The alternative discount rate of 15% was used by Deloitte for the purpose of illustration.

39 Importantly, Empire Capital also stated on affidavit that, save for updates, nothing further will be disclosed at the sanction stage:

> 44. Subject to guidance from the Honourable Court, [Empire Capital] will only submit additional evidence relating to its financial position and operations at the sanction stage of the Scheme insofar as any such additional evidence relates to updating the information being provided herein.

Submissions

40 Empire Capital argues that the information disclosed presents a true and fair view of the Berau Group's financial position, and is sufficient to allow the creditors to make an informed decision as to the merits of the Proposed Scheme. As against the submission that the disclosure it has made remains inadequate, Empire Capital makes the following arguments:

(a) The Berau Group is a contractor of the Indonesian Government and therefore requires approval from the relevant Indonesian authorities for the disclosure of financial information to third parties, especially if there are foreign entities. In this instance, Empire Capital has already gone to considerable lengths to obtain permission to provide the present disclosures.

(b) The Minority Creditors' demands for disclosure of the Berau Group's "highly sensitive trade secrets such as the average selling price of… coal" are unreasonable given that the Minority Creditors are related to a primary competitor of the group.

(c) Several deficiencies alleged by the Minority Creditors go to the merits of the Proposed Scheme and not to the composition of the classes of creditors or whether the creditors' meeting and therefore the Proposed Scheme are doomed to failure. Thus, these purported deficiencies ought not be examined at the leave stage.

41 On the other hand, the Minority Creditors submit that, even with the further disclosure, there has been woefully inadequate disclosure for the following reasons:

(a) No information has been provided on the entities whose debts are sought to be compromised besides Berau Coal;

(b) No audited accounts or information equivalent to what would have been contained in such accounts have been furnished;

(c) No information on the debts of related parties or of trade creditors has been provided;

(d) No operational data on the coal mining group has been provided;

(e) The position assessment by Deloitte is misleading;

(f) There have been undisclosed recent share sales in BCE and Berau Coal at valuations which suggest that the financial situation of the Berau Group is not as bad as the group claimed.

42 In light of these inadequacies, the Minority Creditors suggest that the financial situation of the Berau Group may in fact be far better than is presented by the group and that the group may not even be close to insolvency.

43 Thus, the Minority Creditors submit that leave ought not be granted as Empire Capital has not provided satisfactory disclosure despite several opportunities for it to do so, and/or the creditors' meeting would be futile if not unfair because the creditors do not have the requisite information that would enable them to consider how to vote on the Proposed Scheme.

Legal principles

44 At the outset, we observe that there are provisions in the CA relating to the company's disclosure obligations in the context of a scheme of arrangement. For instance, s 211B(6) of the CA requires the court, when it makes a moratorium order under s 211B(1), to order the company to submit within such time "sufficient information relating to the company's financial affairs to enable the company's creditors to assess the feasibility of the intended or proposed

compromise or arrangement". Section 211(1) also provides for the notice requirement when a creditors' meeting is due to be convened, and requires, amongst other things, an accompanying statement "explaining the effect of the compromise or arrangement" and declaring certain material interests of the company's directors.

45 The sufficiency and comprehensiveness of these statutory disclosure obligations, which might appear or be thought to be relatively bare given the importance of informed creditor decision-making in the scheme regime, have been criticised. For instance, Professor Wee Meng Seng has expressed the following view in "Whither the Scheme of Arrangement in Singapore: More Chapter 11, Less Scheme?" (24 February 2017) <https://ssrn.com/abstract=2922956> at p 5:

> A striking feature of the law on scheme is that it contains the barest minimum of statutory provisions and no subsidiary legislation. First, the provisions give very little guidance on the extent that a company is required to disclose to the creditors regarding the company and the proposed scheme. A critical feature of the scheme process is its reliance on creditor evaluation and majority consent within each class as a means of resolving the complex web of conflicting interests and assessments of the company's value at stake. It is clearly insufficient for the statute to stipulate only that the company is required to explain the effect of the scheme and to state any material interests of the directors and the trustee for the debenture holders that differ from the others voting on the scheme.

46 In any event, none of the provisions directly relate to the company's financial disclosure obligations at the leave or sanction stages. Indeed, s 211B of the CA was not even operative when the present application was filed.

47 Therefore, the standard of disclosure that is required of an applicant-company must be determined by reference to the relevant case law. Insofar as the sanction stage is concerned, we recently affirmed the long-standing position that the company must demonstrate that it has disclosed, by the time of the creditors' meeting, sufficient information to ensure that the creditors are able to "exercise their voting rights meaningfully" (*SK Engineering & Construction Co Ltd v Conchubar Aromatics Ltd and another appeal* [2017] 2 SLR 898 at [88]; *Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd* [2003] 3 SLR(R) 629 ("*Wah Yuen*") at [24]; *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT international Ltd and another appeal* [2012] 4 SLR 1182 at [16]).

48 We accept as a general proposition that a less onerous standard of disclosure is required of the applicant-company at the leave stage than at the sanction stage. This proposition is well established in case law and the parties do not seem to disagree, even though in their submissions they have emphasised different aspects of the standard to suit their respective positions. One illustrative authority is *Re Attilan Group Ltd* [2018] 3 SLR 898, where the High Court explained that two distinct standards of disclosure exist and should not be confused (at [38]):

> The requirements imposed by the courts for all material information to be given by the applicant at the calling of meeting stage is intended to ensure that there is sufficient material before the courts for an informed decision to be made as to how the creditors' meeting is to be conducted: see *TT International* at [62]. … This, however, is not to be confused with the sufficiency of information that must be disclosed under s 211 of the CA, after the leave to convene the creditors' meeting is granted. At this latter stage, more detailed information is

> required to ensure that the creditors will be able to "exercise their voting rights meaningfully" …

49 A less onerous requirement of disclosure at the leave stage is also consistent with the recognition that matters are usually in a greater state of flux at this relatively early stage in the restructuring process. Thus, for instance, courts will not require a finalised restructuring plan at the leave stage and the company need only present a proposal with "sufficient particulars" (see [29(a)] above). Further, given that a creditors' meeting will subsequently be convened at which time the views and votes of the creditors will be taken, the sufficiency of financial disclosure may, within limits, be seen as a matter of commercial risk for the creditors to weigh, and an overly-restrictive approach taken by the court might prematurely deprive the creditors of an opportunity to evaluate the quality or sufficiency of the disclosure and the viability of the proposed scheme for themselves.

50 However, we must emphasise that even this less onerous standard of disclosure at the leave stage is not wholly without bite, and there remains a minimal standard of disclosure that a company must satisfy before leave will be granted under s 210(1) of the CA. As we have noted above (see [29]), existing jurisprudence makes clear that at the leave stage, the company bears a duty of unreserved disclosure to assist the court in determining whether and how the creditors' meeting is to be conducted. This must be taken to require at least such disclosure as would enable the court to determine the issues that it must properly consider at this stage, such as the classification of creditors, the proposal's realistic prospects of success, and any allegation of abuse of process.

51 In our judgment, the balance between the company's desire to table a proposal, the creditors' right to consider such a proposal, and the court's overriding duty to ensure the proper exercise of its statutory powers, is correctly struck by requiring, in addition, that the company provide such financial disclosure by the leave stage in such manner and to such extent as is reasonably necessary for the court to be satisfied that fair conduct of the creditors' meeting is possible.

52 We consider this formulation to be justified in principle. As an aspect of the company's duty of disclosure at the leave stage, it should not be applied in a manner that is particularly onerous or exacting. The leave application is, after all, usually heard on an expedited basis (see [29(d)(ii)] above). But this does not mean that the duty is a hollow one, and the court should not be taken as a rubber stamp just because the proposed scheme would likely return to the court at the sanction stage. By that later stage, if an unsuitable creditors' meeting had been convened in the interim, it is likely that valuable time and resources would have been spent, positions crystallised, the financial situation deteriorated, and serious distrust engendered, all of which may be fatal to any prospective rehabilitation of the company while also being unfairly prejudicial to the creditors. Thus, if the disclosure made is so lacking at the leave stage and it appears that nothing further will be forthcoming, there would be no reason for the court to grant leave under s 210(1). This is quite aside from whether the scheme is doomed to fail or whether there is an inference of abuse of process. Rather, the overarching focus in this context is on the question of fairness in the conduct of the creditors' meeting, and the sufficiency of the financial disclosure is pivotal to that end because it underpins the integrity of the scheme regime and provides a real safeguard to this exercise in creditor democracy. It should be

reiterated that the scheme regime often entails a significant compromise on creditors' rights and that it is imperative to ensure that there is fairness in the process so that the creditors, in particular the dissenting ones, are able to make their case to the whole body of creditors that the proposed scheme should (or should not) be approved. Where the fairness of the creditors' meeting is patently compromised, it is legitimate for the court to refuse leave even if the proposed scheme is thought likely to obtain the requisite votes and there is no finding of abuse of process.

53 This is also consistent with our holding in *TT 1*, where we unequivocally affirmed the existence of a duty on the company at the leave stage "*to unreservedly disclose all material information* to the court to assist it in arriving at a properly considered determination on how the scheme creditors' meeting is to be conducted" [emphasis original] (at [62]). We explained that this duty was necessary for the local adoption of the practice in the UK regarding similar applications for leave laid down in the *Practice Statement (Companies: Schemes of Arrangement)* [2002] 1 WLR 1345, in which it was unequivocally stated, amongst other things, that it is the company's responsibility, at the leave stage, "to draw to the attention of the court as soon as possible any issues which may arise as to the constitution of meetings of creditors or which otherwise affect the conduct of those meetings…" (at para 4). To this end, the conduct of the creditors' meeting is indisputably an issue within the court's consideration at the leave stage, and we cannot see how this can meaningfully be addressed if the financial disclosure at this stage is so patently inadequate that a fair meeting is not possible in all the circumstances.

54 Further, this formulation of the disclosure requirement is also consistent with other aspects of the scheme regime. We raise two illustrations:

(a) One, as we have stated above (see [29(a)]), although a finalised restructuring plan need not be produced by the leave stage, the company should nevertheless present a restructuring proposal "with sufficient particulars to enable the court to assess that it is feasible and merits due consideration by the creditors when it is eventually placed before them in detailed form". This necessitates a certain, albeit minimal, level of financial disclosure by the leave stage so that the court can assess whether the proposed scheme, though lacking in finality and detail, is at least "feasible and merits due consideration by the creditors".

(b) Two, in *TT 1*, we also stressed that the explanatory statement must be "perfectly fair and, as far as possible, give all the information reasonably necessary to enable the recipients to determine how to vote" (at [65], citing *In re Dorman, Long and Company, Limited* [1934] Ch 635 at 657). Although the language of s 211(1) of the CA suggests that the explanatory statement need only be sent to the creditors after the court has granted leave under s 210(1), it is now common practice, and also the case here, that the explanatory statement is provided to the court at the leave stage in support of the leave application. In that light, we similarly consider that a minimal level of financial disclosure is necessary to enable the court to assess the fairness and adequacy of the explanatory statement.

55 In addition, this formulation is also consistent with the dictum of Snowden J in *Re Indah Kiat International Finance Company BV* [2016] EWHC

246 (Ch) ("*Indah Kiat*") with which we broadly agree. *Indah Kiat* too involved an application seeking leave to convene a meeting of the scheme creditors. At [38], Snowden J opined that leave should not be granted because he considered that "the evidence adduced by the [applicant-company] as to the appropriate composition of the scheme meeting(s) and the draft explanatory statement are materially deficient in their current form". Under the sub-heading "The role of the court at the convening hearing", he went on to explain as follows:

> 39. It is, of course, well understood that the convening hearing is "emphatically not" the occasion upon which the court considers the merits or demerits of a scheme or engages in a debate as to any of the discretionary factors which will ultimately be relevant to the decision whether or not to sanction the scheme at the sanction hearing… As I have indicated above, the only issues that are generally appropriate to be considered at the convening hearing are the proper class composition of the scheme meetings, together with any other essential issue which, if decided against the scheme company, would mean that the court simply had no jurisdiction or would unquestionably refuse to sanction the scheme.
>
> 40. *But the court is not bound to accept at face value bare assertions in the evidence in relation to class composition or any other matter. At the convening hearing, the applicant company has the burden of adducing evidence of sufficient quality and credibility to persuade the court to act. Further, and importantly, whether or not there is any opposition, the company proposing a scheme of arrangement has a duty to make full and frank disclosure to the court of all material facts and matters which may be relevant to any decision that the court is asked to make. The scheme jurisdiction can only work properly and command respect internationally if parties invoking the jurisdiction exhibit the utmost candour with the court.*
>
> 41. In addition, the task of producing an explanatory statement is the sole responsibility of the scheme company, and it is well-established that the scheme company has a duty to place before members or creditors sufficient information for them to make a reasonable judgment as to whether the scheme is in their commercial interest or not…
>
> 42. It is most assuredly not the function of the court at the convening hearing to approve the contents of the explanatory

> statement (not least because the court has no means of investigating whether what is said is accurate or complete). However, if the court detects, or its attention is drawn to, manifest deficiencies in the draft explanatory statement, it must be entitled to decline to convene the scheme meeting unless and until they are corrected. …
>
> [emphasis added in italics, original citations omitted]

56 We agree with Snowden J that the integrity of the scheme regime and its utility as a restructuring tool should not be compromised by allowing parties to invoke the court's scheme jurisdiction where they have acted with less than "utmost candour". Although there may have been suspicious circumstances in *Indah Kiat* that are not present in our case, the approach taken by Snowden J was not premised on a finding of dishonesty or a lack of good faith, and it remains pertinent for our purposes. We therefore respectfully disagree with the Judge's view that *Indah Kiat* may be distinguished on the basis that it concerned an applicant who lacked *bona fides* (see the Judgment at [89]).

57 In approaching the matter in this way, we are not unappreciative of the concerns of and difficulties faced by applicant-companies who seek refuge of the scheme regime in times of financial turmoil. Operating under time, cost, and creditor pressures, comprehensive and wholly accurate financial disclosure of a similar standard as might be expected of a solvent and well-operated company will often simply not be feasible. Disclosure obligations that are oppressive may thus fetter genuine attempts at restructuring, especially by smaller companies lacking resources and bargaining power. In this context, we stress three points that should guide the application of this disclosure requirement:

> (a) First, it is only in clear and obvious cases that the court should intervene at the leave stage solely on the ground of inadequate

disclosure. As we have mentioned above (see [49]), although this logic cannot be taken to its extreme, the adequacy of disclosure is to some extent a matter of commercial risk for the creditors themselves to weigh against other commercial factors.

(b) Second, as would be evident on the face of the disclosure obligation that we have formulated (see [51] above), reasonableness frames the court's inquiry into whether the company has provided sufficient disclosure. This is contextual, and relevant factors would include the size and resources of the company, the size of the debts to be restructured, the urgency of the application, and the reasons for the company's inability to provide further disclosure. We emphasise, however, that although the reasons for non-disclosure may be taken into account, the ultimate question of sufficiency is an objective one for the court to decide.

(c) Third, unless there are complications such as significant legal issues to be considered, we envisage that the leave stage will remain a largely expedited process. In this regard, the court has and will continue to accommodate, so far as possible, the parties' requests for expedition, and we reiterate what we said in *TT 1* at [62]:

> Concerns about delays and contentious proceedings at an early stage may be somewhat overstated as the court has complete carriage over timelines and the conduct of the proceedings. In our view, even if there is a need at this stage to hear potentially dissenting creditors, such a hearing could usually be conducted expeditiously and summarily. …

58 Further, we should also stress that we are not departing from the long-standing principle mentioned above (at [29(d)(i)]) that the merits and

reasonableness of a proposed scheme are matters left for consideration at the sanction stage. In our judgment, in examining the sufficiency of the financial disclosure at the leave stage to determine the possibility of a fair creditors' meeting, the court is not concerned with the merits of the proposed scheme, but rather with the fairness of the context in which the scheme is to be presented to the creditors. These are distinct inquiries. Even an eminently reasonable and pro-creditor scheme can be presented in circumstances that cast doubt on the fairness of the manner in which it is put forth for consideration.

59 Finally, we also add that an inquiry into the sufficiency of financial disclosure at the leave stage does not preclude the court from re-examining the same issue of disclosure at the sanction stage under the applicable standard at that stage (see [47] above; see also *Indah Kiat* at [42]).

Application to facts

60 Having set out the law and its justifications, we turn to the facts.

61 In the present case, Empire Capital stated on affidavit that, save for updates to the information already provided, no further disclosure will be made between now and the sanction stage. In our view, this unique circumstance is a reason for closer scrutiny of the sufficiency of the disclosure already made. Indeed, a strong argument could be made that the more stringent standard of disclosure applicable at the sanction stage ought to apply. However, even under the less onerous standard of disclosure at the leave stage, the Proposed Scheme does not pass muster. Two points in particular trouble us.

62 The first point relates to the complete lack of updated financial information about the companies whose debts are sought to be compromised under the Proposed Scheme. There are four main aspects:

(a) First, no financial disclosure (whether audited or otherwise) has been made in relation to any member of the Berau Group other than Berau Coal. This is so even though the Proposed Scheme seeks to compromise the debts of 10 other obligors within the Berau Group. The financial statuses of those entities remain opaque to the scheme creditors and the court. In particular, the financial statements of BCR and BCE, as the companies that issued the 2015 and the 2017 Notes in the first place, are not available even though BCR was incorporated in Singapore. Nor, curiously, are the financial statements of Empire Capital who is the applicant before us. We are not aware of any precedent in Singapore or indeed elsewhere where leave has been granted for a creditors' meeting to be convened in similar circumstances where the financial disclosure is so woefully inadequate.

(b) Second, even in relation to Berau Coal, the latest set of audited accounts disclosed was for the year 2014, which was almost four years prior to the first hearing of these appeals. This is wholly unsatisfactory. What we find of even more concern is the concession by counsel for Empire Capital at the hearing in January 2019, when pressed by us for the reason why the financial statements of Berau Coal had not been audited, that there was no need for such audit since the Indonesian regulatory authorities had not required it. We are unable to accept this explanation because it suggests that the Berau Group *chose* not to audit its financial statements even though it plainly could have done so.

(c) Third, we consider that little weight can be placed on the position assessment by Deloitte, on which Empire Capital relies heavily. This assessment suggests on its face that the creditors stood to recover more under the Proposed Scheme than in a liquidation scenario (see [37] above). We are concerned, however, that the assessment was based on the deficient primary financial information provided by the Berau Group. For instance, the liquidation recovery analysis was "prepared primarily based on [Berau Coal's] net book values as of 30 June 2018 as set out in [Berau Coal's] unaudited management accounts" (at para 3.6 of the assessment). As we have already mentioned, not only were these accounts unaudited, no information about the other obligors was provided or considered. Further, the assessment assumes the very issues that the creditors should be in a position to assess for themselves with adequate disclosure of the Berau Group's financial information. For instance, Deloitte stated at para 3.1 that the liquidation recovery analysis was prepared:

> … on the basis that the Berau Group will be unable to continue to carry on business as a going concern and the recoveries will be achieved through a forced sale of Berau Group's assets through the enforcement of collateral and/or guarantees and the bankruptcy/liquidation of the companies within the Berau Group in the event that the proposed restructuring of the 2015 Notes and 2017 Notes are not completed.

However, as we understand it, the Minority Creditors' precise complaint is that the Berau Group is in a better financial situation than it claimed, that it may not be insolvent, and that it may not need to realise its value through a forced sale of its assets (see [42] above). Indeed, these appear to be reasonable concerns that will weigh on the minds of every creditor.

Given this, the Deloitte position assessment does not assist Empire Capital in discharging its duty of disclosure. On the contrary, it may have the effect, perhaps unintended, of confusing creditors into thinking that there is independent support for what in the end is the Berau Group's own assessment of the comparative positions.

(d) Fourth, although some updated unaudited statements of Berau Coal were belatedly disclosed (see [35] above), the information is so sparse and unreliable that it does not constitute meaningful disclosure. For instance, as the Minority Creditors have pointed out, the 2018 unaudited accounts of Berau Coal are only four pages long whereas its 2014 audited accounts covered more than 300 pages.

63 In the circumstances, on this basis alone, we would consider the financial disclosure by Empire Capital to be so wholly inadequate that it is impossible for the court to be satisfied that any creditors' meeting can be fairly conducted.

64 The second point on inadequate disclosure relates to the absence of information concerning the funds that ought to have been paid into the CAMA accounts of BCR and BCE who were the issuers of the 2015 and the 2017 Notes. These accounts form part of the security packages for the two notes sought to be compromised under the Proposed Scheme (see [10] and [11] above). The Minority Creditors claim that an aggregate sum of at least US$150m has been wrongfully diverted from these CAMA accounts from around April 2016. Empire Capital denies the claims and avers that it could not make payment to these accounts for various legitimate reasons, including the resignation of the account bank overseeing the CAMA accounts. According to counsel for Empire

Capital, for some time, no funds have flowed into these accounts and in fact some monies have been withdrawn for use in the group's operations.

65 In our judgment, the disclosure made in relation to the funds that ought to have been paid into the CAMA accounts is insufficient, and this is so for three main reasons. First, the CAMA accounts are indisputably an essential security right under the notes, and the Proposed Scheme obliges the creditors, including the Minority Creditors, to surrender their right to pursue any CAMA account-related claim against the Berau Group. Second, the proper payment and use of these funds have been clearly put into question by the Minority Creditors from the outset, and Empire Capital has not provided any meaningful response apart from a bare denial of wrongful conduct, despite several opportunities to do so. Indeed, many of the "disclosures" made by Empire Capital in relation to these funds were put forward by way of submissions and not evidence adduced under oath. The explanations are also not sufficiently specific to address the concerns raised by the Minority Creditors. Third, even though Empire Capital belatedly disclosed the balances of the CAMA accounts as of 30 June 2018 (see [35(g)] above), this does not assist because these static account balances do not address the question of what happened to the funds that should have been but evidently were not paid into the accounts.

66 In the circumstances, we do not consider it possible for a creditors' meeting to be fairly conducted without at least some information provided as to the status of the disputed CAMA-account funds. For the avoidance of doubt, we make no comment on the merits of the Minority Creditors' claim of wrongful diversion.

67 Empire Capital advances several arguments in an attempt to excuse its inadequate disclosure of information, but we are not persuaded by any of them.

68 First, Empire Capital claims that from the perspective of the group's management, Berau Coal is the only entity within the group with any material and tangible assets, and therefore the only entity relevant in assessing the group's financial position. We do not accept this. The assertion rests on the premise that the other members of the Berau Group involved in the Proposed Scheme have no significant assets, but that is precisely the question for the creditors to assess after being provided with sufficient financial disclosure.

69 Second, Empire Capital also explains that the disclosure made is the best that it can provide, especially since the new owners of the group have only taken control in 2015. We have serious doubts over the validity of this explanation. There seems to us to be no reason why investigations into the affairs of at least some of the companies concerned would be impossible or unduly onerous. Several of these companies are wholly owned subsidiaries within the group, are said to have few assets, and were incorporated in Singapore. Indeed, at the second hearing in January 2019, counsel for Empire Capital accepted that steps could have been taken to investigate the financial situations of some of these companies, but explained that this was considered unnecessary because the companies are thought to be operationally irrelevant from the perspective of the management. Having chosen not to conduct any investigation, the Berau Group must bear the consequences of its choice. In our judgment, the financial situations of the other companies under the Proposed Scheme remain legally

relevant insofar as the debts they owe to the scheme creditors are sought to be compromised.

70 To the foregoing analysis we add three further observations:

(a) Insofar as the Judge placed weight on the fact that the Minority Creditors were themselves not entirely willing to disclose their expert reports to all the noteholders (see [23(a)] above), we respectfully think that he erred. Empire Capital is the applicant and *it* bears the burden to show that it has discharged its duty of disclosure. It is not the Minority Creditors' duty to prove that the disclosure is lacking. Indeed, at the sanction stage, there is authority that the court will not sanction a proposed scheme if the company's disclosure is found wanting, regardless of the objector's ulterior motives (*Wah Yuen* at [38]). It cannot be, therefore, that a creditor's acts may excuse the company from its failure to discharge its own disclosure obligations at the leave stage.

(b) In relation to the relevance of prejudice, as counsel for the Minority Creditors candidly accepted, it appears to us that the Minority Creditors are unlikely to be materially prejudiced even if leave were granted for the creditors' meeting to proceed since the court would have the opportunity to consider the matter more closely at the sanction stage. However, it would be wrong to grant leave under s 210(1) merely on the basis that the balance of prejudice lies in favour of doing so. The question of the adequacy of financial disclosure is one of principle and fairness, as explained at [52] above. Prejudice, in the sense of immediate harm to the objecting creditor in having the meeting convened, is not and should not be the controlling test.

(c) We are concerned about the incremental nature of the disclosures provided by Empire Capital in the present case, and we caution future applicants against the same. As we mentioned (at [62(b)]), at the end of the second hearing in January 2019, when it became clear that we were troubled by the issue of disclosure, counsel for Empire Capital suggested that an audit of the financial statements of Berau Coal might be arranged. This is less helpful than it is troubling. At the first hearing in September 2018, we had already given Empire Capital an opportunity to provide all further disclosure that it considered necessary to sustain its application, and it elected to make some further disclosure even though it had earlier stated that it was prevented by Indonesian laws and regulations from doing so. In our view, this series of events simply demonstrates that Empire Capital has not unreservedly disclosed all material information, and has obviously not acted with utmost candour in seeking to invoke the jurisdiction of the court.

71 For these reasons, we hold that Empire Capital has failed to provide the scheme creditors with the minimal level of financial disclosure reasonably necessary to satisfy us that fair conduct of the creditors' meeting is possible. Furthermore, we also consider that the financial disclosure made is so insufficient that (a) the court is not able to assess the proper classification of creditors, as there is insufficient information to determine the most realistic alternative to a successful scheme and the validity of the assumption in Deloitte's position assessment that insolvency is the most realistic alternative, these being preliminary issues that need to be answered for the classification of creditors to be determined (see [62(c)] above and the analysis at [88] and [90]

below), and (b) it would be an exercise in futility to grant leave since the court would not sanction the Proposed Scheme in any event.

Issue 2: Third party releases

72 The foregoing analysis suffices to dispose of the appeals, but in light of the submissions made on the other issues and for the benefit of those embarking on future restructuring plans, we briefly state our provisional views on the remaining issues.

73 The first of these issues is the jurisdiction of the court to sanction a scheme that seeks to compromise a debt between the creditor and a third party (see [20(b)] above).

74 The Minority Creditors argue, first, that this is an issue going to the court's jurisdiction and should therefore be considered at the leave stage, and second, that only third party releases that are "necessary" to give effect to the proposed scheme may be compromised under a scheme of arrangement. According to them, given the nature of a guarantee, while a *primary obligor* may propose a scheme that involves a release of its *guarantor's* liabilities, a *guarantor* cannot propose a scheme that involves a release of the *primary obligor's* liabilities because such release is not "necessary" for the compromise of liabilities between the guarantor and its creditors.

75 Empire Capital submits that this issue should not be considered at the leave stage. Rather, it is a question for the creditors to consider at the scheme meeting, and thereafter for the court to consider at the sanction hearing. In any event, there is no hard and fast limitation on the jurisdiction of the court to

sanction a scheme under which third party debts are released. Courts do not and should not draw a distinction between the release of third party "primary" and "secondary" obligations. Further, even if the test of necessity is adopted, the Proposed Scheme satisfies the test because non-release of liabilities owed by the other members of the Berau Group will "self evidently hamper the success of the Proposed Scheme on a holistic and comprehensive basis".

76 In our view, the fact that a proposed scheme seeks to release third party liabilities may be considered both at the leave stage and the sanction stage, but the focus of the court's inquiry will be different at each of the two stages. At the leave stage, the question for the court is jurisdictional, and this rests primarily on a construction of s 210(1) of the CA. At the sanction stage, however, the court's focus will primarily be on the merits and the reasonableness of the inclusion of such third party releases in the proposed scheme, although jurisdictional challenges on the issue may also be raised then.

77 In relation to the substantive test of jurisdiction, it seems to us that the proper inquiry is similar to that which the Judge had formulated (see the Judgment at [65]): whether there is a sufficient nexus or connection between the release of the third party liability and the relationship between the company and the scheme creditors. In this regard, we agree with the Judge that the decision of the Federal Court of Australia in *Re Opes Prime Stockbroking Ltd* [2009] FCA 813 ("*Re Opes*") is persuasive. There, Finkelstein J had to consider a scheme under which creditors of the company were required to release claims against third parties including another company in the corporate group, certain banks, liquidators, and receivers. After discussing three cases from the UK,

Canada, and Singapore (the case being *Daewoo Singapore Pte Ltd v CEL Tractors Pte Ltd* [2001] 2 SLR(R) 791), Finkelstein J opined at [48] that:

> The approach evident in the pro-release cases is that the scheme of arrangement provisions are intended to be a flexible instrument and it is that flexibility which gives the provisions their efficacy. When first enacted in England as ss 159–161 of the Companies Act 1862, 25 & 26 Vic, c 89, the provisions were intended to facilitate compromises and arrangements between insolvent companies and their members and creditors as an alternative to liquidation. Now they have a much wider purpose, including allowing businesses to restructure or reorganize their affairs to enable them to go forward in a better condition, or to amalgamate their business so as to reduce expenses and compete with greater effect.

78 Finkelstein J then proceeded to examine the US jurisprudence, and concluded at [55] that a pro-release approach that is governed by a test of "sufficient nexus" should be adopted:

> Accepting that the approach to the construction of s 411 should ensure that the section has a flexible operation, I have no doubt… that I should follow the approach in the pro-release cases to which I have referred. In other words, *provided there is a sufficient nexus between a release and the relationship between the creditor and the scheme company, the scheme can validly incorporate the release.* …
>
> [emphasis added]

79 We agree that there is much practical attraction in the "sufficient nexus" test. The Minority Creditors urge us to come to a contrary view, submitting, amongst other things, that *Re Opes* in fact applied a necessity test and that later decisions of the Australian courts did not follow the case. We are not persuaded. It suffices to say that it appears to us that, save for minor differences in emphases and formulation, the "sufficient nexus" test remains the law in Australia so far as schemes of arrangement are concerned (see, for instance, *Fowler v Lindholm,*

Re Opes Prime Stockbroking Ltd (2009) 259 ALR 298 at [73]; *Lehman Brothers Australia Ltd, in the matter of Lehman Brothers Australia Ltd (in liq) (No 2)* [2013] FCA 965 at [80]). Further, there also does not appear to be good reasons for drawing a distinction between a "primary" and a "secondary" obligation in the context of a guarantee for the purpose of determining jurisdiction under s 210(1) of the CA.

80 On this basis, the Proposed Scheme would appear to fall within the scope of s 210(1) of the CA since the release of the debt owed by other members of the Berau Group to the 2015 and the 2017 Noteholders is evidently closely related to the creditor-debtor relationship between these noteholders and Empire Capital. The debts all arise out of the same note issues and indeed, from the creditors' view, are effectively the same liability since the discharge of one extinguishes the right to pursue the other. On this basis, it is not relevant to the court's jurisdiction under s 210(1) of the CA whether the scheme applicant is the issuer of the notes (BCR and BCE) or a guarantor of the same (Empire Capital).

81 Even if the test of necessity were to be adopted, as the Minority Creditors propose, we would have been inclined to find that it would be satisfied on the present facts. In our judgment, having regard to the legislative context of s 210(1), any jurisdictional test would have to be applied in a commercially sensible manner particularly where a group restructuring is concerned. In this context, even if it was the guarantor and not the primary obligor who was the scheme applicant, a release of the third party debt owed by the primary obligor to the scheme creditors would still be regarded as necessary, since otherwise liability and enforcement risks would merely be shifted between members of

the corporate group and the overall restructuring objective would be entirely unmet. Indeed, without a release of the primary obligor's liability, it seems to us unrealistic to even expect a guarantor within the same corporate group to settle or compromise its contingent liability through a scheme of arrangement. In that context, the third party releases must be viewed as necessary to give effect to the Proposed Scheme.

82 For these reasons, we would have affirmed our jurisdiction to grant leave under s 210(1) of the CA in respect of the Proposed Scheme notwithstanding that the scheme applicant is Empire Capital who is a guarantor of the 2015 and the 2017 Notes, and that there are third party debts, including those of the primary obligors, sought to be compromised.

Issue 3: Classification of creditors

83 The next issue is whether the 2015 and the 2017 Noteholders should be classified as a single class of creditors for purposes of considering and voting on the Proposed Scheme (see [20(c)] above). There is no dispute that this issue is one for the leave stage. The significance of this issue is that it affects the question of whether the Minority Creditors will have a veto right over the Proposed Scheme at the creditors' meeting.

84 Empire Capital argues that the 2015 and the 2017 Noteholders should be classified into one group, relying substantially on the following similarities between the two sets of Notes which allegedly give rise to a "commonality of interests" between the noteholders:

(a) they are secured over substantially the same assets;

(b) the securities over the underlying obligations are granted to the same common security agent, and are governed by the same inter-creditor agreement; and

(c) both notes utilise CAMA accounts with the same account banks and are held by the same trustee.

85 Empire Capital further highlights that the obligors for both sets of notes are identical save for one exception: BCR is an obligor of the 2015 Notes but not of the 2017 Notes. However, this is said to be immaterial because BCR is a S$2 company with no operations or significant assets. In any event, Empire Capital has indicated that it is prepared to remove BCR from the Proposed Scheme so as to address any concern in this regard.

86 The Minority Creditors submit that the 2015 and the 2017 Noteholders should be put into separate classes because of the following differences in their positions:

(a) they have rights against different obligors and different issuers based in different jurisdictions;

(b) the notes have different interest rates;

(c) they will be required to compromise different securities under the Proposed Scheme; and

(d) they have different recovery rates in the liquidation scenario.

87 We had some difficulty understanding the legal frameworks applied by the parties and so take the opportunity to clarify the proper legal approach. The

proper test for creditor classification was stated as follows by this court in *TT 1* at [133]: "if the scheme favours or prejudices a group of creditors (against other creditors) differently from how they would be favoured or prejudiced in [the situation of a comparator] … then that group of creditors should be classed separately". A comparator, in this context, refers to "the most likely scenario in the absence of scheme approval" (*TT 1* at [140]), which will often although not necessarily be insolvent liquidation. In this sense, it is perhaps helpful to see the test for creditor classification as not a "static" one that is singularly focused on the creditors' plight under the proposed scheme *or* in a liquidation situation, but rather a "dynamic" inquiry that examines whether the creditors will be affected by the proposed scheme *to the same extent*.

88 In practical terms, under the approach laid down in *TT 1*, there are three broad steps to creditor classification:

> (a) First, identify the comparator. For instance, in *TT 1*, the court considered the expert evidence and stated at [142]: "In the present case, the appropriate comparator was an insolvent liquidation. Without the [proposed scheme], the liquidator would distribute the contingent claimants a portion of the [company's] assets (on a *pari passu* basis) based on the 'just estimate'… of their contingent claims. …"
>
> (b) Second, assess whether the *relative* positions of the creditors under the proposed scheme *mirror* their *relative* positions in the comparator. This implies that at least four positions must be identified and compared: the positions of the two groups of creditors under the proposed scheme, and their positions in the comparator.

(c) Third, if there is a difference between the creditors' relative positions identified in the second step, assess whether the extent of the difference is such as to render the creditors' rights "so dissimilar that they cannot sensibly consult together with a view to their common interest" (*Wah Yuen* at [11]; *TT 1* at [131]). This raises a question of judgment and degree. In *TT 1* at [140], we explained the approach in these terms: "if a creditor's (or a group of creditors') position will improve or decline to such a different extent *vis-à-vis* other creditors simply because of the terms of the scheme… assessed against [the comparator], then it should be placed in a different voting class" (see also *TT 1* at [133], [143], and [147]). There is sense in this approach, since if the creditors are in the same relative position under the proposed scheme as in the comparator, then there is no issue of the proposed scheme preferring one creditor over the other, and the creditors' interests (in a loose sense of the term) in relation to the question of whether to vote for the proposed scheme may reasonably be expected to be aligned. To this end, the court generally takes a "broad, practical and objective approach" and seeks to avoid "an impractical mushrooming of classes that could potentially result in the creation of unjustified minority vetoes" (*TT 1* at [141]).

89 There is also authority elsewhere that in assessing the extent of the difference between the creditors' relative positions under the proposed scheme and the comparator, "[i]t is the rights of creditors, not their separate commercial or other interests, which determine whether they form a single class or separate classes" (see, for instance, *T&N 3* at [85]). It is not necessary for us to reach a

conclusion on this and we leave it open at this point, though this position seems sensible to us.

90 An application of this framework to the facts leads us to the following analysis:

(a) The appropriate comparator in this case is not clear because of Empire Capital's inadequate financial disclosure (see [71] above). We can therefore only assume that the company's most likely alternative to a sanctioned scheme of arrangement is insolvent liquidation.

(b) The Proposed Scheme would not affect the 2015 and the 2017 Noteholders to the same extent. If the Proposed Scheme were sanctioned, there would be uniformity in the rights of all the noteholders as they would all become holders of the New Notes. However, their positions in an insolvent liquidation are not identical as they expect to receive different estimated rates of recovery. Based on Deloitte's calculations (see [37] above), it appears that whatever the discount rate applied, the rates of recovery of the 2015 and the 2017 Noteholders in an insolvent liquidation will differ by around 3%. The Minority Creditors also pointed out other purported differences between the 2015 and the 2017 Notes such as the different issuers and obligors (see [86] above).

(c) However, the differences between the relative positions of the 2015 and the 2017 Noteholders under the Proposed Scheme and in an insolvent liquidation do not appear material. In our provisional view, the noteholders would be able to sensibly consult together with a view to their common interest even assuming a difference of around 3% in their respective rates of recovery. Indeed, in *Wah Yuen*, we declined to separately classify creditors whose recovery rates ranged from 15% to 89% (at [22] and [19]), even though we opined that those with 100% recovery and those with subordinated claims ought *prima facie* to be separated from the rest of the creditors (at [23]). Although the latter observation has been criticised (see Lee Eng Beng SC, *Insolvency Law* (2003) 4 SAL Ann Rev 263 at paras 14.77–14.78), the point remains that a 3% difference in the rates of recovery is unlikely in itself to be considered material.

(d) The other purported differences that have been identified similarly do not appear to us to be material. Indeed, on the basis of the present financial disclosure, they appear to have no material financial impact on the noteholders. More importantly, we stress that the relevant inquiry is *not* to compare the Proposed Scheme with the *present situation* but rather to compare the Proposed Scheme with *the comparator* which is here assumed to be insolvent liquidation. Therefore, differences such as those between the interest rates under the 2015 and the 2017 Notes are not relevant to the issue of creditor classification since these differences have no relevance in a state of insolvent liquidation.

91 For these reasons, we think, at least provisionally given the inadequacy of the disclosure we have already referred to, that the 2015 and the 2017 Noteholders could properly have been classed together for the purposes of considering and voting on the Proposed Scheme.

Issue 4: Abuse of process

92 Finally, we turn to the question of abuse of process (see [20(d)] above).

93 The Minority Creditors submit that leave should not be granted under s 210(1) of the CA because the Berau Group is abusing the scheme regime to prevent or delay legitimate enforcement on the 2015 and the 2017 Notes. Empire Capital denies the allegations and submits that it is simply trying to achieve a fair and realistic repayment of the notes. In this regard, the parties rely heavily on their own characterisation of the procedural history of the group's restructuring attempts which we have summarised above (see [15]).

94 In our judgment, the threshold for a finding of abuse of process is necessarily a high one, particularly in the context of scheme applications where regard must be had to the inherently dynamic nature of the restructuring process. As the company is in financial distress, it, as well as the other stakeholders, is constantly in a state of action, anticipation, and reaction. The dynamics are both collaborative and adversarial at the same time, and the parties' interests are multifaceted and ever-changing.

95 In that light, we consider that there is insufficient evidence in the present circumstances to warrant a finding that Empire Capital's present leave application amounts to an abuse of process. Amongst other things, although this is the Berau Group's fourth set of restructuring proceedings in Singapore (see [15] and [16] above), there have been genuine changes in the restructuring plans put forward in the various applications, and the *ad hoc* creditors' committee itself has also changed significantly over time both in terms of composition and the positions that it took in the restructuring applications.

Conclusion

96 For these reasons, we allow CA 99 and set aside the order below granting leave under s 210(1) of the CA for Empire Capital to proceed with the creditors' meeting to consider the Proposed Scheme. Although we would have been inclined to agree with Empire Capital's position in CA 100, we make no substantive order in that appeal since it is rendered moot by our decision in CA 99 and since, in any case, given the inadequacy of the financial disclosure by Empire Capital, our views remain provisional.

97 Unless the parties are able to come to an agreement on costs, they are to file written submissions within 14 days of this judgment. Such submissions, which are to be limited to 10 pages each, should deal with the appropriate costs orders (including as to quantum) that the parties contend should be made.

Sundaresh Menon	Judith Prakash	Steven Chong
Chief Justice	Judge of Appeal	Judge of Appeal

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