IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2017] SGCA 51

Civil Appeal No 15 of 2017

Between

SK ENGINEERING & CONSTRUCTION CO LTD

… *Appellant*

And

CONCHUBAR AROMATICS LTD

… *Respondent*

In the matter of Originating Summons No 153 of 2016

In the matter of Section 210(1) and 210(10) of the Companies Act, Cap 50 (2006 Rev Ed)

CONCHUBAR AROMATICS LTD

… *Applicant*

Civil Appeal No 16 of 2017

Between

SK ENGINEERING & CONSTRUCTION CO LTD

… *Appellant*

And

UVM INVESTMENT CORPORATION

… *Respondent*

In the matter of Originating Summons No 154 of 2016

In the matter of Section 210(1) and 210(10) of the Companies Act, Cap 50 (2006 Rev Ed)

UVM INVESTMENT CORPORATION

… *Applicant*

JUDGMENT

[Companies] — [Schemes of Arrangement] — [Related creditors]
[Companies] — [Schemes of Arrangement] — [Assignment of debts]

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SK Engineering & Construction Co Ltd
v
Conchubar Aromatics Ltd and another appeal

[2017] SGCA 51

Court of Appeal — Civil Appeals Nos 15 and 16 of 2017
Sundaresh Menon CJ, Chao Hick Tin JA, Andrew Phang Boon Leong JA, Judith Prakash JA and Tay Yong Kwang JA
20 March 2017

30 August 2017 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 We have before us two appeals, Civil Appeals Nos 15 and 16 of 2017 ("CA 15" and "CA 16" respectively, and "these Appeals" collectively), against the High Court's decision in Originating Summonses Nos 153 and 154 of 2016 ("the High Court OSes" collectively) approving two schemes of arrangement under s 210(3AB) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act") and granting a moratorium under s 210(10) on all pending, contingent or fresh actions against two companies, Conchubar Aromatics Ltd and UVM Investment Corporation ("Conchubar" and "UVM" respectively, and "the two Scheme Companies" collectively), for one year with effect from 29 August 2016. The grounds of decision of the High Court

judge ("the Judge") for the High Court OSes can be found in *Re Conchubar Aromatics Ltd and another matter* [2017] 3 SLR 748 ("the GD").

2 The High Court OSes were brought by the two Scheme Companies to seek (among other things) the court's sanction of two schemes of arrangement that had been approved by their respective creditors in accordance with s 210(3AB) of the Companies Act. For ease of discussion, we will refer to the scheme relating to Conchubar as "the Conchubar Scheme", the scheme relating to UVM as "the UVM Scheme", and the two schemes collectively as "the Schemes". The material terms of the Schemes are set out at [18] below. The High Court OSes were opposed by SK Engineering & Construction Co Ltd ("SKEC"), a judgment creditor of the two Scheme Companies as well as the appellant in these Appeals. SKEC's opposition was based mainly on the ground that the creditors that had voted in favour of the Schemes were related to the two Scheme Companies and their votes should therefore be wholly discounted. On this basis, SKEC submitted that the requisite level of approval by the creditors of the two Scheme Companies had not been obtained in relation to the Schemes.

3 The key issue identified by the parties in these Appeals relates to an unsettled point of law touching on the appropriate discount to apply to the votes of related creditors – *ie*, creditors related to the company which is the subject matter of a scheme of arrangement (a "scheme company") – that are *not* wholly-owned subsidiaries of the scheme company. However, it will become apparent in the course of this judgment that this question does not in fact arise in the circumstances of this case as the threshold requirement of a relationship between the alleged related creditors and the two Scheme Companies has not been made out. Instead, it appears to us that the more

important question is whether the assignments of part of the two Scheme Companies' debts by some of their creditors to other parties were genuine, or made for the purpose of circumventing the statutory requirement in ss 210(3AB)(*a*) and 210(3AB)(*b*) of the Companies Act that a scheme of arrangement must be approved by a majority in number of the scheme company's creditors or shareholders (as the case may be) representing three-fourths in value of the creditors or shareholders. We will refer to the requirement of a majority in number as the "headcount test", and the requirement of three-fourths in value as the "value test".

4 We will first set out the facts which form the backdrop to the present dispute, followed by an outline of the issues raised by the parties in these Appeals. We will then set out the parties' specific arguments on each of these issues, and thereafter, our holdings in relation to each issue.

The background facts

The parties to these Appeals and the alleged related creditors

5 Jurong Aromatics Corporation Pte Ltd ("JAC") was incorporated on 30 May 2005 as a joint venture vehicle to own and operate an integrated condensate splitter and aromatics complex on Jurong Island that would process and produce aromatics and oil products ("the JAC Project").

6 SKEC is a company incorporated in South Korea. It is a creditor of Conchubar for a sum of US$14,527,732.33, and a creditor of UVM for a sum of US$4,129,333.57.[1] These debts were incurred by the two Scheme Companies pursuant to a judgment and corresponding costs orders made by

[1] Respondents' Case para 12

the court in a suit brought by SKEC against them on account of an indemnity which each of them had given SKEC.[2]

7 Conchubar, the respondent in CA 15, is a company incorporated in the Cayman Islands. It is an indirect shareholder of JAC. Its primary asset is its 6% indirect shareholding in JAC, owned through its 26.7% stake in SKEC Jurong Investment Pte Ltd ("SKECJI"). SKECJI holds a 75% stake in SK International Investment Singapore Pte Ltd ("SKIIS"), which in turn has a 30% stake in JAC.[3] SKECJI was set up by SKEC and Conchubar on 12 July 2010 for the purpose of investing in JAC (and, in turn, the JAC Project) through SKIIS. At the time of the meeting of Conchubar's creditors to vote on the Conchubar Scheme, Conchubar owed a total debt of US$76,277,818.33 to the following parties:[4]

Creditor	**Debts (US$)**
Conchubar Chemicals Ltd ("Chemicals")	50,000,000.00
Universal Petrochem Corp Ltd ("Universal")	10,599,174.00
Estanil Assets Ltd ("Estanil")	1,150,912.00
SKEC	14,527,732.33

8 Chemicals, one of Conchubar's creditors, is a company incorporated in the Cayman Islands. It is wholly-owned by Conchubar Infrastructure Fund

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2 RA IV(A) pp 15 and 292

3 Respondents' Case para 4

4 RA IV(A) p 4

("Conchubar Infrastructure"). The latter wholly owns Conchubar[5] and is also the holding company of several other investment companies. Conchubar Infrastructure, Conchubar and Chemicals share a common director, Pardeep Dhir. Chemicals became a creditor of Conchubar for US$50m pursuant to a Corporate Guarantee Agreement dated 25 August 2010 ("the 2010 Corporate Guarantee Agreement")[6] under which Conchubar acted as the guarantor of a US$50m loan from Chemicals to SKECJI. The loan was used by SKECJI to subscribe (through SKIIS) for JAC shares. SKECJI defaulted on repayment of the loan on 25 August 2015. In September 2015, Chemicals made a demand against Conchubar for this debt pursuant to the 2010 Corporate Guarantee Agreement.[7] Because of Chemicals' corporate structure and these contractual arrangements, SKEC alleges that Chemicals is a related creditor of Conchubar.

9 Besides the US$50m, Chemicals was also a creditor of Conchubar for:

(a) a sum of US$10.422m, which arose out of a separate Loan Agreement dated 23 May 2011 between them ("the 2011 Loan Agreement"),[8] pursuant to which Chemicals paid SKECJI US$9m on behalf of Conchubar, with accruing interest for the period between May 2011 and April 2015 amounting to US$1.422m;[9] and

(b) a sum of US$1,131,673, which represented fees paid by Chemicals on behalf of Conchubar.[10]

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5 Respondents' Case para 48

6 RA IV(A) pp 27-30

7 RA III(H) pp 284-285

8 RA IV(A) pp 111-116

9 RA IV(A) pp 11 and 75

10 Chemicals allegedly owed Universal, a company incorporated in the British Virgin Islands ("BVI"), US$11m pursuant to a Sales and Purchase Agreement dated 1 August 2014 ("the 2014 SPA").[11] On 30 April 2015, Chemicals assigned to Universal its receivables of US$10.422m from Conchubar under the 2011 Loan Agreement. This assignment operated to extinguish Chemicals' debt to Universal by the said amount.[12] This resulted in Universal becoming a creditor of Conchubar for the principal sum of US$10.422m, which sum increased to US$10,599,174 taking into account accrued interest.

11 Chemicals also allegedly owed Estanil, another BVI-incorporated company, US$1.2m pursuant to a Financing Lease Agreement dated 7 August 2013 ("the 2013 FLA").[13] On 30 April 2015, Chemicals assigned to Estanil its receivables of US$1,131,673 from Conchubar. This assignment operated to extinguish Chemicals' debt to Estanil by the said amount.[14] This resulted in Estanil becoming a creditor of Conchubar for the sum of US$1,131,673, which sum increased to US$1,150,912 taking into account accrued interest.[15]

12 SKEC alleges that Universal and Estanil are also creditors which are related to Conchubar because they acquired their claims against Conchubar by way of assignment from Chemicals, which SKEC says is a related creditor of Conchubar.

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10 RA IV(A) p 137

11 RA IV(A) pp 119-127

12 RA IV(A) p 117

13 RA IV(A) pp 231-253 and 264

14 RA IV(A) p 259

15 RA IV(A) p 137

13 UVM, the respondent in CA 16, is a BVI-incorporated company. It is a direct shareholder of JAC, and its primary asset is its 5.1% shareholding in JAC. At the time of the meeting of UVM's creditors to vote on the UVM Scheme, UVM owed a total debt of US$32,583,446.57 to the following parties:[16]

Creditor	**Debts (US$)**
MacNair Group Inc ("MacNair")	28,000,000.00
Shefford Investment Holdings Ltd ("Shefford")	317,651.00
Emirates Resources Inc ("Emirates")	136,462.00
SKEC	4,129,333.57

14 MacNair, a BVI-incorporated company, is a creditor of UVM pursuant to a Convertible Bond Agreement dated 31 March 2011 which it entered into with UVM and UVM's sole shareholder, Bonquest Capital Ltd ("Bonquest").[17] Under that agreement ("the 2011 CBA"), MacNair subscribed for US$28m worth of convertible bonds in UVM for the purpose of providing debt finance to UVM so as to enable the latter to invest in JAC.[18] The convertible bonds could be converted into 99.82% of UVM's shares at MacNair's option, upon giving notice, between the third and the 15th anniversary of the issue date of the convertible bonds.[19] As part of the 2011 CBA, Bonquest also granted

16 RA IV(A) p 282

17 RA IV(B) pp 8-40

18 RA IV(B) p 10 – see recitals

19 RA IV(B) p 22

MacNair a charge over all its rights, title and interests in UVM, such that MacNair also holds a charge over 100% of UVM's shares. Because of these contractual arrangements, SKEC alleges that MacNair is a related creditor of UVM.

15 Separately, MacNair was also a creditor of UVM for fees of US$134,181[20] which it had paid on UVM's behalf. MacNair allegedly owed Emirates US$200,000 pursuant to a promissory note dated 23 November 2014.[21] On 30 April 2015, MacNair assigned to Emirates its receivables of US$134,181 from UVM. This assignment operated to extinguish MacNair's debt to Emirates by the said amount.[22] This resulted in Emirates becoming a creditor of UVM for the sum of US$134,181, which sum increased to US$136,462 taking into account accrued interest. As Emirates acquired its claim against UVM by way of assignment from MacNair, which SKEC alleges is a related creditor of UVM, SKEC contends (albeit merely by way of a passing reference in its Appellant's Case (see [62] below)) that Emirates too is related to UVM.

The events leading to the sanctioning of the Schemes

JAC runs into financial difficulties

16 JAC ran into substantial difficulties in its operations and was put into receivership on 28 September 2015. As a result, the two Scheme Companies also found themselves in financial difficulties as their shares in JAC were their primary assets.

20 RA IV(B) pp 251

21 RA IV(B) p 270

22 RA IV(B) pp 187-189 and 269

17 Jurong Energy International Pte Ltd ("JEI") was set up on 13 July 2015 in an attempt to preserve and rehabilitate the JAC Project, which was threatened by JAC's difficulties. At the hearing before us, counsel for the two Scheme Companies, Mr Andy Lem ("Mr Lem"), asserted that JEI was founded by the same parties as those who had invested in the two Scheme Companies. We note, however, that this assertion is not backed up by any evidence.[23] On or around 12 November 2015,[24] JEI submitted to the receivers and managers of JAC ("JAC's R&M") a restructuring proposal ("the JEI Proposal"). The material terms of the proposal were that, among other things, JEI would inject funds into JAC in return for a 60% shareholding in JAC.[25] This arrangement would enable JAC to repay debts which it owed to a syndicate of secured finance parties that held charges over some 95% of its shares (the "Secured Lenders").

The material terms of the Schemes

18 The two Scheme Companies then proposed the Schemes to their respective creditors. The material terms of the Schemes, which are identical except for the quantum of the failsafe payment provided for in each scheme, are reproduced below:[26]

> **2. Scheme**
>
> **2.1** Following [JAC R&M]'s acceptance of the JEI Restructuring Proposal, and within 30 days after the JEI Restructuring Proposal is fully and finally implemented:

[23] RA III(B) p 261 para 15; RA III(C) p 8.

[24] RA III(E) p 272: affidavit of one of JAC's R&M.

[25] RA I pp 99 and 138

[26] RA I pp 65-66 and 116-117

2.1.1 the Company [*ie*, Conchubar in the case of the Conchubar Scheme, and UVM in the case of the UVM Scheme] hereby agrees to sell its entire interest (whether direct or indirect) and/or shareholding in JAC (the "**Company's JAC Interest**") to JEI, and JEI hereby undertakes and agrees to purchase the Company's JAC Interest subject to the obtaining of the appropriate waivers and consents in respect of the transaction; and

2.1.2 JEI hereby agrees and undertakes that such purchase shall be made by the issuance to the Company of shares or convertible bonds in JEI ("**JEI New Shares/Bonds**") of equal or greater value to the Company's JAC Interest to be determined by way of a third-party valuation.

2.2 Within 30 days after the transactions in Clause 2.1 are completed, the Company hereby agrees and undertakes to distribute the JEI New Shares/Bonds to the Eligible Creditors *pari passu* according to their share of the Approved Outstandings (the "**Effective Date**").

2.3 Within 30 days of the earlier of (i) one (1) year from the date of this Scheme and (ii) the date that the Company receives notice from JEI that the JEI Restructuring Proposal has been rejected by [JAC's R&M] ("**the Expiry Date**"), the Company shall give notice to the Eligible Creditors as to whether it intends to propose a new Scheme. If the Company intends to propose a new Scheme, it shall have the liberty to convene an Eligible Creditors' Meeting for the Eligible Creditors to vote on the new Scheme within 60 days thereby superseding this Scheme if accepted.

3. Failsafe

3.1 Orient Time Capital Ltd hereby guarantees the payment of the sum of [US$650,000 in the case of the Conchubar Scheme and US$300,000 in the case of the UVM Scheme] to the Eligible Creditors in accordance with Clause 3.2 below ("**Failsafe**").

3.2 The Company shall pay the Failsafe to the Eligible Creditors *pari passu* according to their share of the Approved Outstandings in the following instalments:

(i) 25% of the Failsafe within 6 months of the Expiry Date;

(ii) 25% of the Failsafe within 12 months of the Expiry Date;

(iii) 25% of the Failsafe within 18 months of the Expiry Date; and

(iv) 25% of the Failsafe within 24 months of the Expiry Date.

3.3 The Approved Outstandings of any Eligible Creditor shall be reduced accordingly by the amount of the Failsafe paid to that Eligible Creditor.

19 It should be noted that the "JEI Restructuring Proposal" referred in the principal terms of the Schemes quoted above is specifically defined as "the restructuring proposal sent by JEI to [JAC's R&M] over the course of November to December 2015".[27]

20 At the hearing before us, Mr Lem confirmed on behalf of the two Scheme Companies that the Schemes were not linked and were independent of each other; each scheme's operation was not affected by the acceptance or rejection of the other. We note that the plain reading of the terms of the Schemes indicates that the core of the Schemes, as encapsulated in cll 2.1 and 2.2, is contingent on JAC's R&M accepting the JEI Proposal. The effect of cll 2.1 and 2.2 is that if JAC's R&M accept the JEI Proposal, JEI would purchase the two Scheme Companies' respective shares in JAC and issue to them JEI shares or JEI convertible bonds of the same or greater value than that of their respective JAC shares as determined by third-party valuation. The said JEI shares or JEI convertible bonds would then be distributed *pari passu* to the two Scheme Companies' creditors.

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[27] See cl 1.1.13 of the Explanatory Statements at RA I pp 49 and 100

21 On the other hand, if JAC's R&M reject the JEI Proposal or if one year has passed from the date of commencement of the Schemes ("the Expiry Date"), whichever is earlier, then under cl 3, the two Scheme Companies would be liable to make failsafe payments to their creditors. UVM would pay US$300,000 and Conchubar, US$650,000, to their respective creditors over 24 months, in four equal instalments every six months, on a *pari passu* basis. The outstanding debts owed to the creditors would correspondingly be reduced by the failsafe payments made. The failsafe payments would be guaranteed by Orient Time Capital Ltd, a BVI-incorporated company.

22 Concurrently, under cl 2.3, within 30 days of the Expiry Date, the two Scheme Companies would be obliged to give notice to their respective creditors as to whether they intended to propose any new scheme(s). If either company intended to propose a new scheme, it would have the liberty to convene the requisite meeting of its creditors to vote on the new scheme within 60 days. The new scheme, if successfully approved, would supersede the original scheme.

The creditors' meetings to vote on the Schemes

23 On 18 March 2016, the Judge granted leave to the two Scheme Companies to convene meetings of their respective creditors to consider the Schemes. Creditors' meetings to vote on the Schemes were held on 19 May 2016 by the two Scheme Companies, and both of them obtained the approval of the majority in number of their respective creditors representing three-fourths in value of their respective creditors. The voting results were as follows:

(a) In relation to Conchubar:[28]

Creditor	**Total Proof of Debts (US$)**	**Vote For**	**Vote Against**
Chemicals	50,000,000.00	65.55%	
Universal	10,599,174.00	13.90%	
Estanil	1,150,912.00	1.51%	
SKEC	14,527,732.33		19.04%
Total	76,277,818.33	80.96%	19.04%

(b) In relation to UVM:[29]

Creditor	**Total Proof of Debts (US$)**	**Vote For**	**Vote Against**
MacNair	28,000,000.00	86.8%	
Shefford	317,651.00	–	–
Emirates	136,462.00	0.4%	
SKEC	4,129,333.57		12.8%
Total	32,583,446.57	87.2%	12.8%

24 SKEC was the only creditor of the two Scheme Companies that voted against both of the Schemes. It should be noted that Shefford was in liquidation by the time of the meeting of UVM's creditors and did not exercise its voting rights.

28 RA IV(A) p 4

29 RA IV(A) p 282

The hearing to obtain the court's sanction of the Schemes

25 The two Scheme Companies then sought the court's sanction of the Schemes at a hearing before the Judge on 29 August 2016 ("the sanction hearing"). They urged the Judge to approve the Schemes as the head count and value tests set out in ss 210(3AB)(*a*) and 210(3AB)(*b*) respectively of the Companies Act as well as the three requirements laid down in *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 International (No 1)*") had been met. In the latter, this court stated at [70] that a court must be satisfied of the following three matters before it would sanction a scheme of arrangement:

> (a) The court must be satisfied that the statutory provisions had been complied with. In other words, the court must be satisfied that the resolution approving the scheme was passed by the requisite statutory majority at a meeting of the company's creditors or members (as the case might be) duly convened and held in accordance with the court order permitting the convening of the meeting.
>
> (b) The court must be satisfied that those who attended the meeting were fairly representative of the class of creditors or the class of members concerned (as the case might be), and that the statutory majority did not coerce the minority in order to promote interests adverse to those of the class whom the statutory majority purported to represent.
>
> (c) The court must be satisfied that the scheme was one which a man of business or an intelligent and honest man, being a member of

the class concerned and acting in respect of his interests, would reasonably approve.

26 SKEC objected to the Judge sanctioning the Schemes. Its key contention was that all the creditors that had voted in favour of the Schemes at the creditors' meetings were related to either Conchubar (in the case of the Conchubar Scheme) or UVM (in the case of the UVM Scheme). On this basis, SKEC urged the Judge to wholly discount the votes of all these creditors by applying a discount of 100% to their votes. SKEC also alleged that the two Scheme Companies had not acted *bona fide* as they had engineered the voting outcome by procuring, through creditors related to them, the assignment of part of their debts to parties that would support the Schemes so as to secure the requisite statutory majority needed for the Schemes to be approved.

27 It should be noted that after the Schemes were approved by the two Scheme Companies' creditors, JAC began operations again around July 2016.[30] At this juncture, we should highlight that although the JEI Proposal had been rejected by JAC's R&M as early as December 2015, this fact was only made known to the two Scheme Companies' creditors after they had voted on the Schemes. In his letter dated 19 August 2016,[31] the Schemes' manager informed the creditors that he had found out about JAC's R&M's rejection of the JEI Proposal only after receiving a letter dated 18 July 2016 from Allen & Gledhill LLP ("the A&G letter"), the solicitors representing both JAC's R&M and BNP Paribas (Singapore Branch), the representative of JAC's Secured

[30] RA III(E) p 269: Straits Times newspaper report

[31] RA IV(B) pp 287-289

Lenders.[32] This is a point of significance which we will return to at [85]–[91] below.

The decision below

28 Two main issues were canvassed in the court below:

(a) whether the creditors that had voted in favour of the Schemes at the creditors' meetings were related to either Conchubar or UVM (as the case might be) despite not being wholly-owned subsidiaries, such that their votes ought to be discounted; and

(b) if those creditors were indeed related creditors, what was the appropriate discount to apply to their votes.

29 The Judge agreed with SKEC that Chemicals was indeed related to Conchubar and MacNair to UVM (see [14]–15], [32]–[33] and [35] of the GD). However, he rejected SKEC's argument that Universal and Estanil were also related creditors of Conchubar by virtue of the fact that Chemicals, a related creditor of Conchubar, had assigned portions of its claims against Conchubar to Universal and Estanil. He held that the mere fact that Universal and Estanil became creditors of Conchubar by virtue of Chemicals' assignment to them of debts due to Chemicals from Conchubar did not render Universal and Estanil related creditors of Conchubar (at [34] of the GD). In contrast, he found that Emirates was a related creditor of UVM by virtue of MacNair's assignment to it of a portion of the debts due to MacNair from UVM. The Judge reasoned that "[t]o the extent of that assignment, Emirates, like MacNair …, might convert the debt owed to it by UVM into shares of

32 RA III(F) pp 78-81

UVM", which was similar to the situation in *TT International (No 1)*, where a bank which had provided banking facilities to the scheme company secured by shares in that company was found to be a related creditor (at [36] of the GD).

30 The Judge observed that there was some difficulty in applying the guidance of the Court of Appeal in *TT International (No 1)* to the facts of the present case as the related creditors here (as found by the Judge) were not wholly-owned subsidiaries of the two Scheme Companies, and no valuation could be given to MacNair's and Emirates' respective interests in UVM (see [39] of the GD). He also noted that what constituted "special interests" which motivated related creditors such that their votes ought to be discounted was not defined clearly in *TT International (No 1)*, although the court there did interpret the term broadly as meaning "interests that a party may have that differ from [the interests] of ordinary, independent and objective creditors of the same class" (at [26] of the GD). The Judge rejected the two Scheme Companies' argument that to be a related creditor, the creditor and the scheme company had to be related by way of shareholding (at [33] of the GD). Having considered SKEC's contention, the Judge was of the view that "any discount to be applied was not to exceed 25% of the value of the debt owed to the related creditors", and found that "[s]uch a discount did not sufficiently tilt the balance" as the requisite statutory majority prescribed in s 210(3AB) of the Companies Act was still met (at [16] of the GD).

31 The Judge noted that the Schemes were contingent on JAC's R&M accepting the JEI Proposal, but was of the view that this did not prevent the court from sanctioning the Schemes (at [47] of the GD). He pointed out that while JAC's R&M had indicated that the JEI Proposal as it then stood was unacceptable, they were open to considering future restructuring proposals

from JEI. The Judge also noted that negotiations between JEI and JAC's R&M were still ongoing.

32 On the facts, the Judge was satisfied that the existence of provisions in the Schemes for failsafe payments provided sufficient clarity as to what the two Scheme Companies' creditors would receive at the minimum under the Schemes (at [48] of the GD). He also found that neither Conchubar nor UVM had acted dishonestly in engineering the voting outcome (at [50] of the GD).

33 Accordingly, on 29 August 2016, the Judge approved the Schemes pursuant to s 210(3AB) of the Companies Act and granted a one-year moratorium under s 210(10) on all actions, whether pending, contingent or fresh, against the two Scheme Companies.

The parties' arguments on appeal

34 SKEC has appealed against the whole of the Judge's decision. Its case in these Appeals is premised on the following contentions:

> (a) The Judge erred in applying a discount of only 25% to the votes of Chemicals, MacNair and Emirates. The discount should have been at least 75%, if not a complete discount, in relation to Chemicals' votes, and at least 99.82%, if not a complete discount, in relation to MacNair's votes.[33] We should point out here that SKEC did not make any submissions on the appropriate discount to apply to Emirates' votes apart from arguing that the 25% discount applied by the Judge was too low.

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[33] Appellant's Case paras 25, 65 and 75-76

(b) The Judge erred in finding that Universal and Estanil were not related creditors of Conchubar. In this regard, SKEC reiterates that Chemicals, a related creditor of Conchubar, assigned to Universal and Estanil part of the receivables due to it (Chemicals) from Conchubar so as to ensure that the statutory requirements prescribed in s 210(3AB) of the Companies Act would be met.

(c) The Judge should not have sanctioned the Schemes given the two Scheme Companies' non-disclosure of the material fact that JAC's R&M had, as early as December 2015, already rejected the JEI Proposal.

(d) The Judge should not have sanctioned the Schemes as they lack certainty.

35 The two Scheme Companies' rebuttal to SKEC's case is that:

(a) There is no relationship of control between Chemicals and Conchubar, and no special interests that would have motivated Chemicals to vote differently from an ordinary creditor at the meeting of Conchubar's creditors on 19 May 2016 to vote on the Conchubar Scheme.

(b) Universal and Estanil are not related creditors of Conchubar.

(c) MacNair is not a related creditor of UVM; and even if it is, no discount should be applied to its votes at the meeting of UVM's creditors on 19 May 2016 to vote on the UVM Scheme.

(d) The two Scheme Companies have satisfied their duty of disclosure to their respective creditors.

(e) The Judge correctly found that the Schemes were sufficiently clear and certain to the two Scheme Companies' creditors.

36 We note that the two Scheme Companies' primary arguments regarding the non-existence of a relationship between Chemicals and Conchubar on the one hand and between MacNair and UVM on the other in effect dispute the Judge's findings to the contrary even though they have not filed cross-appeals.

Developments after the Court of Appeal hearing

37 We heard the parties in relation to these Appeals on 20 March 2017 and reserved judgment. On 3 May 2017, SKEC's counsel wrote in to inform the court that an amended version of the JEI Proposal as defined at [17] above – *ie*, the specific restructuring proposal submitted by JEI in November 2015 – had been rejected by JAC's R&M on around 16 March 2017. It appeared from the correspondence annexed to counsel's letter that the two Scheme Companies received notice of the rejection on 12 April 2017. On around 28 April 2017, the solicitors for the two Scheme Companies gave notice to the respective creditors that their clients intended to propose new schemes for the creditors to consider, and reserved their clients' rights to convene creditors' meetings to vote on the new schemes within 60 days pursuant to cl 2.3 of the Schemes.

The issues before this court

38 The main issue in these Appeals is whether, on the facts which we have outlined above, the Judge was right in sanctioning the Schemes. Four specific sub-issues arise for determination:

(a) whether Chemicals, Universal and Estanil are related creditors of Conchubar, and whether MacNair and Emirates are related creditors of UVM; and if so, the appropriate discount (if any) to apply to their votes at the creditors' meetings on 19 May 2016;

(b) whether Chemicals' assignments to Universal and Estanil of a portion of Conchubar's debts to it and MacNair's assignment to Emirates of a portion of UVM's debts to it were genuine and not made to circumvent the headcount test in s 210(3AB)(*a*) of the Companies Act;

(c) whether there was material non-disclosure by either of the two Scheme Companies which invalidated the voting process; and

(d) whether the Schemes lack certainty.

39 We will deal with these issues in turn. First, however, we have to address a preliminary issue – who is a related creditor? In particular, what would constitute a "related" creditor in the context of voting on a scheme of arrangement other than the clear case of a wholly-owned subsidiary of a scheme company?

Preliminary issue: who is a related creditor?

40 In considering the issue of related creditors, the Judge noted this court's statements in *Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd* [2003] 3 SLR(R) 629 ("*Wah Yuen*")[34] at [35] that "[a] related party may have been motivated by personal or special interests to disregard the interests of the class as such and vote in a self-centred manner", and that it was for this reason that "courts have consistently attributed less weight to [related parties'] votes when asked to exercise their discretion in favour of a scheme". As we mentioned earlier (at [30] above), the Judge held that "special interests" should not be construed narrowly – "it simply means interests that a party may have that differ from [the interests] of ordinary, independent and objective creditors of the same class that may cause that party to exercise its vote in a manner that differs from that of ordinary, independent and objective creditors of the class" (see [26] of the GD). This echoes Chadwick LJ's comment in *Re BTR plc* [2000] 1 BCLC 740 at 747, in the context of a scheme of arrangement proposed by shareholders, that "special interests" means any interest "which differs from the interest of the ordinary independent and objective shareholder".

41 In our judgment, it is not possible to proffer a definitive statement of what would constitute a related creditor as the objectivity of a creditor can be undermined in a variety of ways. Whether or not a particular creditor is a related creditor of a scheme company ultimately involves a fact-sensitive and fact-intensive analysis. In some jurisdictions such as England, Australia and Hong Kong, the statutes are silent on this issue and it appears that there is no case law that deals directly with the definition of related creditors. In other

[34] Appellant's Bundle of Authorities ("ABOA") Tab 19

jurisdictions such as the United States and Canada, guidance is set out in statutes (see, *eg*, ss 3(2) and 3(4) of Canada's Companies Creditors Arrangement Act (RSC 1985, c C-36) and §§ 101(2) and 101(31) of the United States Bankruptcy Code 11 USC). In our case, the Companies Act is silent on this issue, and it is not within our remit to lay down exhaustive statute-like guidance on the definition of related creditors. Each case will have to turn on its own facts. That said, from our review of the cases cited to us by the parties and the treatment of this issue across common law jurisdictions, we observe that the presence of one or more of the following (non-exhaustive) factors could go towards establishing the existence of a relationship between a creditor and a scheme company:

(a) The scheme company controls the creditor or *vice versa*. Alternatively, the scheme company and the creditor have a common controlling shareholder, *ie*, a shareholder who owns (directly or indirectly) 50% or more of the shares in each of these companies.

(b) The creditor and the scheme company have common shareholder(s) who hold a less than 50% but more than *de minimis* stake in both companies. In this regard, what would be considered *de minimis* would depend on the facts; for instance, the threshold would be higher in the case of a public listed company as opposed to a private company.

(c) The creditor and the scheme company have common director(s), in particular, director(s) who propose or support the scheme.

(d) The scheme company and the creditor do not have any common shareholder(s), but their controlling shareholder(s) are either: (i) related by blood, adoption or marriage; or (ii) where the controlling shareholder(s) are corporate entities, in turn controlled by individual(s) who are related by blood, adoption or marriage.

(e) The creditor is related by blood, adoption or marriage to the controlling shareholder(s) or director(s) of the scheme company.

42 In our judgment, the presence of one or more factors similar to those listed above could justify a court inferring that a creditor had sufficient personal or special interest to support a scheme, such that it is not necessary to adduce *further* direct evidence of that creditor having regard to collateral considerations in casting its votes for the scheme. The creditor or the scheme company is, of course, at liberty nevertheless to adduce evidence which establishes that their interests are not aligned despite the existence of one or more of the fact situations set out at [41] above.

Whether any of the creditors that voted for the Schemes are related creditors

Chemicals

43 Reverting to the circumstances of these Appeals, as Conchubar's and Chemicals' involvement with SKECJI is relevant to SKEC's argument that Conchubar and Chemicals are related parties, we set out their dealings with SKECJI in greater detail below:

(a) On or around 25 August 2010, SKEC and Conchubar entered into a shareholders' agreement to contribute to the additional funding required by SKECJI to help SKIIS comply with the latter's obligation to provide credit support to JAC's Secured Lenders (as defined at [17] above).[35] Pursuant to cl 9.1 of this shareholders' agreement ("the SKECJI SHA"),[36] Conchubar agreed to provide funding support up to the limit of US$99m, while SKEC agreed to provide funding support up to the limit of US$24.75m. In furtherance of the agreement, SKEC subscribed for 24.75m shares in SKECJI at a price of US$1 per share; Conchubar, however, subscribed for only 9m SKECJI shares (likewise at US$1 per share).[37]

(b) On the same date, SKECJI entered into a separate Convertible Bond Subscription Agreement with Chemicals ("the CBSA"), under which Chemicals was to pay US$90m in subscription fees for convertible bonds in SKECJI. In return, Chemicals obtained a charge over SKIIS shares representing 72.73% of SKECJI's interest in SKIIS.[38]

(c) By a deed dated 12 November 2012 between SKEC and Conchubar ("the Deed"), SKEC undertook to satisfy Conchubar's funding obligations under cl 9.1 of the SKECJI SHA in the event that Conchubar failed to meet the same. This undertaking was premised on Chemicals' compliance with its obligations under the CBSA.[39]

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35 RA III(E) pp 176-208

36 RA III(E) p 189

37 RA III(E) pp 168-169

38 RA IV(A) p 31

39 RA III(E) pp 231-232

44 Conchubar submits on appeal that it is not related to Chemicals because:

(a) The parent company of Conchubar and Chemicals, Conchubar Infrastructure, is simply a holding vehicle of multiple investment companies which are held on trust for various ultimate beneficial owners (“UBOs”). Where Chemicals is concerned, this is evidenced by Conchubar Infrastructure’s declaration of trust in respect of Chemicals’ UBO and the statutory declaration affirmed by that UBO confirming that she has no interest in Conchubar and *vice versa*.[40] The common director of Conchubar and Chemicals (as well as Conchubar Infrastructure), Pardeep Dhir, has also confirmed that he is merely a proxy director of the companies.[41] There was therefore no reason for Chemicals to vote in any party’s interests other than its own interests as a creditor at the time of the meeting of Conchubar’s creditors to vote on the Conchubar Scheme.[42] In this regard, Conchubar was and is unable to influence Conchubar Infrastructure to in turn dictate that Chemicals vote in a certain manner since Conchubar Infrastructure is merely a holding company holding its subsidiary companies’ shares on trust for various UBOs.

(b) The conduct of Chemicals and Conchubar does not show any close relationship between them. Transactions such as the CBSA were entered into by Chemicals on the basis that it was acting as a separate investor in SKECJI. Conchubar also denies that the Deed shows that it

40 RA IV(A) pp 65-71

41 RA IV(A) p 73

42 Respondents’ Case para 49

provided SKEC with any assurance that Chemicals would fulfil its payment obligations under the CBSA in exchange for SKEC fulfilling Conchubar's funding obligations to SKECJI under the SKECJI SHA. Conchubar points out that if it really had control over Chemicals, it could have had Chemicals meet its (Conchubar's) funding obligations to SKECJI.[43]

45 SKEC, on the other hand, claims that Chemicals and Conchubar are related because:

(a) They are both wholly-owned by Conchubar Infrastructure and share a common director. Since Chemicals' votes are entirely controlled by the same company which has complete control over Conchubar, the commercial interests of Chemicals and Conchubar are 100% aligned. Chemicals thus had a special interest in voting for the Conchubar Scheme at the meeting of Conchubar's creditors on 19 May 2016 so as to ensure the preservation and rehabilitation of Conchubar for the benefit of all the companies held by Conchubar Infrastructure.[44]

(b) The SKECJI SHA, the CBSA and the Deed indicate that it must have been envisaged that Conchubar would be able to exercise considerable influence over Chemicals to perform the CBSA, or that Conchubar's and Chemicals' common parent company, Conchubar Infrastructure, would be able to do so.[45] The CBSA was the means by which Chemicals undertook to assist Conchubar in fulfilling the

43 Respondents' Case paras 51-52

44 Appellant's Case paras 44-48

45 Appellant's Case para 58

latter's funding commitment under the SKECJI SHA, given that Conchubar's subscription for 9m shares in SKECJI meant that it had injected only US$9m out of its US$99m commitment.[46]

46 In finding that Chemicals and Conchubar were related creditors, the Judge, while noting that the connection between the SKECJI SHA and the CBSA was not apparent, held that taken together with the Deed, the three agreements did suggest that there was "some kind of relationship" between Conchubar and Chemicals (at [32] of the GD). He did not, however, explain what was special about this relationship.

47 In our judgment, there is no evidence on the record to justify the Judge's finding that Conchubar and Chemicals are related parties. First, we are not satisfied that the CBSA, the SKECJI SHA and the Deed show a relationship between Chemicals and Conchubar such that Chemicals' votes in favour of the Conchubar Scheme at the meeting of Conchubar's creditors on 19 May 2016 should be discounted. The SKECJI SHA merely indicates a funding commitment made by both Conchubar and SKEC towards SKECJI, which they had incorporated as part of their joint venture to invest in JAC and the JAC Project (see [7] above). As regards the CBSA, on a plain reading of its terms, it was a means for SKECJI to raise funds to (indirectly) invest in the JAC Project, which was the purpose for SKECJI's incorporation. There is nothing to warrant the assertion that the CBSA was the *means* by which Chemicals undertook to assist Conchubar in fulfilling the latter's funding commitment under the SKECJI SHA. As for the Deed, it is not against commercial sense that SKEC would commit to assisting Conchubar to fulfil

46 Appellant's Case para 55

the latter's funding obligations under cl 9.1 of the SKECJI SHA in the event that Conchubar was unable to do so, on the condition that the US$90m funding commitment by Chemicals under the CBSA came through. It is not uncommon for a party to a joint venture to commit to providing additional funding only if certain conditions, such as funding from a third party, are fulfilled. These separate agreements do not show that Chemicals has interests in Conchubar which differ from those of an ordinary creditor. Chemicals could have perceived SKECJI to be a good investment at the time it entered into the CBSA. This view on the part of Chemicals would be wholly in line with the very rationale for SKEC and Conchubar entering into the SKECJI SHA. Both SKEC and Conchubar must have perceived potential benefit in continuing to support the JAC Project; otherwise, it is difficult to see why they would have agreed to support SKECJI, whose underlying function was to invest in the JAC Project.

48 Second and more importantly, despite Conchubar and Chemicals being wholly owned by the same parent company and sharing a common director, which would lead to a *prima facie* conclusion that they are indeed related (see [41] above), the UBOs of Conchubar and Chemicals have made statutory declarations directly contradicting such a conclusion. The common director of these companies, Pardeep Dhir, has also made a statutory declaration that he is merely a proxy director. There is nothing on the record that would lead us to doubt the veracity of these statutory declarations, and SKEC has not proffered any reason for us to go behind them.

Universal and Estanil

49 SKEC takes the position that the Judge erred in holding that Chemicals' assignments to Universal and Estanil of a portion of the

receivables due to Chemicals from Conchubar did not make Universal and Estanil related creditors of Conchubar. It submits that the Judge "failed to take into account the circumstances in which the debts were assigned by Chemicals to these entities".[47] According to SKEC, Chemicals assigned part of its receivables from Conchubar to Universal and Estanil in a bid to ensure that Chemicals and these assignees would together meet the statutory requirements set out in s 210(3AB) of the Companies Act for the approval of a scheme of arrangement. SKEC points out that prior to these assignments, Conchubar's only creditors were Chemicals and SKEC. The assignments were made only after SKEC had written to Conchubar demanding payment of the sum which the latter owed. SKEC argues that this is similar to the situation in *TT International (No 1)*, where this court concluded that the agreements between Akira Pte Ltd, one of the alleged related creditors in that case, and the scheme company "did not reflect an arm's length relationship" between the parties and appeared to have been entered into to strengthen the scheme company's hand in the proposed scheme.

50 Conchubar, on the other hand, argues that the Judge was right to find on the evidence that Universal and Estanil are not related to it because:[48]

(a) The UBOs of Universal and Estanil have affirmed in statutory declarations that their sole interests are in their respective companies, and that they do not have any interest in Conchubar.

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47 Appellant's Case para 77

48 Respondents' Case paras 59-61

(b) There is no basis for inferring that Chemicals assigned part of its claims against Conchubar to Estanil and Universal in response to SKEC's letters of demand to Conchubar.

51 In our judgment, the issue of whether a creditor is related to a scheme company and whether an assignment of debt by a creditor to another party was at arm's length should not be conflated. Universal and Estanil should not be treated as related creditors of Conchubar simply because they received their claims against Conchubar from a related creditor (which, in any case, they did not, given our finding that Chemicals is not related to Conchubar). Related creditor status should not be attached to the claim, but should instead depend on a factual analysis of the particular creditor's connection with the scheme company. This approach finds support in other jurisdictions such as the United States. For instance, in *In Re The Village at Lakeridge, LLC* 814 F 3d 993 (9th Cir, 2016), where one of the issues before the court was whether a creditor could become an "insider" as statutorily defined by virtue of receiving a claim from another "insider", the United States Court of Appeals for the Ninth Circuit ruled in the negative, explaining (at 999–1000) that:

> *A person does not become a statutory insider solely by acquiring a claim from a statutory insider for two reasons. First, bankruptcy law distinguishes between the status of a claim and that of a claimant.* Insider status pertains only to the claimant; it is not a property of a claim. Because insider status is not a property of a claim, general assignment law – in which an assignee takes a claim subject to any benefits and defects of the claim – does not apply. *Second, a person's insider status is a question of fact that must be determined after the claim transfer occurs.*
>
> …
>
> … *Courts may not bypass this intensive factual analysis by finding that a third party became an insider as a matter of law when he acquired a claim from an insider.* If so, a third-party assignee could be foreclosed from voting [on] a claim acquired

> from an insider, even if the entire transaction was conducted at arm's length. The bankruptcy code did not intend this result.
>
> [citations in original omitted; emphasis added in italics]

52 The reasoning in this case is persuasive even though it relates to the interpretation of the United States Bankruptcy Code. It would be absurd if a creditor which acquires its claim against a scheme company from a related creditor were to find that the votes attached to the claim are automatically discounted because of the status of the assignor-creditor, regardless of the present assignee-creditor's status and relationship with the scheme company. The purpose of discounting related creditors' votes is to remove or negate the influence of any bias which such creditors might have towards a certain voting outcome. That concern is not attached to the claim, but rather, is attached to the individual creditor in question. Such concerns would not be present if a creditor which acquires its claim against a scheme company from a related creditor has no demonstrable reason for bias towards any particular voting outcome beyond its own interests as a creditor.

53 As a matter of logic, it does not follow that an assignee-creditor will automatically be found to be related to a scheme company simply because the assignment of debt to it by the assignor-creditor was not conducted at arm's length. Here, we are dealing only with the question of whether Universal and Estanil are related to Conchubar. We will consider the circumstances surrounding Chemicals' assignments of receivables to Universal and Estanil later in this judgment (see below at [68]–[83]).

54 Although the Judge did not consider this in the GD, the respective UBOs of Universal and Estanil, like the UBO of Chemicals, have affirmed in statutory declarations that they have no direct or indirect interests in

Conchubar.[49] Again, as in the case of Chemicals, there is nothing on the record that would lead us to doubt the veracity of these statutory declarations and SKEC has not proffered any reason for us to go behind them. Therefore, in the absence of contrary evidence, we accept that Universal and Estanil have no special interest in Conchubar other than that of an ordinary creditor.

MacNair

55 With regard to the relationship between UVM and MacNair, SKEC submits that it should be assumed that MacNair's interests are entirely aligned with UVM's interests because under the 2011 CBA, MacNair has the right to convert the debt owed to it by UVM into a 99.82% shareholding in UVM. This, SKEC argues, makes MacNair different from an unrelated creditor, such as SKEC, which simply wants its debt to be repaid. According to SKEC, it is in MacNair's interests for UVM's debts to other creditors to be reduced as much as possible under the UVM Scheme so that if UVM is revived as a going concern, UVM's shares, which MacNair can obtain by conversion under the 2011 CBA, will be worth more.[50]

56 UVM disputes such a characterisation.[51] Its main argument is that MacNair is merely a contingent shareholder of UVM until it invokes its right under the 2011 CBA to acquire shares in UVM, and thus did not have any special interest other than that of an ordinary creditor at the time of the meeting of UVM's creditors on 19 May 2016 to vote on the UVM Scheme. In any case, MacNair's right to acquire shares in UVM would not survive the

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[49] RA IV(A) pp 129 and 265

[50] Appellant's Case para 69

[51] Respondents' Case paras 65-73

UVM Scheme if it was approved. At the hearing before us, Mr Lem, counsel for the two Scheme Companies, clarified that as far as UVM was concerned, cl 4.1.1 of the UVM Scheme, if approved, would operate to extinguish all liabilities of UVM, including MacNair's ability to convert the debt owed to it by UVM into shares in UVM and MacNair's rights under its charge over UVM's shares. Clause 4.1.1 of the UVM Scheme states:[52]

> **4.1** From the Effective Date [as defined in cl 2.2, which we set out earlier at [18] above]:
>
> > **4.1.1** [UVM] shall be completely and absolutely released and discharged from *all claims, obligations and liabilities (whether actual, contingent or otherwise and including for the avoidance of doubt liabilities in respect of taxes) and indebtedness (whether as principal debtor or surety)* of [UVM] to each and all the Creditors (regardless of whether or not it has delivered a Proof of Debt under this Scheme) whatsoever and howsoever arising out of or in connection with any and all agreements, transactions, dealings and matters effected or entered into or occurring at any time on or prior to the Effective Date[.]
>
> …
>
> [emphasis added]

57 Mr Lem argued that on account of cl 4.1.1, MacNair would not be able to rely on the debt which UVM owed to it under the 2011 CBA to vote on the UVM Scheme and then convert that debt into shares in UVM if the scheme was approved. The UVM Scheme, once approved, would have the effect of extinguishing UVM's debt to MacNair under the 2011 CBA, leaving no basis for MacNair to obtain shares in UVM by way of conversion. Mr Lem also clarified that since MacNair's charge over UVM's shares was expressed as a

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52 RA I p 117

continuing security for the UVM convertible bonds which MacNair had subscribed for under the 2011 CBA, once the debt under that agreement was extinguished, the share charge would also be extinguished. Therefore, it could not be said that MacNair had a special interest to vote for the UVM Scheme at the time of the meeting of UVM's creditors on 19 May 2016.

58 SKEC's counter-argument to this, relying on this court's comments in *Hitachi Plant Engineering & Construction Co Ltd and another v Eltraco International Pte Ltd and another appeal* [2003] 4 SLR(R) 384 ("*Hitachi Plant Engineering*") at [30], is that cl 4.1.1 of the UVM Scheme is not wide enough to take away MacNair's right to acquire shares in UVM as the scheme does not make any express provision to this effect.[53] We are unable to accept this argument. This court's comments in *Hitachi Plant Engineering* at [30]–[31] must be understood in their proper context:

> 30 We agree with the appellants' counsel that *as a general principle*, if a right of the creditors is to be taken away or affected by a scheme of arrangement, it has to be expressly stated in the scheme. Without full disclosure of the mechanics of the scheme of arrangement, it will be difficult for the creditors to decide whether to vote on or participate in the scheme …
>
> 31 However, *the application of that general principle really depends on the facts and circumstances of each case. A court has to first decide whether the creditors have a right that requires protection through an express term in the scheme of arrangement.* Assuming that is answered in the affirmative, the court has to then decide whether the terms of the scheme are sufficiently expressed to affect that right.
>
> [emphasis added]

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53 Appellant's skeletal arguments p 12

59 It should be noted that in *Hitachi Plant Engineering*, this court ultimately found (at [36]) that the general principle enunciated in the above extract was not applicable on the facts as the creditors in question did not have a right to receive any direct payments from the scheme company's debtor at the time when the scheme was proposed and sanctioned.

60 SKEC has not persuaded us that MacNair's right to acquire shares in UVM has to be specifically extinguished by the terms of the UVM Scheme when there is already an all-encompassing clause in the form of cl 4.1.1 extinguishing a wide range of UVM's liabilities, including contingent ones, if the scheme is approved. The concern in *Hitachi Plant Engineering* that creditors must have sufficient notice of changes which affect their rights must be balanced with an understanding of the practicalities in schemes of arrangement – it is impossible to enumerate all the liabilities, actual and contingent, that will be extinguished if a scheme is approved. In the present case, we are satisfied that the explanatory statement to and the terms of the UVM Scheme are clear as to the impact of the scheme on the rights of UVM's creditors if it is approved. Furthermore, cl 3.1.5 of the explanatory statement to the UVM Scheme states clearly that "if the Scheme is implemented, the [c]reditors and [UVM]'s existing legal obligations towards each other will cease to have effect".[54]

61 While it would have been desirable if we had had MacNair's input on its interpretation of the terms of the 2011 CBA, in the round, we accept UVM's explanation that MacNair's right to acquire shares in UVM and its charge over UVM's shares under the 2011 CBA would be extinguished upon

54 RA I p 104

the implementation of the UVM Scheme. To read cl 4.1.1 of the UVM Scheme in any other way would be to do violence to its plain sense. Thus, at the time of the meeting of UVM's creditors on 19 May 2016 to vote on the UVM Scheme, MacNair had no special interest over and above that of an ordinary creditor seeking to recover its debt. We therefore find that MacNair is not a related creditor of UVM.

Emirates

62 Almost no arguments were proffered by the parties in relation to the position of Emirates. The assertion that Emirates is a related creditor of UVM appeared in passing in the heading of Section D of SKEC's Appellant's Case, which states that the Judge erred in applying no more than a 25% discount to the votes of (among other creditors) Emirates. UVM made no mention of Emirates' status in both its Respondents' Case and its skeletal arguments.

63 In our judgment, the Judge's ruling that Emirates is a related creditor of UVM is wrong because it is based on the erroneous premise that Emirates was assigned part of the debt owed by UVM to MacNair under the 2011 CBA and thus could, like MacNair, convert the receivables due from UVM into shares in UVM (see [29] above). We have at [15] above stated that the receivables of US$134,181 which MacNair assigned to Emirates were receivables due to MacNair arising from fees that it had paid on UVM's behalf. This plainly contradicts the Judge's finding (at [36] of the GD) as to the basis of Emirates' claim against UVM. The receivables assigned to Emirates were not connected to the debt owed by UVM to MacNair under the 2011 CBA, so Emirates certainly had no option of converting UVM's debt to it into shares in UVM. In any event, even if the receivables assigned to Emirates were connected to UVM's debt to MacNair under the 2011 CBA, the

same reasoning expressed in our discussion at [60]–[61] above on MacNair's right to acquire shares in UVM would apply to Emirates, which again goes to show that the Judge's finding (as well as SKEC's argument) that Emirates is a related creditor of UVM is wrong.

Observations on the appropriate discount to apply to the votes of related creditors

64 In *TT International (No 1)*, this court held that the votes of creditors which are wholly-owned subsidiaries of the scheme company would be discounted to zero. This ruling was expressly confined to *wholly-owned* subsidiaries, and this court stated that the issue of the appropriate discount to apply to the votes of partially-owned subsidiaries would have to be dealt with in future in a more appropriate case (at [166]). This court did, however, proffer (at [170]–[171]) a *partial* discounting approach in dealing with the votes of two of the related creditors in that case, which, although not wholly owned by the scheme company, were related to the scheme company either by shareholding or by virtue of holding security over the scheme company's shares. It opined that those two creditors' votes could be discounted by the monetary value of their shareholding or security in the scheme company.

65 The partial discounting approach suggested in *TT International (No 1)* was the basis of a number of the arguments put forth by SKEC and the two Scheme Companies in these Appeals. Given our findings, contrary to the Judge's, that Chemicals, Universal and Estanil are *not* related creditors of Conchubar, and that MacNair and Emirates are *not* related creditors of UVM, the crucial question apparently identified in these Appeals regarding the appropriate discount to apply to related creditors' votes (see [3] above) does not in fact arise.

66 That said, we acknowledge that this is an issue of some importance which will likely find itself before this court again. We will say no more at present other than to express our reservations regarding the approach of applying a partial discount to the votes of related creditors which are not wholly-owned subsidiaries of a scheme company. SKEC has acknowledged that the partial discounting approach based on the value of a related creditor's shareholding or security in the scheme company is not suitable in the present case because the two Scheme Companies are not publicly traded. Based on the case law cited by the parties, and to the best of our knowledge, no jurisdiction other than ours (in *TT International (No 1)*) has suggested applying a partial discount to the votes of related creditors which are not wholly-owned subsidiaries of a scheme company. The parties have also been unable to proffer a clear and principled method of determining the appropriate discount to apply in such a situation.

67 From a broader perspective, it seems to us that the exercise of determining an appropriate partial discount is inevitably arbitrary and subjective, and not amenable to definitive guidance. This is hardly surprising, given the myriad fact situations in which a creditor may be found to be related to a scheme company in the context of voting on a scheme of arrangement. It seems to us to be a more principled and certain approach to wholly discount the votes of creditors once they are found to be related to the scheme company: if the position of a creditor is in any way tainted, it should follow that that creditor's votes on the scheme should be entirely disregarded.

Whether the assignments of some of the two Scheme Companies' debts were made for the purpose of circumventing the headcount test in s 210(3AB)(*a*)

68 In our view, a critical issue arising in these Appeals is whether the assignments to Universal and Estanil of part of the receivables due to Chemicals from Conchubar and the assignment to Emirates of part of the receivables due to MacNair from UVM were assignments which were made for the purpose of circumventing the headcount test in s 210(3AB)(*a*) of the Companies Act, rather than genuine assignments. Without these assignments, the Schemes could not have been approved because the headcount test would not have been satisfied: there would have been only one creditor voting against each of the Schemes (*viz*, SKEC) and one creditor voting in favour (*viz*, Chemicals in the case of the Conchubar Scheme, and MacNair in the case of the UVM Scheme). We now turn to examine this point further.

The headcount test in s 210(3AB)(*a*)

69 The earliest predecessor of what is now s 210(3AB) of the Companies Act is s 176 of Singapore's first Companies Act, the Companies Act 1967 (Act 42 of 1967) (the "1967 Companies Act"). At the third reading of the Bill introducing that Act (*viz*, the Companies Bill (Bill 58 of 1966)), the then Minister for Law and National Development, Mr E W Barker, stated that the provisions in the Bill "follow[ed] closely the provisions contained in the Malaysian Companies Act, 1965" (see *Singapore Parliamentary Debates, Official Report* (21 December 1967) vol 51 at cols 1035–1036). Malaysia's Companies Act 1965 (Act No 76 of 1965) in turn took inspiration from legal developments in England and Australia. Indeed, s 176 of Singapore's 1967 Companies Act was *in pari materia* with s 206 of England's Companies Act 1948 (c 38).

70 In England, the headcount test for approving schemes of arrangement was first introduced in 1870 to "provide a check on the ability of creditors with large claims to carry the day": Prof Jennifer Payne ("Prof Payne"), *Schemes of Arrangement: Theory, Structure and Operation* (Cambridge University Press, 2014) ("*Schemes of Arrangement*") at p 61. While some jurisdictions which imported the scheme of arrangement from England, such as New Zealand and Canada, no longer apply the headcount test, it remains intact in England with the aim of protecting the interests of minority creditors or shareholders: *Schemes of Arrangement* at p 61, fn 210. In Singapore, the headcount test remains in s 210(3AB)(*a*) of the Companies Act.

Vote-splitting in shareholders' schemes of arrangement

71 The existence of the headcount test for approving schemes of arrangement has given rise to the phenomenon of vote-splitting, especially in the context of shareholders' schemes of arrangement, where shareholders who do not form the majority in number despite representing more than three-fourths in value of the shareholders give away shares to parties who are willing to vote in line with them, thereby circumventing the headcount test. Such vote-splitting or share-splitting arrangements would engage the concern identified by this court in *TT International (No 1)* at [70] as to whether "those who attended the meeting were fairly representative of the class of creditors or the class of members".

72 Courts in other jurisdictions where the headcount test still applies have disapproved of the vote-splitting device in relation to shareholders' schemes of arrangement. This can be seen from the following two cases.

73 In *Re PCCW Ltd* [2009] 3 HKC 292 ("*Re PCCW*"),[55] despite both the headcount and the value tests set out in s 166 of the then Hong Kong Companies Ordinance (Cap 32) being satisfied in respect of a shareholders' scheme of arrangement to privatise the scheme company, the Hong Kong Court of Appeal unanimously refused to sanction the scheme on the basis that the outcome of the vote was not reflective of the interests of the class of shareholders concerned. The court affirmed the finding by the judge at first instance that there had been share-splitting devised to boost the headcount in favour of the scheme. The share-splitting involved a number of individuals buying up lots of shares and then distributing them alongside proxy forms to numerous individuals during the two-month period before the voting exercise.

74 Rogers VP held that the conclusion that the statutory requirements had been met could not be challenged, but refused to sanction the scheme because there had been "clear manipulation" of the vote to such an extent that the court could not be sure that the vote was fair (see *Re PCCW* at [66]). He also commented that vote manipulation was "a form of dishonesty" as well as "a form of coercion where the wishes of the minority in number of shares are overridden by those who hold the majority of the shares" (at [71]), and cautioned that if the court were to take a permissive stance towards such manipulation, it would render the voting process in a scheme of arrangement meaningless (at [75]).

75 Lam J held that the burden was on the party seeking the court's approval of a scheme to show that the court ought to grant its approval. He clarified that the court's jurisdiction in deciding whether to approve a scheme

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55 ABOA Tab 13

was quasi-inquisitorial, and that the court did not have to take statements made by a petitioning party at face value even if the opposing party could not prove those statements to the contrary (at [114]). While this did not mean that the court had to question every statement made by or on behalf of a petitioning party, "if there [were] matters which cast serious doubt on the extent to which a statutory majority fairly reflect[ed] the interest[s] of the class", the court had to take that into account when deciding how much weight to attach to the statutory majority's opinion (at [115]–[116]). Lam J distinguished the process of obtaining the court's sanction of a scheme of arrangement from ordinary adversarial proceedings. In the former, the court was focused on whether the materials presented to it satisfied it that the scheme should be approved; if the court was not so satisfied, its decision should not be equated with a finding under the latter process that a party had manipulated the votes on the scheme (at [121]–[122]). Lam J cautioned judges against lapsing into fact-finding when deciding whether to approve a scheme; a judge did not have to make a positive ruling that there had been vote manipulation before he could come to the conclusion that the statutory majority had not arrived at an outcome that was fairly representative of the interests of the class in question (at [126]–[128]). Lam J also clarified that when a court refused to sanction a scheme despite the statutory requirements having been met, the shareholders who had voted in favour of the scheme were not being disenfranchised because their votes counted for the purpose of satisfying the statutorily-prescribed headcount and value tests (at [147]).

76 In the recent English case of *Re Dee Valley Group Plc* [2017] EWHC 184 (Ch) ("*Re Dee Valley*"), the majority shareholders demonstrated an opposite intent to that of the statutory majority in *Re PCCW*. Sir Geoffrey Vos C observed that *Re Dee Valley* was "the first case in which a

share-splitting exercise has been undertaken with the apparent object of *defeating* a scheme of arrangement between a company and its members" [emphasis added] (at [4]). He held that the chairman of the shareholders' meeting to vote on the scheme was right in disallowing the votes of 434 individual shareholders who opposed the scheme (the scheme, if approved, would have led to a third-party acquisition of all the shares of the company). The result was that both the headcount and the value tests were satisfied in respect of the scheme (which would not have been the case if the opposing votes had been taken into account), and the scheme was eventually sanctioned by the court. The chairman of the shareholders' meeting had disallowed the opposing shareholders' votes because those shareholders were either employees of the scheme company or family members of employees who had acquired their shares in the scheme company by way of gift from the same shareholder who was opposed to the scheme.

77 Sir Geoffrey identified the key issue in the case as being the basis upon which a shareholder's votes at a shareholders' meeting to vote on a scheme of arrangement could be rejected. He held that in deciding whether to approve a scheme, the court was generally concerned with voting motivations: the shareholders had to be "fairly representing their class, acting bona fide, and not coercing a minority in order to promote interests adverse to the class they purport to represent" (at [42]–[43]). After referring to the well-established principle that the members of the class of shareholders concerned must vote in the interests of the class as a whole (at [47]), he acknowledged that it was difficult to reject votes by reference to shareholders' motivations unless it was very obvious that the shareholders in question had been motivated by their own interests in a very different capacity (at [55]). Share-splitting, he held, undermined the underlying spirit of the dual requirements encapsulated in the

statutorily-prescribed headcount and value tests (at [57]). Sir Geoffrey's decision ultimately turned on his finding that the only possible explanation for the conduct of the 434 opposing shareholders was that they were seeking to further a share manipulation strategy to defeat the scheme, considering that they had each accepted a gift of a single share during the one-month period before the shareholders' meeting to vote on the scheme was held (at [58]).

Vote-splitting in creditors' schemes of arrangement

78 In our judgment, the general concern with vote-splitting in respect of shareholders' schemes of arrangement would not be any different in relation to creditors' schemes of arrangement. As Prof Payne has pointed out in *Schemes of Arrangement* (at p 66), vote-splitting can occur in relation to creditors' schemes of arrangement as well – "[d]ebts (or part of them) can potentially be assigned in order to boost the headcount". We are, of course, aware that there is nothing inherently sinister in the trading of claims or the assignment of debts, and acknowledge that it is not easy to define the point at which an assignment of debt ceases to be a lawful and routine commercial transaction. However, in our judgment, the assignments to Universal, Estanil and Emirates on the same date of part of the receivables due to Chemicals and MacNair from the two Scheme Companies had the effect of allowing the Schemes to be passed when they otherwise would not, and therefore merited some consideration by the Judge when deciding whether to sanction the Schemes. The issue of whether these assignments were genuine assignments made at arms length or transactions entered into for the purpose of circumventing the headcount test in s 210(3AB)(*a*) of the Companies Act should have been considered.

79 We agree with Lam J's comments in *Re PCCW* that in determining whether to sanction a scheme of arrangement, the court does not have to accept at face value what the petitioning parties claim as to the *bona fides* of their actions. We also agree with his observation that the process of obtaining the court's sanction of a scheme of arrangement is different from ordinary adversarial proceedings. The former process is designed to be summary in nature, and therefore, the court's focus should not be on fact-finding in relation to vote manipulation, but rather, should be on satisfying itself that: (a) the statutory requirements have been satisfied; (b) the statutory majority have voted in a manner that is representative of the interests of the class concerned; and (c) the scheme is one which is reasonable.

Analysis of the scenario in these Appeals

80 The timing of the assignments by Chemicals and MacNair to Universal, Estanil and Emirates in the present case was more innocuous than that in *Re PCCW* and *Re Dee Valley* – the assignments here were all made on 30 April 2015, which was roughly a year before the Schemes were in serious contemplation, and also before SKECJI defaulted on repayment of Chemicals' loan in August 2015, thereby rendering Conchubar liable under the 2010 Corporate Guarantee Agreement (see [8] above). However, a closer perusal of the documents that purportedly show the circumstances surrounding the assignments gives rise to serious doubts as to whether these assignments were genuine transactions that were entered into at arm's length.

81 It will be recalled that Chemicals purportedly owed Universal US$11m pursuant to the 2014 SPA, which was the reason why Chemicals assigned to Universal its receivables of US$10.422m from Conchubar to extinguish Chemicals' debt to Universal by the said amount (see [10] above). However,

there was no proof as to how the US$11m was incurred under the 2014 SPA; the 2014 SPA did not contain a liquidated damages clause, and there was no evidence as to how the US$11m debt came about. As for the US$1.2m which Chemicals purportedly owed Estanil under the 2013 FLA (see [11] above), that agreement contained a liquidated damages clause, and an invoice was presented as proof of the sum owed.[56] Nevertheless, the court was left none the wiser as to the nature and authenticity of the debt purportedly owed by Chemicals to Estanil. With regard to MacNair's debt of US$200,000 to Emirates (see [15] above), although the promissory note forming the basis of this debt was enclosed as proof of debt, that note did not explain the circumstances which led to its being issued. All that was stated was that "for value received", MacNair promised to pay Emirates the sum of US$200,000 together with interest of 4% per annum on the unpaid balance on or before 23 May 2015. The "value" obtained by MacNair under the promissory note was unclear.

82 In our judgment, while the proof of debt process under a scheme of arrangement ought to be quick and efficient due to the summary nature of the proceedings, where there are creditors who obtained their debts by assignment, there has to be sufficient information to satisfy the court that the assignments were genuine and also made at arm's length. This court held in *Fustar Chemicals Ltd (Hong Kong) v Liquidator of Fustar Chemicals Pte Ltd* [2009] 4 SLR(R) 458 (at [20]), in relation to a liquidator's duties in verifying a proof of debt, that the verification process was not a mere administrative exercise. This reasoning should similarly apply to a scheme manager's duties. There has to be evidence which is sufficient to satisfy the court that the assignments of

[56] RA IV(A) pp 235 and 264

debts in the period leading up to the scheme company's financial difficulties were genuine; otherwise, creditors seeking to circumvent the headcount test in s 210(3AB)(*a*) of the Companies Act can easily contrive debts owed to third parties who are willing to side with them and assign portions of the receivables due from the scheme company to these third parties, who would then vote in line with the assignor-creditors' wishes.

83 In *Re Ice-Mack Pte Ltd (in liquidation)* [1989] 2 SLR(R) 283, Yong Pung How J (as he then was) observed in *obiter dicta* (at [11]) that:

> … In anything resembling an arms-length situation, an audit confirmation would of course be strong evidence against a party of the correctness of the credit or debit balance which it has confirmed. …

In the present case, there is no audited confirmation of either Chemicals' debts to Universal and Estanil or MacNair's debt to Emirates which would support the inference that these debts are genuine, and that the assignments of receivables to Universal, Estanil and Emirates were genuine transactions entered into at arm's length. In the circumstances, we are not persuaded that Chemicals and MacNair owed genuine debts to these three companies. We are thus of the view that although the headcount and the value tests have apparently been satisfied in respect of the Schemes, the Judge erred in sanctioning the Schemes in the absence of proof of the authenticity of the alleged debts owed by Chemicals and MacNair to Universal, Estanil and Emirates that resulted in the assignments to the latter three companies of part of the receivables due from the two Scheme Companies.

84 Given our decision on this issue, these Appeals should be allowed. However, for completeness, we will move on to briefly consider the remaining issues.

Whether there was material non-disclosure by the two Scheme Companies in relation to the Schemes

85 One of the arguments made by SKEC on appeal is that the two Scheme Companies breached their duty of disclosure to their respective creditors by concealing the material fact that the JEI Proposal had been rejected by JAC's R&M as early as December 2015 (see above at [27]). SKEC alleges that the two Scheme Companies were aware of the rejection, but did not disclose it either in the explanatory statements to the Schemes that were circulated to their respective creditors on 3 May 2016 ("the Explanatory Statements")[57] or at the respective creditors' meetings held on 19 May 2016 to vote on the Schemes. SKEC argues that the wording of the Explanatory Statements gave the misleading impression that the JEI Proposal was still under consideration, and contends that if the creditors of the two Scheme Companies had known of the material fact that the JEI Proposal had already been rejected by JAC's R&M, the voting outcome would likely have been different.[58]

86 The two Scheme Companies, on the other hand, claim that prior to receiving the A&G letter in July 2016, they were not aware that JAC's R&M had rejected the JEI Proposal.[59] They assert that even after they received that letter, their subsequent email correspondence with JAC's R&M indicated that the latter were still open to reconsidering the JEI Proposal if its terms were improved, and this was affirmed by the solicitors for JAC's R&M at the sanction hearing before the Judge on 29 August 2016.[60] The two Scheme

57 RA I pp 43 and 94

58 Appellant's Case para 99-103

59 Respondents' submissions para 36; RA III(G) pp 10 and 17

60 Respondents' Case para 83; Respondents' skeletal submissions para 36

Companies also argue that at the time of the creditors' meetings to vote on the Schemes, the language of the Explanatory Statements made it clear that the terms of the JEI Proposal were tentative and subject to ongoing negotiation with JAC's R&M, so the Schemes were not premised on JAC's R&M accepting the JEI Proposal as it then stood.[61]

87 We note that SKEC did not raise the issue of material non-disclosure before the Judge even though it relied on the facts relating to such non-disclosure to support its argument that the Schemes lacked certainty and clarity.[62] In the GD, the Judge did not discuss whether there had been material non-disclosure since the point was not advanced before him, but he did consider the said facts brought up by SKEC in explaining why he found the Schemes sufficiently clear and certain.

88 Section 211 of the Companies Act, read together with the case law, requires scheme companies to disclose to their creditors (or their shareholders, as the case may be) all material information relating to a scheme of arrangement which would allow the latter to exercise their voting rights meaningfully: *Wah Yuen* at [24]. The information provided should not only enable creditors to determine their expected returns under the scheme, but should also relate to the commercial viability of the scheme as a whole: *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[63] at [21].

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61 Respondents' Case para 86; RA III(G) p 10 at para 18 and p 17 at para 9

62 RA III(H) pp 286-290: SKEC's submissions below

63 ABOA Tab 17

89 We accept that the rejection of the JEI Proposal by JAC's R&M in December 2015 should have been disclosed to the two Scheme Companies' creditors at the creditors' meetings on 19 May 2016 as it affected the most material terms of the Schemes. It is difficult for us to believe that the two Scheme Companies were unaware of the rejection of the JEI Proposal by JAC's R&M given their claim that JEI was set up by the same investors who had invested in them (see [17] above), and given that JEI was set up for the sole purpose of salvaging the JAC Project, in which they had much at stake.

90 However, the fact remains that Conchubar's director, Pardeep Dhir, and UVM's director, Tan Lian Kiow, have deposed that their respective companies, rightly or wrongly, were under the impression that the JEI Proposal was still under consideration until they received the A&G letter dated 18 July 2016.[64] (As we mentioned at [86] above, it also appears that even after receiving the A&G letter, the two Scheme Companies continued to believe that JAC's R&M were still prepared to reconsider the JEI Proposal if its terms were improved.) This impression also appears to have been the result of their mistaken understanding that the terms of the JEI Proposal were not final and were subject to ongoing negotiations between JEI and JAC's R&M. We do not agree with such a characterisation of the JEI Proposal, a point which we will elaborate on in the next section regarding the issue of whether the Schemes lack certainty (see [92]–[101] below).

91 Given the affidavit evidence from the two Scheme Companies' directors and SKEC's failure to challenge the veracity of that evidence with contrary evidence, we are left with no option but to accept the two Scheme

64 RA III(G) pp 10 and 17

Companies' position that they did not know of the rejection of the JEI Proposal at the time of the creditors' meetings on 19 May 2016. Therefore, we find that there was no material non-disclosure on the part of the two Scheme Companies because they were not aware of the said material fact at that point in time.

Whether the Schemes lack certainty

92 SKEC argues that the Judge erred in finding that the Schemes were sufficiently certain and clear for the following reasons:[65]

(a) he failed to consider that the terms of the Schemes would effectively allow JAC's R&M to veto the Schemes;

(b) he failed to give due weight to the evidence showing that even if an eventual restructuring proposal were accepted by JAC's R&M, it could be radically different from the JEI Proposal in its original form; and

(c) he accorded too much weight to the failsafe payments provided for in the Schemes when the JEI Proposal was "the heart and soul" of the Schemes.[66]

93 It should be noted that SKEC's arguments before the Judge centered on cl 2.3 of the Schemes, which SKEC argued contained machinery that could lead to a variation of the Schemes' terms. We earlier set out cl 2.3 at [18] above, and reproduce it again below for ease of reference:

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65 Appellant's Case para 105

66 Appellant's Case para 127

> Within 30 days of the earlier of (i) one (1) year from the date of this Scheme and (ii) the date that the Company [*ie*, Conchubar in the case of the Conchubar Scheme, and UVM in the case of the UVM Scheme] receives notice from JEI that the JEI Restructuring Proposal has been rejected by [JAC's R&M] (the "**Expiry Date**"), the Company shall give notice to the Eligible Creditors as to whether it intends to propose a new Scheme. If the Company intends to propose a new Scheme, it shall have the liberty to convene an Eligible Creditors Meeting for the Eligible Creditors to vote on the new Scheme within 60 days thereby superseding this Scheme if accepted.

94 The two Scheme Companies argue that the Schemes identified two eventualities: (a) the failsafe payments in cl 3 would apply (see [21] above); or (b) there would be a purchase of their shares in JAC if the JEI Proposal were accepted (see [20] above). They seek to analogise the situation with one featuring conditions subsequent rather than one containing a variation mechanism.[67] They also disagree that the terms of the Schemes effectively allow JAC's R&M to veto the Schemes, submitting that even if the JEI Proposal were not accepted, that would not terminate the Schemes.[68] They further argue that the terms of the JEI Proposal must be distinguished from the terms of the Schemes – it is only the terms of the latter that are relevant to the court's assessment of whether the creditors were able to understand what they were voting for at the creditors' meetings on 19 May 2016.[69]

95 The principles relied upon by SKEC and the Judge regarding the standard of clarity and certainty required of a scheme of arrangement are uncontroversial. In our judgment, the Schemes do not suffer from a lack of clarity or certainty. The problem is a different one – the Schemes as they stand

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67 Respondents' Case paras 93-94

68 Respondents' Case para 95

69 Respondents' Case para 97

are no longer a meaningful compromise. This will become apparent once we elucidate what the "JEI Restructuring Proposal" referred to in the Schemes is.

96 The Judge appeared to accept the two Scheme Companies' argument that the JEI Proposal was a proposal whose terms were subject to further negotiations between JAC's R&M and JEI (see [43] of the GD). In our judgment, this view of the JEI Proposal is erroneous and goes against the plain definition of the "JEI Restructuring Proposal" set out in the Schemes. As pointed out in SKEC's submissions below and in our narration of the background facts at [19] above,[70] cl 1.1.13 of the Explanatory Statements defines the "JEI Restructuring Proposal" as "the restructuring proposal sent by JEI to [JAC's R&M] over the course of November to December 2015".

97 The recital in Schedule 1 of Appendix D to the Explanatory Statements ("Appendix D"), which we were referred to during the hearing, states:

> The terms set out below represent the *principal terms and structure* of the contemplated restructuring ("the Restructuring", and this proposal, the "Restructuring Proposal"). This Restructuring Proposal is *indicative and subject to definitive legal documentation* that is in the form and substance satisfactory to JEI, [JAC], [JAC's R&M] and JAC's Lenders ("the Senior Lenders") in all respects. This document does not create or evidence any legal rights or obligations whatsoever.
>
> This Restructuring Proposal is *only a summary, and does not purport to be a comprehensive or exhaustive statement* of the requirements of the parties or information relating to the contemplated restructuring. …
>
> …
>
> [emphasis in original omitted; emphasis added in italics]

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70 RA III(H) pp 287-290

98 In our judgment, the "JEI Restructuring Proposal" referred to in the Schemes is the JEI Proposal as we have defined it at [17] above – *ie*, the specific restructuring proposal submitted by JEI in November 2015 – which had already been rejected by JAC's R&M sometime in December 2015 (see [27] above), well before the sanction hearing on 29 August 2016. To an ordinary creditor reading the Explanatory Statements and Appendix D, it would seem incredible that the JEI Proposal could refer to whatever restructuring proposal JEI and JAC's R&M could agree on after negotiations, which appears to be the gist of what the two Scheme Companies argued below and what the Judge accepted when he found that the parties were in ongoing negotiations as to the terms of the JEI Proposal. While the recital in Schedule 1 of Appendix D does contain qualifying language indicating that the terms in the Term Sheet in Appendix D are not set in stone in so far as it states that the JEI Proposal is "indicative and subject to definitive legal documentation", that is quite different from saying that the *material terms* of the proposal set out in that Term Sheet are subject to negotiation. Otherwise, the creditors, in voting in favour of the Schemes, would effectively be voting to give JEI a grace period of up to a year to come to *any* agreement with JAC's R&M, which would in turn give the two Scheme Companies a moratorium on debt repayment for the same period pending an agreement between JEI and JAC's R&M.

99 Further, JAC's R&M indicated very clearly at paras 13–15 of the A&G letter that the material terms of the JEI Proposal were unworkable, and also pointed out that the terms of the JEI Proposal had remained unchanged since it was first put forward by JEI in November 2015. Therefore, the Judge erred in finding that the parties were still undertaking negotiations as to the particular proposal stated in the terms of the Schemes. That proposal – *viz*, the JEI

Proposal – had clearly been rejected by the time of the sanction hearing before the Judge, which means that the "Expiry Date" defined in cl 2.3 of the Schemes would have occurred, rendering the two Scheme Companies liable for the failsafe payments set out in cl 3.

100 We agree with SKEC that the acceptance by JAC's R&M of the JEI Proposal was a critical part of the Schemes, without which the Schemes would essentially be meaningless. Given JAC's R&M's rejection of the JEI Proposal, all that was left of the Schemes consisted essentially of the provision in cl 2.3 that (among other things) the two Scheme Companies could propose new schemes for their respective creditors to consider and the provision in cl 3 for failsafe payments. Sanctioning the Schemes in these circumstances would be tantamount to the court sanctioning a scheme of arrangement to propose a new scheme, which is absurd. In this regard, it is important to note that Conchubar owed a total debt of over US$76m to its creditors and would repay only US$650,000 on a *pari passu* basis in four equal instalments over 24 months, while UVM owed a total debt of over US$32m and would repay only US$300,000 in the same manner. The failsafe payments set out in cl 3 of the Schemes would have repaid only a miniscule fraction of the two Scheme Companies' debts to their respective creditors. It is thus clear that the acceptance of the JEI Proposal formed the core pillar of the Schemes. The rejection of the JEI Proposal by the time of the sanction hearing before the Judge on 29 August 2016 really meant that the court was being asked to sanction a shell of what was formerly a potentially meaningful compromise.

101 This surely cannot be the effect of a scheme of arrangement, the core purpose of which is to compromise creditors' (or shareholders', as the case may be) claims against an insolvent company. We are unable to see how,

given the rejection of the JEI Proposal by JAC's R&M, the remaining terms of the Schemes could effect a compromise in any meaningful way. In our view, the Schemes as they stood by the time of the sanction hearing were not schemes which "a man of business or an intelligent and honest man, being a member of the class concerned and acting in respect of his interest[s], would reasonably approve" (see *TT International (No 1)* at [70]).

Conclusion

102 In the light of our analysis, the Schemes should not have been sanctioned. We thus allow these Appeals and set aside the Judge's order sanctioning the Schemes as well as his order for a one-year moratorium under s 210(10) of the Companies Act on all pending, contingent or fresh actions against the two Scheme Companies with effect from 29 August 2016.

103 With regard to costs, although SKEC has succeeded in terms of the overall outcome of these Appeals, it has not succeeded on its crucial arguments relating to whether the creditors that voted in favour of the Schemes are related creditors of the two Scheme Companies, whether there was material non-disclosure on the part of the two Scheme Companies and whether the Schemes lack certainty. It would therefore be fair to award SKEC only one-third of the costs of these Appeals. As for the costs in the court below, we set aside the Judge's costs order and instead order that the two Scheme Companies pay half of SKEC's costs below. The costs for Summonses No 93 and 94 of 2016, which were applications by SKEC for these Appeals to be heard on an expedited basis, were ordered to be costs in the cause. Since SKEC has succeeded in these Appeals, SKEC shall also have the full costs of these two summonses. The usual consequential orders will apply.

Sundaresh Menon
Chief Justice

Chao Hick Tin
Judge of Appeal

Andrew Phang Boon Leong
Judge of Appeal

Judith Prakash
Judge of Appeal

Tay Yong Kwang
Judge of Appeal

Debby Lim and Jamal Siddique (Shook Lin & Bok LLP) for the appellant in Civil Appeals Nos 15 and 16 of 2017;
Andy Lem, Justin Chia, Akesh Abhilash and Kok Yee Keong (Harry Elias Partnership LLP) for the respondents in Civil Appeals Nos 15 and 16 of 2017;
Leong Yi Ming and Tham Hsu Hsien (Allen & Gledhill LLP) for the non-parties, the Receivers and Managers of Jurong Aromatics Corporation Pte Ltd and BNP Paribas (Singapore Branch).