# Re Horizon Knowledge Solutions Pte Ltd
# [2004] SGHC 270

**Case Number** : OS 273/2004

**Decision Date** : 02 December 2004

**Tribunal/Court** : High Court

**Coram** : Lai Siu Chiu J

**Counsel Name(s)** : Navinder Singh (Navin and Co) for applicant; Tan E-Fang (Hin Tat Augustine and Partners) for International Factors (Singapore) Ltd; Wong Soo Chih (Ho Wong and Partners) for Fuisland Offset Printing (S) Pte Ltd

**Parties** : —

*Companies – Schemes of arrangement – Classification of creditors – Whether related and unrelated unsecured creditors should be treated as falling within the same class of creditors for the purpose of sanctioning a scheme of arrangement*

*Companies – Schemes of arrangement – Court's power to sanction proposed scheme of arrangement – Whether sufficient information provided to creditors at creditors' meeting*

2 December 2004

**Lai Siu Chiu J:**

**The background**

1 Horizon Knowledge Solutions Pte Ltd ("the Company") was incorporated in Singapore on 28 February 2000 under its former name Postkid.com Pte Ltd, as a private company limited by shares. It changed to its present name on 24 October 2004. The Company is part of a group of companies controlled by Horizon Education and Technologies Limited ("the parent company") which is listed on the Stock Exchange of Singapore ("SGX"). The Company is principally engaged in media and trading activities.

2 On 2 March 2004, the Company filed the above (*ex parte*) Originating Summons ("the OS") applying, *inter alia*, for the following orders:

(a) that the Company be at liberty to convene a meeting of creditors of the Company for the purpose of considering a scheme of arrangement ("the scheme") proposed by the Company to the creditors;

(b) no proceedings in any action be taken against the company or be continued from the date of the order to be made until the holding of the meeting of creditors, pursuant to s 210(10) of the Companies Act (Cap 50, 1994 Rev Ed) ("the Act").

The OS was supported by an affidavit filed by the Company's former director Faisal Alsagoff ("Alsagoff"), who is a director of the parent company.

3 The OS was granted an order in terms of prayers (a) and (b) above on an urgent basis on 3 March 2004 ("the Order of Court"). Pursuant to the Order of Court, a meeting of creditors ("the creditors' meeting") of the Company was convened on 24 March 2004.

4 On 5 May 2004, the Company filed Summons in Chambers No 2452 of 2004 ("the application") praying for the scheme to be sanctioned by the court so as to be binding upon the Company and its

unsecured creditors. The application was supported by an affidavit filed by the Company (again affirmed by Alsagoff) but it was opposed by two creditors.

5 After several part hearings, the application was dealt with finally on 30 August 2004. I dismissed the application and the Company has now filed a notice of appeal against my decision (in Civil Appeal No 97 of 2004).

**The facts**

6 In his first affidavit filed in support of the OS, Alsagoff explained that the parent company was the subject of a reverse take-over ("RTO") in June 2000 by a third party. He deposed that this fact had an adverse effect on the Company's ability to trade and made the Company's trading partners cautious. The Company encountered cash-flow difficulties and Alsagoff listed the suits which the Company faced in the High Court, the Subordinate Courts as well as in the Small Claims Tribunal. Further, a judgment creditor, Fabulous Printers Pte Ltd ("Fabulous"), pursuant to a default judgment obtained under O 13 of the Rules of Court (Cap 322, R 5, 1997 Rev Ed) in Suit No 290 of 2003 on 7 April 2003 for $272,867.35, had filed Companies Winding Up No 30 of 2004 ("the winding-up proceedings"). This and other execution proceedings had caused the Company's bank account to be frozen. It resulted in the Company being unable to disburse funds to pay various creditors and this led in turn to legal and/or enforcement proceedings against the Company.

7 Alsagoff deposed that since its incorporation, the parent company had injected $6m into the Company through loans and bank credit lines guaranteed by the parent company. The parent company had been in the information technology business for almost 20 years during which time it had built up a significant amount of goodwill. Alsagoff said it would not be in the interests of any creditor for such an intangible asset to be terminated abruptly by the winding-up proceedings which were scheduled to be heard on 5 March 2004.

8 Alsagoff deposed that despite concerted efforts by the Company, it could no longer pay its debts to its creditors, including the judgment debt of Fabulous which it had partially settled. The accounting consultants, BDO International ("BDO"), appointed by the Company to prepare and administer the scheme proposed, stated that the Company's total debts as at 31 January 2004 were $9,533,243 whilst its current assets as at that date were only $4,673,190 resulting in a shortfall of $4,860,044.

9 He deposed that a forced sale of the Company's unencumbered assets would only yield $51,906 whilst realisation in a liquidation scenario would only total about $395,797. This would mean that unsecured creditors would receive approximately four cents in a dollar in respect of their claims as worked out by BDO. Alsagoff exhibited a list of the Company's creditors to his affidavit. The list showed the claims of unsecured creditors totalled $722,196.45, that of secured creditors totalled $3,196,298.30 whilst those of unsecured related party creditors totalled $3,541,140.05. One of these related party creditors was the parent company which was owed $3,089,699.30.

10 Under the scheme proposed by BDO, the Company intended to pay unsecured creditors 15% of their claims in three equal instalments over a period of 18 months at six-monthly intervals.

11 In his second affidavit filed after the creditors' meeting, Alsagoff exhibited the minutes of the creditors' meeting which he chaired. He deposed to the following results after the attendees had voted:

| | Number | Percentage | Value (S$) | Percentage |
|---|---|---|---|---|

| | | | | |
|---|---|---|---|---|
| For | 20 | 94.23% | $3,955,905.61 | 86.96% |
| Against | 3 | 5.77% | $242,145.33 | 13.04% |
| Total | 23 | 100.00% | $4,198,050.94 | 100.00% |

and described the response in support of the scheme as "overwhelming". As the 75% threshold required for approval of the scheme under s 210(3) of the Act had been crossed, Alsagoff requested the court's sanction under s 210(4) for the scheme to be implemented. He explained that the secured creditors of the Company (essentially banks and leasing companies) did not feature in the scheme because the parent company had agreed to absorb the Company's liability to such creditors. The Company's debts to the parent company would be subordinated to those of the unsecured creditors.

12 As stated earlier, the application was opposed by at least three creditors one of which was International Factors (Singapore) Ltd ("IFS"). The Vice-President of IFS, one Teoh Chun Mooi ("Teoh"), filed two affidavits. In her first affidavit, she complained of the lack of transparency of the proposed scheme as the unsecured creditors did not know how the debts owed to related party creditors came about. IFS had repeatedly requested for details but in answer to their queries, the Company's solicitors merely forwarded its unaudited accounts to IFS's solicitors.

13 In her second affidavit, Teoh alleged that the scheme was prejudicial to the interests of unsecured creditors as it meant they would have to write off 85% of their claims, not to mention that they would have to wait 36 months to receive their total payment of 15%. Teoh also deposed that it was because the parent company was a listed entity that many creditors willingly entered into business transactions with the Company.

14 Teoh deposed that there was a poor turn-out at the creditors' meeting by unsecured unrelated creditors because they knew the related unsecured creditors held a majority of the votes and they would have been outvoted, which turned out to be the case. She revealed that IFS was one of creditors who opposed the scheme at the creditors' meeting. She exhibited to her first affidavit[1] the creditors' list which was presented at the creditors' meeting but which Alsagoff had omitted to exhibit in his second affidavit. The list showed that the claims of unrelated unsecured creditors totalled $1,805,908.63 whereas the claims owed by the Company to its related unsecured creditors (including the parent company) totalled $3,541,140.05. Without the claims of the four related creditors who voted in favour of the scheme, the claims of the unsecured creditors who voted for the scheme only totalled $454,765.56 in value, a far cry from the three-fourths minimum value required under s 210(3) of the Act.

15 Teoh pointed out that if the RTO of the parent company was successful, there was a real possibility that the Company's debts would be paid in full. She said IFS was first informed of the RTO when it conducted an examination of judgment debtor ("EJD") exercise early in 2004, in District Court Suit No 3513 of 2003. At that time, the Company's solicitors sought an adjournment of the EJD because of the pending RTO. No further mention was made of the RTO by the Company or at the creditors' meeting. IFS only learnt in the first week of July 2004 that the parent company intended to proceed with the RTO.

16 Another criticism levelled against the Company by Teoh related to the company's intangible assets. She pointed out that the company owned a significant number of trade marks and trade names ("Postkids" being one of them) of considerable value as well as copyrights over numerous

published books. Yet, in the Company's accounts which accompanied the scheme papers presented at the creditors' meeting, the value of its intangible assets was stated to be $57,747 as a going concern, nil in a liquidation scenario, whereas its book value was $577,468. She believed that if the Company's intellectual property rights had been properly valued, the returns to its unsecured creditors (be it in a winding-up or going-concern scenario) would definitely be much higher.

17 Teoh concluded her second affidavit with the comment that IFS felt that the proposed scheme and the creditors' meeting failed to take into account material information and the interests of unrelated unsecured creditors.

18 Teoh's views were supported by Fuisland Offset Printing (S) Pte Ltd ("Fuisland"), an unrelated unsecured creditor whose invoice against the Company had been factored to IFS. Alsagoff, in his reply to Teoh's affidavits, had questioned the *locus standi* of IFS, asserting that it could not be considered an unsecured creditor, being a factoring company. As such, he contended, IFS had no commercial relationship with the Company. Alsagoff further asserted that notwithstanding the parent-subsidiary relationship between them, the fact remained that the parent company and the Company were separate legal entities and should not be viewed as one company.

19 I adjourned the hearing and directed the actual creditor of the Company, *viz* Fuisland, to file an affidavit, which it did by its managing director Png Eng Lee ("Png"). In that affidavit, Fuisland reiterated that the Company's intangible assets were worth more than what was stated in the accounts presented at the creditors' meeting. Whilst he acknowledged that the parent company and the Company were separate legal entities, Png argued that in the real commercial world, businessmen transacted based on good faith and representations. He asserted that the boards of both the parent company and the Company comprised essentially the same people pointing out that the two companies shared the same premises. He deposed that when Fuisland contracted with the Company, it dealt with the same directors or officers as the parent company, in particular, its managing editor (Sarindar Kaurah) and deputy general manager (Richard Lee) whose name cards showed they were from the parent company. He had also dealt with the accounts manager (called Caroline) from the parent company.

20 Png added that throughout the proceedings, including the EJD, the Company had never objected to IFS' position as a factor. Even as a factor, he contended that IFS had a commercial relationship with the Company, as an unsecured creditor. Fuisland was liable to pay IFS the Company's outstanding invoice if it was not paid by the Company. In addition, Fuisland would have to pay IFS interest and legal fees incurred thereon. Accordingly, if the scheme recommending 15% payment to unsecured creditors was approved by the court, it meant that Fuisland would have to pay to IFS the shortfall of 85% of the debt owed by the Company to Fuisland.

21 In his fifth affidavit filed on 6 August 2004, Alsagoff dismissed the belief of IFS that creditors treated the parent company and the company as one and the same as "irrelevant". He deposed that the proper majority who attended the creditors' meeting had approved the scheme. He stated that inter-company indebtedness was "perfectly normal" in a corporate group. The Company's debts were audited and IFS had produced no evidence to show that the related creditors who had voted at the creditors' meeting were disentitled from voting. Alsagoff confirmed that the parent company was undergoing an RTO on which it was awaiting SGX's approval.

**The decision**

22 In the exercise of my discretion, I refused to sanction the scheme under s 210(4) of the Act; I shall now give my reasons.

***The law***

23 Sections 210(3) and 210(4) of the Act read as follows:

> (3) If a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members present and voting either in person or by proxy at the meeting or the adjourned meeting agrees to any compromise or arrangement, the compromise or arrangement shall, if approved by order of the Court, be binding on all the creditors or class of creditors or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.
>
> (4) The Court may grant its approval to a compromise or arrangement subject to such alterations or conditions as it thinks just.

24 In recent years, our courts have sometimes refused to sanction schemes under s 210 of the Act. One such case was the Court of Appeal's decision in *Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd* [2003] 3 SLR 629 ("*Wah Yuen*'s case"). The headnote reads:

> The appellant, which had a winding up petition against it, presented a scheme of arrangement under the Companies Act ("the Act") for the consideration of its creditors. The scheme provided that creditors whose claims were less than a stipulated amount would be paid in full and subordinated the claims of its directors and a related company ("related parties") to the rest of the creditors. More than 75% in value of the creditors (which was the minimum required under the Act) voted in support of the scheme which was opposed to by the respondent. Had the claims of the related parties been discounted, the scheme would have received the support of less than 75% in value of the creditors. The judge below refused to sanction the scheme.

25 In dismissing the appeal, the Yong Pung How CJ, *inter alia*, held (as set out in the headnote):

> (1) There was no rule of law 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. However, the court would take into account the adequacy of the information provided in determining whether to sanction the scheme …
>
> …
>
> (4) It was an independent principle of law that the creditors should be put in possession of such information as was necessary to make a meaningful choice …
>
> (5) Although the related parties' votes were counted for purposes of determining whether the statutory majority was reached, the court treated the votes with reserve because the appellant had not been sufficiently transparent about the circumstances in which the related parties' debts were incurred …

26 It can be seen that there are similarities in the facts between our case and *Wah Yuen*'s case. Both had related unsecured creditors whose claims were subordinated to those of other unsecured creditors. Even so, the appellate court refused to sanction the scheme. The same submission was made before me by counsel for the Company who, whilst acknowledging that the related unsecured creditors were not separately classed from the rest of the creditors for voting purposes, argued that it would not have made any difference as the claims of the related creditors were subordinated to the

claims of other unsecured creditors. With respect, that is not a valid answer to the objections of the unsecured unrelated creditors.

27 The proper test for classification of creditors is that formulated in *Sovereign Life Assurance Company v Dodd* [1892] 2 QB 573 by Bowen LJ who said (at 583):

> The word "class" is vague … [W]e 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 … 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.

Applying the dissimilarity test, it seemed to me that the related unsecured creditors should have been separately classed from the rest of the unsecured creditors. It would have been impossible for the related creditors to consult with the unrelated creditors as their interests were not common. As the payment to unsecured creditors under the proposed scheme amounted to 15% of their claims (which percentage IFS considered *paltry*), the unrelated creditors may well take the view that it was no better than what they could obtain in a liquidation scenario (be it $0.04 or 0.12%). On the other hand, the related creditors would want the scheme approved whatever the extent of the "haircut" creditors had to accept. The Company could carry on trading. Alsagoff's first affidavit[2] gave the reason. Inter-company loans and bank credit lines guaranteed by the parent company amounting to $6m had been injected into the Company. The parent company's claim for voting purposes was $3,089,698.30. The less the unrelated creditors were paid, the more the secured creditors would be paid and the less the shortfall to be borne by the parent company, pursuant to the guarantees it had furnished to banks and other secured creditors. The fact that the related party claims were subordinated to those of other unsecured creditors did not make the former any worse off in the scenario which I have painted.

28 The figures set out in Alsagoff's second affidavit ([11] above) and in Teoh's first affidavit ([14] above) were not disputed by IFS or the Company respectively. Accordingly, less the claims ($3,541,140.05) of the four related creditors, the value of the claims of the other creditors who voted for the scheme amounted to only $414,765.56 ($4,198,050.94 – $3,541,140.05). That would result in the following votes:

| | Number | Percentage | Value (S$) | Percentage |
|---|---|---|---|---|
| For | 16 | 84.21% | $414,765.56 | 63.00% |
| Against | 3 | 15.79% | $242,145.33 | 37.00% |
| | 19 | 100.00% | $656,930.94 | 100.00% |

The 75% vote required under s 210(3) would not have been achieved.

29 Even if the creditors' meeting had secured the requisite 75% mandate, it did not necessarily mean that the court must sanction the scheme. In *Re Econ Corp Ltd* [2004] 1 SLR 273, although 89% in value of admitted claims at the meeting of unsecured creditors voted in favour of the scheme proposed by Econ Corporation Ltd under s 210 of the Act, I declined to sanction the same. There were a number of disquieting features surrounding the company's proposed scheme, the chief of which was my concern that the 89% vote might not have been obtained with the informed consent of unsecured creditors.

30 Counsel for the Company sought to distinguish both cases in his request for further arguments (which I rejected). He submitted that in *Wah Yuen*'s case, the Court of Appeal did not go so far as to hold that the related party claims of the company had to be separately classed (see [25] above). As for *Re Econ Corp Ltd*, counsel pointed out that there, the court only held that creditors whose claims would be paid in full should be separately classed; nothing was said about related party claims which would similarly be subordinated to the claims of other unsecured creditors.

31 In opposing the Company's request for further arguments, counsel for IFS pointed out that what the Chief Justice said in *Wah Yuen*'s case (at [23]) of related party claims was persuasive authority:

> What did cause us more concern, however, was whether Wah Yuen should at least have put the 14 who stood to recover 100% of their claims, as well as the three whose claims were subordinated to the rest of the creditors, into separate classes for voting purposes. *Prima facie*, it seemed to us that the rights of these two groups of creditors were so dissimilar from the remaining creditors that they could not sensibly consult together with a view to their common interest. We did not find it necessary, however, to come to a definitive view on this because Wah Yuen's lack of transparency over its related party debts was sufficient reason not to sanction the proposed scheme of arrangement.

32 As for *Re Econ Corp Ltd*, there was no necessity there for me to consider whether related party claims should have been separately classed as other considerations prompted me to withhold sanction of the scheme therein proposed. It bears mentioning that the same complaint in *Re Econ Corp Ltd* was made against the Company by IFS – that despite repeated requests, no details were provided on the related creditors' debts and the parent company's debts in particular. Neither did Alsagoff explain why the Company did not furnish the information. I would add that his explanation on the low value ascribed to the Company's intangible assets and its goodwill in the "Postkid" name was unsatisfactory; it gave rise to suspicion that IFS's allegation of undervalue was not unfounded.

33 The RTO was another cause of unhappiness of the creditors. Counsel for the Company did not dispute the statement made to the court by counsel for IFS and Fuisland, that the Company did not inform the creditors' meeting of the RTO. At the EJD on 16 February 2004, however, the Company used the pending RTO as a ground for seeking a further adjournment of six weeks of the hearing to 15 March 2004, which was then stayed because of the OS.

34 If the RTO was successful, it was arguable that unsecured creditors may obtain a better return than 15% of their claims as proposed under the scheme or (as was told to them at the creditors' meeting) 0.12% in a winding-up scenario. Yet the Company was coy in providing information on the RTO.

35 Alsagoff's excuse in not furnishing the information was that the RTO was still pending and in any case, it concerned the parent company, not the Company. His stand was inconsistent. Where it suited his or the Company's purpose, he treated the two companies as one and the same. This can be seen from three instances. First, he filed affidavits on the Company's behalf even though he is not a director of the Company but is a director of the parent company. Secondly, in answer to IFS's request for information on the accounts, the Company's solicitors forwarded a set of its unaudited accounts for year 2003, giving the excuse that its accounts were being fully audited for the RTO, thereby giving IFS the (wrong) impression in February 2004 that the Company, and not the parent company, was the subject of the RTO. Thirdly, in relation to the scheme itself, Alsagoff signed the scheme documents[3] on behalf of the parent company and *not* the Company.

36 The RTO 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. Information pertaining to the parent company's accounts, the Company's audited accounts and related creditors' debts was equally material and should have been provided at the creditors' meeting, if not earlier, when requested by IFS.

37 I concluded there was lack of transparency in the scheme and accordingly declined to sanction it under s 210(4) of the Act.

*Application dismissed.*

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[1]See TCH-1

[2]Para 11

[3]Exhibit FA-4 in his affidavit filed 4 May 2004