IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 211

Originating Summons No 767 of 2016
(Summons No 4055 of 2017)

In the matter of Section 227B(1) of the Companies Act (Cap. 50)

Swiber Holdings Ltd

… *Applicant*

GROUNDS OF DECISION

[Companies] — [Receiver and manager] — [Judicial management order]

TABLE OF CONTENTS

Re Swiber Holdings Ltd

[2018] SGHC 211

High Court — Originating Summons No 767 of 2016 (Summons No 4055 of 2017)
Kannan Ramesh J
27 November, 1 December 2017

1 October 2018

Kannan Ramesh J:

Introduction

1 This was an application by British and Malayan Trustees Ltd ("BMT") for directions and orders on matters arising out of BMT's appointment as trustee of certain notes ("the Notes") issued by Swiber Holdings Ltd ("Swiber"), which is under judicial management. The central issue in this application was whether, in creditors' meetings held during the judicial management of Swiber, BMT was the proper party to vote in respect of the Notes and, if so, whether and how it should take into account the views of the ultimate beneficial owners of the Notes in exercising its vote. Further, two other issues arose. The first issue was whether BMT was entitled to have its expenses in performing its duties as trustee charged on and paid out of Swiber's property. The second issue was whether certain holders of trust certificates issued by Swiber ("the Trust Certificate Holders") who filed submissions in this application could claim their costs of and incidental to the application.

2 On 1 December 2017, I gave the relevant directions and indicated that I would issue detailed grounds of decision given the novelty and significance of the issues that arose in this application. I now deliver my grounds of decision.

Facts

The Notes

3 By a trust deed dated 20 July 2007, which was amended on 22 July 2010 and further amended and restated on 21 December 2012 ("the Deed"), BMT, a trust company registered under the Trust Companies Act (Cap 336, 2006 Rev Ed), was appointed trustee of the Notes. The Notes were issued under Swiber's $1,000,000,000 Multicurrency Debt Issuance Programme, and comprised:

(a) $160,000,000 7.125% notes due 2017 comprised in series 014 ("the Series 14 Notes");

(b) $100,000,000 5.55% notes due 2016 comprised in series 015 ("the Series 15 Notes"); and

(c) CNY 450,000,000 7.75% notes due 2017 comprised in series 017 ("the Series 17 Notes").

4 Swiber issued the Notes under a global custodian arrangement. Under such a structure, one or more notes representing the entire principal amount of a series are placed with a common depository (under the Classical Global Note ("CGN") structure) or a nominee for a clearing system (under the New Global Note structure): see Colin Bamford, *Principles of International Financial Law* (Oxford University Press, 2011) at paras 6.58 and 6.69. Here, the Notes were issued under the CGN structure: they were placed with a depository, the Central Depository (Pte) Ltd ("the CDP"). I will thus refer only to the CGN structure in this paragraph. The structure has the following notable features:

(a) First, the issuer makes a covenant to pay that is typically either expressed in favour of the "holder" of the notes or a trustee where the notes are constituted by a trust deed: see Jennifer Payne, *Schemes of Arrangement: Theory, Structure and Operation* (Cambridge University Press, 2014) ("*Payne*") at p 185. Where a trustee is involved, the trustee holds the covenant to pay on trust for the noteholders.

(b) Second, the depository that holds the global note(s) holds the note(s) for one or more clearing systems. The clearing systems hold their interests on trust for persons who hold accounts with the clearing systems. These account holders hold the beneficial interest in the notes on their own account, or for clients who are either the ultimate beneficial owners or intermediaries holding their interests for the ultimate beneficial owners. Here, although the Deed also referred to Euroclear Bank SA/NV ("Euroclear") and Clearstream Banking SA ("Clearstream"), the clearing system appeared to be the CDP.

5 Under cl 2.3 of the Deed, Swiber covenanted to pay the redemption monies of the securities it issued under the Deed "to or to the order of or for the account of the Trustee". In other words, Swiber's obligation to make payment in respect of the Notes was owed to the trustee, *ie*, BMT. Under cl 2.3, BMT was to "hold the benefit of this covenant on trust for the Securityholders and Couponholders of the relevant Series". The term "Securityholders" was defined under cl 1.1 to refer to "the Noteholders and the Perpetual Securityholders". I note here that Swiber only issued "Notes" as defined under the Deed, and hence only the provisions pertaining to "Notes" were material in this application.

6 Clause 1.1 of the Deed defined "Noteholders" by reference to the Terms and Conditions of the Notes in Schedule 1, Part III of the Deed ("the Note

Conditions”). Clause 1.1(b)(iii) of the Note Conditions defined a “Noteholder” as the bearer of any Bearer Note or the person in whose name a Registered Note was registered in the Register. The “Register” was defined under cl 1.1(b)(i) of the Note Conditions to refer to the register kept by the “Registrar”, Citicorp Investment Bank (Singapore) Limited (“Citicorp”). Clause 1.1(b)(ii) further provided that where the notes were represented by a Global Security or a Global Certificate held by a common depository for Euroclear, Clearstream or the CDP, as was the case here with CDP being that depository, the “Noteholder” would be “the bearer of the Global Security or … the person whose name is show[n] on the Register”. Accordingly, the Noteholders referred to CDP or the persons whose names were registered in the register maintained by Citicorp.

7 Clause 8 of the Deed provided that as a general rule, only the Trustee, *ie*, BMT, was entitled to enforce Swiber’s obligations under the Notes, unless certain contingencies arose. Clause 8 stated:

> **8. <u>POWER TO INSTITUTE PROCEEDINGS</u>**
>
> 8.1 In relation to the Notes:
>
> (a) at any time after an Event of Default shall have occurred or after the Notes shall have become due and repayable, *the Trustee may … institute such proceedings against the Issuer as it may think fit to enforce repayment of the Notes and payment of accrued interest and to enforce the provisions of the Issue Documents*;
>
> (b) *the Trustee shall not be bound to take any steps … to enforce the performance by the Issuer* of any of the provisions of the Issue Documents or of the Notes or the Coupons relating to them unless (i*) it shall have been so requested in writing by the holders of not less than 25 per cent. in principal amount of the Notes outstanding or so directed by an Extraordinary Resolution* and (ii) *it shall have been indemnified to its satisfaction by the Noteholders against all actions, proceedings, claims, demands and liabilities to which it may thereby become liable and all costs, charges, damages and expenses which may be incurred by it in connection therewith*; and

> (c*) only the Trustee may pursue the remedies available under the general law or under the Issue Documents, the Notes or the Coupons relating to them to enforce the rights of the Noteholders* or Couponholders or the provisions of the Issue Documents, the Notes or the Coupons relating to them. *No Noteholder or Couponholder shall be entitled to proceed directly against the Issuer to enforce the performance of any of the provisions of the Issue Documents, the Notes or the Coupons relating to them unless the Trustee, having become bound as aforesaid to take proceedings, fails or neglects to do so within a reasonable period and such failure or neglect is continuing.*

[emphasis added in italics]

8 In short, cl 8.1(a) of the Deed vested BMT, as the trustee, with the right to institute proceedings against Swiber to enforce Swiber's obligations pertaining to the Notes. Under cl 8.1(b), BMT would only be bound to take steps to enforce Swiber's obligations if it was directed by holders of not less than 25% of the outstanding principal amount of the Notes or an extraordinary resolution to do so, *and* indemnified to its satisfaction by the Noteholders for its associated costs and expenses. Notably, cl 8.1(b) provided for BMT to be indemnified by the Noteholders, not Swiber, for its costs in enforcing Swiber's duties in relation to the Notes upon an event of default. Clause 8.1(c) made clear that BMT alone was entitled to enforce Swiber's obligations pertaining to the Notes, unless BMT, having been bound to take steps to enforce Swiber's obligations, failed to do so within a reasonable period and such failure or neglect was continuing.

9 The Deed also entitled the Noteholders to elect to obtain direct rights against Swiber ("the Direct Rights") upon an event of default. Schedules 2, 3 and 4 of the Deed set out the Forms of Temporary Global Security, Permanent Global Security and Global Certificates for the Notes. All of the Forms included the following provision (with minor variations):

> *If there shall occur any Event of Default entitling the Trustee to declare all of the Notes to be due and payable,* as provided in

> the Conditions, the Trustee may exercise the right to declare Notes represented by this Global Certificate due and payable in the circumstances described in the Conditions *by stating in the notice given to the Issuing and Paying Agent and the Issuer (the "default notice") the principal amount of Notes* (which may be less than the outstanding principal amount of this Global Certificate) *which is being declared due and payable*.
>
> *Following the giving of the default notice, the holder of the Notes represented by this Global Certificate may (subject as provided below)* ***elect that direct rights*** *("Direct Rights") under the provisions of the Deed of Covenant* ***shall come into effect in respect of a principal amount of Notes*** up to the aggregate principal amount in respect to which such default notice has been given.
>
> [emphasis added in italics and bold italics]

In other words, upon an event of default, BMT would be entitled to declare the relevant notes due and payable by issuing a default notice. The Noteholders would then be entitled to elect for the Direct Rights against Swiber in respect of a principal amount of the Notes.

10 Finally, cl 16 of the Deed provided for Swiber to remunerate BMT for its services. Clause 16.1 imposed a general obligation on Swiber to pay BMT for its ordinary services as the trustee, with the sum to be agreed by the parties. Clause 16.2 dealt specifically with the case of an event of default or potential event of default, stating that after such an event, Swiber was required to pay BMT "such additional remuneration as may be agreed between them".

Background

11 On 29 July 2016, Swiber applied by Originating Summons No 767 of 2016 ("OS 767") to be placed under judicial management, and issued an announcement in relation to the same.

12 On 16 September 2016, Swiber announced that it would be defaulting on an upcoming coupon payment for the Series 17 Notes.

13 On 6 October 2016, I ordered that Swiber be placed under judicial management. On the same day, Swiber issued an announcement that it had been placed under judicial management and a separate announcement that it would be defaulting on an upcoming coupon payment for the Series 15 Notes.

14 On 12 October 2016, Swiber announced that it would be defaulting on an upcoming coupon payment for the Series 14 Notes.

15 By a letter dated 13 October 2016, BMT's then-solicitors wrote to Swiber's solicitors stating that BMT "recognises Potential Events of Default and Events of Default (variously relating to the Notes)", including acts and/or omissions notified in the announcements referred to at [11]–[14] above. The letter referred to cl 16 of the Deed (see [10] above), and enquired whether Swiber's judicial managers ("the Judicial Managers") would be:

(a) "[indemnifying] [BMT] for all reasonable legal and other related expenses incurred"; and

(b) "[remunerating] [BMT] for all work done since the occurrence of the Potential Events of Default and Events of Default, and on an ongoing basis pending resolution of claims relating to the Notes".

16 By a letter dated 2 November 2016, Swiber's solicitors informed BMT that Swiber was "currently not in a position to indemnify and/or remunerate [BMT]". The letter also stated the following:

> Please take this as *our client's notice* under [s 227I(2)] of the Companies Act (Cap 50) *that the Judicial Managers are not personally liable for [Swiber's] obligations under the Trust Deed, the Supplemental Deeds and/or other related agreements entered into between [Swiber] and your clients*. [emphasis added]

The Judicial Managers thus notified BMT that it was disclaiming any personal liability under the Deed and related agreements between Swiber and BMT.

17 On 11 January 2017, the Judicial Managers issued an announcement that an informal creditors' meeting would be held on 25 January 2017. Notices of the meeting were sent to persons who were listed in CDP's records as holders of particular amounts of the Notes ("the Account Holders"). However, a notice of this meeting was not sent to BMT. It seemed that this led to some confusion on the part of BMT and the Account Holders over who was entitled to attend the informal creditors' meeting and, more generally, who was entitled to participate as a creditor in the judicial management of Swiber. BMT was later allowed to attend the 25 January 2017 meeting upon request.

18 At the meeting on 25 January 2017, the Judicial Managers stated that they intended to propose a scheme of arrangement for approval by the creditors.

19 On 13 June 2017, BMT filed a proof of debt as the trustee of the Notes. According to BMT, this was "in line with [its] expectation that it [would] be declared as the proper party to vote at creditor and scheme meetings in respect of the Notes as provided under the Trust Deed". Subsequently, in a report to Swiber's creditors, the Judicial Managers informed that "the bondholders will be liaising with [BMT] in relation to their claims", and that claims, *ie*, proofs of debt filed by bondholders with Swiber would be disregarded "in view that [BMT] had already filed [bondholders'] claims on their behalf".

20 On 5 September 2017, BMT filed Summons No 4055 of 2017 ("Summons 4055") for the following directions and orders:

(a) directions as to whether the right to vote in respect of the Notes at any meeting of Swiber's creditors vested in BMT;

(b) directions as to whether at a meeting of Swiber's creditors, BMT would count for "x" number of votes, "x" representing the number of individual ultimate beneficial owners of the relevant notes in respect of which BMT exercised the right to vote;

(c) an order that BMT's costs (including the costs of its solicitors) in carrying out its duties under the Deed "be treated as debts incurred under contracts entered into by the Judicial Managers in carrying out their functions to be charged on and paid out of [Swiber's] property …" (in priority to other debts);

(d) an order that the Judicial Managers provide BMT promptly, and without the need for request, notice of hearings in OS 767 and copies of reports issued by the Judicial Managers; and

(e) an order for costs of and incidental to the application, to be paid out of Swiber's assets.

21 During the hearing on 27 November 2017, Mr Wilson Zhu ("Mr Zhu"), counsel for the Judicial Managers, submitted that an order in relation to the provision of information to BMT (see [20(d)] above) would be unnecessary, as the Judicial Managers were prepared to confirm that, moving forward, they would provide BMT with the information sought. Mr Suresh Sukumaran Nair ("Mr Nair"), counsel for BMT, indicated that he was satisfied with that

confirmation. In other words, BMT was no longer seeking an order relating to the provision of information. That matter accordingly fell away.

22 Besides BMT and the Judicial Managers, the Trust Certificate Holders also filed submissions in this application, for the purpose of obtaining guidance regarding the trust certificates they held, on the basis that these were similar to the Notes. Although I appreciated that my decision could have a bearing on the legal position relating to the trust certificates, I made it clear at the hearing on 27 November 2017 that issues relating to the trust certificates were not strictly before me and I would not be making any rulings on such issues.

The parties' submissions

23 BMT made the following submissions:

(a) *The right to vote*: Clause 8 of the Deed clearly vested the right to vote in respect of the Notes in the Trustee (instead of the Noteholders).

(b) *The number of votes BMT's vote would count for*: This issue did not arise in relation to meetings called by the Judicial Managers for the approval of a scheme of arrangement under s 227X read with s 210 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act"), because the applicable provision – the version of s 227X in force before 23 May 2017 – did not contain a requirement in terms of the *number* of creditors present and voting at the meeting (a "Headcount Test"), but only a requirement in terms of the *value* of creditors present and voting. (The present version of s 227X does include a Headcount Test. I address this at [45] below.) By contrast, a Headcount Test applied to meetings called by the Judicial Managers for the approval of their statement of proposals, by virtue of s 227N(2) of the Act which stated that approval of the judicial manager's statement of proposals was to be by a "majority *in number* and value" [emphasis added] of creditors voting at creditors' meetings held under ss 227M–227N of the Act. BMT submitted that in such meetings, its vote should count for as many votes as there were ultimate beneficial owners, either for or against, for which it was voting ("the Multiple Votes Approach"). BMT also cited a Jersey case in which a single vote was split into fractions to reflect the differing views of the beneficial holders ("the Fractional Vote Approach").

(c) *BMT's expenses*: The Judicial Managers had adopted the Deed, and BMT was performing its duties under the Deed for the benefit of Swiber. In the circumstances, BMT's expenses should be charged on and paid out of Swiber's property in priority to other unsecured debts. In this regard, although the prayer in the summons for BMT's expenses was framed in terms used in s 227J(3)(*a*) of the Act, Mr Nair did not rely on that provision. Instead, he relied on s 227J(3)(*b*) of the Act, the liquidation expenses principle as developed in *In re Atlantic Computer Systems Plc* [1992] Ch 505 ("*In re Atlantic*") and the principle in *Ex parte James; In re Condon* (1874) LR 9 Ch App 609 ("*ex p James*"), which was applied in *Re PCChip Computer Manufacturer (S) Pte Ltd (in compulsory liquidation)* [2001] 2 SLR(R) 180 ("*Re PCChip*").

24 The Judicial Managers made the following submissions:

(a) *The right to vote*: With regard to a meeting held under ss 227M–227N of the Act, only BMT had the right to vote in respect of the Notes. With regard to a meeting held under s 227X read with s 210 of the Act, it was open to the court to direct either that BMT was to vote on behalf of the Noteholders, or that the Noteholders could vote directly, subject to there being no double-voting. In this regard, counsel for the Judicial Managers cited several foreign cases where it was held that the ultimate beneficial holders of notes were entitled to vote directly in a meeting to approve a scheme of arrangement, on the basis that they were contingent creditors.

(b) *The number of votes BMT's vote would count for*: In meetings held under ss 227M–227N where BMT voted for the Noteholders, to the extent the Noteholders were not unanimous on BMT's vote, BMT's vote should count as one vote for and one vote against *in number*, with BMT's voting value split to reflect the value of notes held by the Noteholders voting for and against ("the Split Vote Approach"). The Judicial Managers pointed out that this approach had been adopted in several foreign cases. In meetings held under s 227X read with s 210 of the Act in the judicial management of Swiber, the issue did not arise because a Headcount Test did not apply (see [23(b)] above).

(c) *BMT's expenses*: There was no basis for BMT's expenses to be charged on and paid out of Swiber's property in priority to all unsecured debts; this would subsidise the costs of one group of unsecured creditors and confer proprietary status on an *in personam* claim for expenses.

25 The Trust Certificate Holders made the following submissions:

(a) *The right to vote*: The Trust Certificate Holders agreed with the Judicial Managers (see [24(a)] above). With regard to a meeting held under ss 227M–227N of the Act, only the relevant trustee had the right to vote. With regard to a meeting held under s 227X read with s 210 of the Act, either the trustee or the Noteholders could vote.

(b) *The number of votes the Trustee's vote would count for*: Again, the Trust Certificate Holders agreed with the Judicial Managers (see [24(b)] above), submitting that where the trustee received conflicting instructions to vote both for and against in a meeting under ss 227M–227N of the Act, the Split Vote Approach should be adopted, with the votes being split to reflect the value of the vote either way of the Noteholders. As for meetings held under s 227X read with s 210 of the Act, a Headcount Test did not apply and thus no issues regarding headcount arose (see [23(b)] and [24(b)] above).

(c) *The Trust Certificate Holders' expenses*: The Trust Certificate Holders submitted that Swiber should be ordered to pay their costs of and incidental to the application.

The issues

26 Four issues arose for determination:

(a) First, in the judicial management of Swiber, who was entitled to vote in relation to the Notes in meetings under ss 227M–227N of the Act or under s 227X read with s 210 of the Act ("the Right to Vote Issue")?

(b) Second, if BMT held the right to vote, how many votes should BMT's vote count for in number and, in addition, how should the vote in value be determined ("the Vote Issue")?

(c) Third, should the expenses that BMT incurred in carrying out its duties under the Deed be charged on and paid out of Swiber's property in priority to all other unsecured debts ("the BMT Expenses Issue")?

(d) Fourth, were the Trust Certificate Holders entitled to their costs of the application ("the Trust Certificate Holders Expenses Issue")?

27 I now address these issues in turn.

The Right to Vote Issue

28 The starting point is that meetings under ss 227M–227N of the Act or s 227X read with s 210 of the Act are creditors' meetings. Hence, only creditors of Swiber would be entitled to vote in these meetings. The Right to Vote Issue therefore turned on the issue of who was a creditor in respect of the Notes.

29 It is settled law that for the purpose of a scheme of arrangement under s 210 of the Act, a "creditor" refers to any person with a pecuniary claim against the company, *including contingent creditors with unproven and unliquidated claims*: see *SAAG Oilfield Engineering (S) Pte Ltd (formerly known as Derrick Services Singapore Pte Ltd) v Shaik Abu Bakar bin Abdul Sukol and another and another appeal* [2012] 2 SLR 189 ("*SAAG Oilfield Engineering*") at [29]–[30] and [50] (endorsing the definition of "creditor" laid down in *In re Midland Coal, Coke, and Iron Company* [1895] 1 Ch 267 ("*Re Midland Coal*")).

30 The issue of who amounts to a creditor, in specific relation to bonds held through global custodian arrangements, is discussed in *Payne* at p 185 as follows:

> … a creditor consists of *anyone who has a monetary claim against the company that, when payable, will constitute a debt. The analysis of which party in a bond issue* can take action to enforce a claim against the company for recovery of an amount owed to it, in its own name and for its own account, and thereby *may be treated as a creditor*, ***will depend ultimately on the terms of the relevant instruments.*** … *Where the structure incorporates a separate trustee, the terms of the trust deed will usually contain* ***a promise to pay given by the issuing***

> ***company to the trustee,*** *albeit the promise to pay will be held on trust for the benefit of the ultimate bondholders,* ***and the trust deed will provide the trustee with the power to take enforcement action. In such circumstances the trustee may also be considered to be the creditor in respect of the relevant bond***. [emphasis added in italics and bold italics]

In sum, where a trust deed under which notes are issued contains a promise by the issuer company to pay the trustee, and also confers on the trustee the power to enforce the issuer's duties under the deed, the trustee is a creditor in respect of the notes. This is because in such circumstances, the trustee will have a monetary claim for a debt against the issuer.

31 In this case, the covenant to pay in cl 2.3 of the Deed was expressed to be in favour of BMT (see [5] above). Further, cl 8 of the Deed provided that BMT was entitled to enforce Swiber's obligations relating to the Notes (see [7]–[8] above). Hence, BMT had a monetary claim against Swiber amounting to a debt once the amounts due under the Notes became payable. I accordingly concluded that BMT was a creditor in relation to the Notes.

32 The question then arose as to whether any party besides BMT was a creditor in relation to the Notes, and was thus entitled to vote in meetings under ss 227M–227N of the Act or s 227X read with s 210 of the Act. In particular, were the ultimate beneficial holders of the Notes creditors who were entitled to vote in creditors' meetings held during the judicial management of Swiber?

33 The traditional position at common law appeared to be that a beneficial holder of notes that were constituted by a trust deed did not amount to a creditor of the issuer. The issuer had covenanted under the deed to pay the trustee, not the beneficial holder. It was therefore the trustee, not the beneficial holder, who held a pecuniary claim against the issuer and was thus its creditor. The mere fact that the beneficial holder was a beneficiary of the trustee's pecuniary claim

against the company did not suffice to render it a creditor: see *Payne* at p 186, citing *In re Dunderland Iron Ore Co Ltd* [1909] 1 Ch 446 at 452 (see also *In re Uruguay Central and Hygueritas Railway Company of Monte Video* [1879] 11 Ch D 372 at 380–382).

34 Nevertheless, significant practical difficulties would arise if the trustee was the only creditor for a bond held through a global custodian arrangement in circumstances where a Headcount Test applies. *Payne* illustrates this point at p 187 with the following example:

> … Imagine a company, A plc, that raises £100 million in a bond issue, and subsequently proposes a scheme of arrangement to compromise its bond. *If it cannot treat the ultimate bondholders as creditors, then it would have only one creditor: the trustee.* Generally, the trustee will have an omnibus proxy to allow it to vote, and will solicit the views of the beneficial owners through the issue of sub-proxies. ***The vote is then treated as one vote, split as to value in accordance with the wishes of the beneficial owners****. Whilst this can give rise to information about the value of the debts of those supporting the scheme,* ***no majority can arise in this situation****.*

If the trustee were the only creditor, a proposed scheme would never pass a Headcount Test unless the ultimate bondholders unanimously agreed that it should be approved. This is because, without unanimity, the trustee's one vote could not be cast to achieve a majority in number. The vote would either be treated as one vote for or one vote against, or a vote neither for nor against. On either iteration, the Headcount Test would not be fulfilled: see *Payne* at p 187 fn 47. Since the bondholders would almost never unanimously agree to approve a scheme, a bondholder scheme would almost never be approved.

35 *Payne* notes at p 187 that issuing definitive certificates to all of the bondholders would address this problem. Definitive securities "grant the [ultimate beneficial holder] direct rights against the issuer, making it a direct

creditor in the event of the issuer's failure to pay": see Christian Pilkington, *Schemes of Arrangement in Corporate Restructuring* (Sweet & Maxwell, 2013) at para 7.5.6. However, this solution could be expensive and cumbersome.

36 In this light, it is unsurprising that in recent cases, English and Australian courts have avoided the conclusion that the trustee was the only creditor for a bond held through a global custodian arrangement. The courts have instead held that the ultimate beneficial holders of notes, in those cases, *were* creditors of the issuer company, and were therefore entitled to vote directly in a scheme.

The foreign authorities

37 The first case is *In the Matter of Castle Holdco 4 Ltd* [2009] EWHC 3919 (Ch) ("*Castle Holdco*"). There, the holding company for Countrywide Plc proposed a scheme of arrangement. The company had issued two sets of notes in "global form": the registered holder was a nominee for a common depository, which held its interest in the notes for Euroclear and Clearstream, which in turn held for account holders, who were either the ultimate beneficial owners or held for the ultimate beneficial owners directly or through intermediaries: see *Castle Holdco* at [22]. One question that arose for consideration was who was entitled to vote in the creditors' meeting for the approval of the scheme. In this regard, Norris J reasoned at [23]–[25] as follows:

> 23. When the Scheme of arrangement comes to be considered, ***it ought obviously to be considered by those who have an economic interest in the debt, that is to say, by the ultimate beneficial owner or principal***. Castle Holdco itself is not generally concerned with who is the ultimate beneficial owner. Indeed the security documents themselves contain a provision that Castle Holdco shall treat the common depository or its nominee as the absolute owner of the global security for all purposes. However, *the security documentation does contain a mechanism whereby the beneficial owner can upon request become a direct creditor of Castle Holdco.*

> 24. On the occurrence of an event of default, *there is a provision that the global security is to be transferred to the* ***beneficial owners*** *in the form of definitive securities upon the request by the owner of a book entry interest. It has been submitted to me, and I accept, that* ***the ultimate beneficial owners may therefore be properly regarded as contingent creditors of the company*** …
>
> 25. Accordingly, when the meeting is convened, *it is to those principals or beneficial owners that the relevant notices ought ultimately to be directed, and it is their votes not the vote of the common depository or of the nominee which will count.* To avoid any danger of double-proof or double-counting of votes, *in each Scheme the common depository has undertaken not to vote.*
>
> [emphasis added]

In sum, Norris J held that the ultimate beneficial owners of the notes were entitled to and would vote in creditors' meetings called to consider the scheme. This ruling turned on a provision in the security documents that entitled the *ultimate beneficial owners*, upon an event of default, to receive definitive securities for their interests in the notes. In other words, under the security documents in *Castle Holdco*, the ultimate beneficial owners were entitled to acquire rights against the issuer in respect of their interests in the notes. They were thus contingent creditors (and hence creditors for the purpose of a scheme under the definition in *Re Midland Coal*: see [29] above). I will refer to the analysis adopted in *Castle Holdco* as "the Contingent Creditor Analysis".

38 Norris J applied the Contingent Creditor Analysis in *In the matter of Gallery Capital SA* (21 April 2010) (HC, UK) ("*Gallery Capital*"). There, Norris J again held that the ultimate beneficial owners of notes held through global custodian arrangements were entitled to vote in meetings to consider a proposed scheme. The ultimate beneficial owners were contingent creditors, because the terms of the global note provided for them to receive definitive notes upon the occurrence of certain events: see *Gallery Capital* at [10].

39 The Contingent Creditor Analysis was again applied in the subsequent case of *In the Matter of The Co-operative Bank plc* [2013] EWHC 4072 (Ch). In that case, a bank proposed a scheme of arrangement in relation to certain notes it had issued under trust deeds. Hildyard J reasoned that parties holding the beneficial interest in the notes were entitled to vote in meetings to approve the scheme, in place of the trustees, at [36]–[40] as follows:

> 36 … instead of the trustees under the trust deeds on which the notes are held voting, *it is proposed that those beneficially interested in the relevant debt instruments should vote in the place of trustees*, who will therefore not vote.
>
> 37 This caused me some initial anxiety, since of course the statutory enabling of a scheme depends upon the votes of creditors by the prescribed margin. I was concerned lest, for all the economic sense of the matter, *nevertheless persons beneficially interested under a trust might not be considered to be creditors for the purpose of the statutory jurisdiction*.
>
> 38 I was assisted in this regard by reference to … [*Castle Holdco*] [and] [*Gallery Capital*]. None of those schemes was opposed … but nevertheless *the conclusion that [was] reached (which was that in the particular context the beneficiaries could be treated as contingent creditors and that as such they could be treated as creditors for the purpose of the relevant provision in the Act) seems to me to be both logical and justified*. I say that with diffidence, but *his reasoning seems to me to be entirely justified*.
>
> …
>
> 40 ***I have stressed that my conclusion in that regard is case-specific, it being the case here that the beneficiaries have an absolute right to require the Bank to issue definitive notes directly****. It seems to me that since there is such a mechanism to trigger a direct right and therefore obtain control over that contingency, which is defined, they are properly described as contingent creditors and thus as creditors for the purposes of the relevant provision of the Act.*
>
> [emphasis added in italics and bold italics]

It is notable that Hildyard J emphasised that his conclusion that the ultimate beneficial owners of the notes were contingent creditors was based on a specific provision in the trust deed under which the ultimate beneficial owners had "an absolute right to require the Bank to issue definitive notes directly".

40 It seems the Contingent Creditor Analysis was also applied in Australia in the recent case of *In the matter of Boart Longyear Ltd* [2017] NSWSC 567 ("*Boart Longyear*"), which again concerned a scheme relating to notes held under global custodian arrangements. There, the court stated at [29] as follows:

> Mr Jackman also draws attention to an issue concerning the identification of creditors for the purposes of the schemes, *where the notes … are issued in a "global" form* that is characteristic of United States debt market issues … I am satisfied, for the reasons put by Mr Jackman in submissions, which I need not repeat, that *the ultimate beneficial owners of the notes are properly treated as the scheme creditors for the purposes of the scheme.* That is consistent with the approach adopted in the United Kingdom in *Re Castle Holdco 4 Ltd* [2009] EWHC 3919 (Ch) and in *Re Gallery Capital SA* (EWHC, unreported, 21 April 2010), *which treated the ultimate beneficial holders as contingent creditors so far as they had the right (**as creditors here also have**) to be issued with definitive or certificated securities in the case of an event of default …* [emphasis added in italics and bold italics]

Although the reasoning in *Boart Longyear* is not entirely clear, it appears that the notes there also provided for the ultimate beneficial owners to be issued with definitive securities upon an event of default. The court accordingly applied the Contingent Creditor Analysis in holding that the ultimate beneficial owners were creditors entitled to vote for the purposes of the scheme.

41 In sum, in the aforementioned cases, the courts held that the ultimate beneficial owners of the notes were contingent creditors because they were entitled under the relevant security documents to require definitive securities to be issued to them. *What was vital was that the ultimate beneficial owners held that right; whether they had attempted to exercise that right was immaterial.* In

this light, I turned to consider whether and to what extent the Contingent Creditor Analysis could apply in this case.

Analysis

Meetings held under ss 227M–227N of the Act

42 It was undisputed that the Contingent Creditor Analysis cannot apply to meetings held under ss 227M–227N of the Act. This is because reg 73 of the Companies Regulations (Cap 50, Rg 1, 1990 Rev Ed) ("the Regulations") states that "[a] creditor *shall not vote in respect of any … contingent debt*" [emphasis added]. In other words, reg 73 prevents contingent creditors from voting in the meetings to which it applies. It was evident that reg 73 applies to meetings held under ss 227M–N of the Act for the following reasons:

(a) First, reg 61 of the Regulations provides as follows:

> **Application of regulations as to meetings.**
>
> 61. ***Except where and so far as the nature of the subject-matter or the context may otherwise require***, the regulations relating to meetings hereinafter set out shall apply to ***the first meeting*** and *the judicial manager's meetings of creditors*, but so that those regulations shall take effect subject and without prejudice to any express provisions of the Act.
>
> [emphasis added in italics and bold italics]

Under reg 61 of the Regulations, reg 73 applies to "*the first meeting* and the judicial manager's meetings of creditors" [emphasis added], except "where and so far as the nature of the subject-matter or the context may otherwise require" ("the Proviso"). It was undisputed, and I was satisfied, that the Proviso did not apply here.

(b) Second, reg 54 defines the term "the first meeting" to mean "[t]he meeting of creditors under s 227N(1) of the Act". Hence, under reg 61, reg 73 applies to meetings held under ss 227M–N of the Act.

In sum, under reg 73 of the Regulations, contingent creditors may not vote in meetings held under ss 227M–227N of the Act. Therefore, the Contingent Creditor Analysis cannot apply in such meetings.

43 Given my earlier conclusion that BMT was a (non-contingent) creditor entitled to vote in relation to the Notes (see [31] above), I came to the view that BMT was the only creditor entitled to vote in relation to the Notes in meetings held under ss 227M–227N of the Act. This was undisputed before me.

Meetings held under s 227X read with s 210 of the Act

44 Turning to meetings held under s 227X read with s 210 of the Act, I came to the view that reg 73 does not apply to such meetings. In my recent decision in *Re Swiber Holdings Ltd and another matter* [2018] SGHC 180 ("*Re Swiber*"), I held that reg 74 of the Regulations does not apply to such meetings. My reasons for that conclusion apply *mutatis mutandis* here:

(a) First, the applicability of reg 73 is provided for by reg 61, under which reg 73 applies to "the first meeting and the judicial manager's meetings of creditors" (see [42(a)] above). However, as I explained in *Re Swiber* at [41]–[42], a meeting held under s 227X read with s 210 of the Act is neither "the first meeting" nor one of "the judicial manager's meetings of creditors". In brief, the reasons are as follows:

(i) First, "the first meeting" refers to a meeting held under ss 227M–227N of the Act (see [42(b)] above), rather than a meeting held under s 227X read with s 210 of the Act.

(ii) Second, reg 60 of the Regulations, which provides for the judicial manager to hold "meetings of the creditors", indicates that such meetings are summoned by the judicial manager at his or her discretion, unlike meetings held under s 227X read with s 210 of the Act which are ordered by the court.

(b) Second, even if a meeting held under s 227X read with s 210 of the Act was "the first meeting" or one of "the judicial manager's meetings of creditors", the Proviso would apply such that reg 73 would not apply to such meetings: see *Re Swiber* at [43]. This is because the conduct of meetings in judicial management to approve a scheme is separately provided for by s 227X(*aa*) read with s 211F of the Act.

45 I concluded that reg 73 does not apply to meetings held under s 227X read with s 210 of the Act and thus does not bar contingent creditors from voting in such meetings. Further, the Court of Appeal endorsed a wide definition of the term "creditor" in *SAAG Oilfield Engineering* which encompassed contingent creditors (see [29] above). I therefore came to the view that it was open to the court to apply the Contingent Creditor Analysis for the purpose of meetings held under s 227X read with s 210 of the Act, in relation to a scheme of arrangement pertaining to bonds held under global custodian arrangements insofar as the Headcount Test was relevant. In this regard, notwithstanding that the applicable version of s 227X did not lay down a Headcount Test (see [23(b)], [24(b)] and [25(b)] above), the parties were content for me to address the question on the basis that it did and to apply the Contingent Creditor Analysis accordingly. I therefore proceeded on that basis for the purpose of this decision. Having said that, moving forward, it seemed there would, in general, be good reason to apply the Contingent Creditor Analysis since s 227X(*a*)(ii) of the Act as it now stands lays down a Headcount Test for the approval of a scheme. The Contingent

Creditor Analysis would avert the practical difficulties which arise from a strict application of the Headcount Test in relation to bonds held under global custodian arrangements (see [34]–[35] above). This is of course on the assumption that the relevant security document provides for direct rights against the debtor to be vested in the relevant party.

46 However, the application of the Contingent Creditor Analysis here did not lead to the conclusion that the ultimate beneficial holders of the Notes were entitled to vote in meetings held under s 227X read with s 210 of the Act. This was because unlike the security documents in the foreign authorities discussed above, the Deed did not provide for the ultimate beneficial holders to be entitled to acquire direct rights against Swiber. Rather, the Deed entitled the *Noteholders, who as defined under the Deed were not necessarily the ultimate beneficial owners of the Notes*, to elect for direct rights against Swiber upon BMT's issuance of a default notice (see [6] and [9] above). It was therefore the Noteholders who were contingent creditors in relation to the Notes. It was they who would be entitled to vote in any meeting where the Headcount Test was relevant. I pause to note that it was unclear why the Deed chose to define the entitlement to Direct Rights with reference to the Noteholders rather than the ultimate beneficial owners of the Notes. In this regard, the Deed appeared to differ from the instruments referred to in the English and Australian cases cited above (see [38]–[41] above).

47 In sum, applying the Contingent Creditor Analysis, I decided that for the purpose of meetings held under s 227X read with s 210 of the Act, only the Noteholders were entitled to vote, in place of BMT, as contingent creditors if the Notes were subject to a scheme and the Noteholders were classified as scheme creditors.

The Vote Issue

48 As noted above, I concluded that BMT was the sole creditor entitled to vote in relation to the Notes in meetings held under ss 227M–227N of the Act; the Noteholders would not be eligible to vote as contingent creditors by reason of reg 73 of the Regulations (see [43] above). This raised the question of how BMT should exercise its vote in such meetings.

49 It was undisputed that in terms of the vote on value, BMT should vote "x" in terms of the vote in value for, and "y" in terms of the vote in value against (with "x" and "y" reflecting the value of the notes held by the Noteholders who were in favour and against the scheme respectively). In my judgment, for the reasons given at [71]–[72] below, this was correct.

50 What was in dispute was how BMT was to exercise its vote in terms of the vote in number, given that s 227N(2) lays down a Headcount Test by providing that the judicial manager's statement of proposals must be approved by "*the majority in number* and value of creditors" [emphasis added]. BMT submitted that the Multiple Votes Approach should be adopted, and also cited authority for the Fractional Vote Approach (see [23(b)] above). However, the Judicial Managers submitted that the Split Vote Approach should be adopted (see [24(b)] above). I will now discuss the authorities cited by the parties, turning first to the cases in which the Split Vote Approach was adopted.

The Split Vote Approach

51 In *Re Equitable Life Assurance Society* (26 November 2001) (HC, UK) ("*Re Equitable Life*"), an insurance society applied to the court for an order that a meeting of the society's creditors, its policyholders, be convened to consider a proposed scheme of arrangement. Some of the policyholders were nominees

or trustees who held for several beneficiaries. The question arose as to how these policyholders should vote in the meeting to consider the scheme (given that the beneficiaries they represented would likely have different wishes as to how the vote should be cast). Counsel for the society, Mr Gabriel Moss QC, submitted that it was open to the court to direct that a single trustee or nominee could vote both for and against the proposed scheme if the beneficiaries were not unanimous. Lloyd J accepted this submission, making the following observations about such an approach:

> *That does, in a sense, produce an oddity, because if you had, let us say, in an extremely simple case, ten members, one of whom wished to cast a split vote, you would really have to count that person on the headcount both for and against. So you would have on the face of it 11 members voting.* ***But since that person would be on both sides of the head count, both in the "yes" and the "no" lobbies, that makes no difference to the calculation of the majority in number****, whereas it permits an appropriate way to achieve and calculate the true majority in value.* [emphasis added in italics and bold italics]

In short, the Split Vote Approach would not lead to a distortion in the vote in terms of number, and would cohere with the vote in terms of value.

52 The Split Vote Approach was also endorsed by the Hong Kong Court of Appeal in *Re PCCW Ltd* [2009] 3 HKC 292 ("*Re PCCW*") where a shareholder scheme was proposed for the privatisation of a company. The issue was whether the scheme should be approved given the evidence of "share-splitting", *ie*, some parties had received shares in order that they would vote for the scheme, thus ensuring that the Headcount Test would be satisfied. Under the Central Clearing and Settlement System ("CCASS") in Hong Kong, the vast majority of shares in the company were held by one nominee: see *Re PCCW* at [28]. In addressing the submission that share-splitting should not be a ground on which to refuse sanction of the scheme, Barma J accepted at [193]–[194] that for the purpose of

the applicable Headcount Test, the vote (of the nominee) of CCAS would count as one vote in favour and one vote against in terms of number:

> 193 It was also suggested that the requirements of s 166(2) had to be considered in the light of the fact that *the vast majority of shareholders in publicly listed companies hold their shares through CCASS, and therefore would not be entitled to vote, as they would not be the registered holders of their shares*. The effect of this is that *CCASS would vote shares registered in its name in accordance with the instructions (if any) received from its market participants*. Such market participants generally seek instructions from the beneficial owners of the shares held through them with CCASS. The result is that *CCASS will vote a certain number of the shares registered in its name in favour of the resolution, and a certain number against it, according to such instructions as it may receive*. This does not affect the number of shares voted for and against the resolution in value terms. However, ***in terms of headcount, CCASS will be counted as one vote in favour and one vote against the resolution, thereby cancelling itself out***. This, it is said distorts the position in terms of the desires of the beneficial owners of the shares held by it.
>
> 194 However, it seems to me that this too, is not an argument in favour of permitting votes cast by persons who do not fairly represent the class whom they purport to represent being given full weight by the court, when the court has good reason to think that this is the position. The same argument holds in relation to any shareholder who chooses to hold his beneficial interests through a nominee company that provides such services to a large number of individual shareholders. *Where such a shareholder wishes to have his vote count, both in terms of the shares he holds, and in terms of headcount, he is at liberty to take steps to have the shares registered in his own name. …*
>
> [emphasis added in italics and bold italics]

53 In sum, the position in both England and Hong Kong appeared to be that where one voting party represented beneficial owners with conflicting wishes, the Split Vote Approach was adopted for the purposes of a Headcount Test.

The Multiple Votes Approach

54 A different approach was taken in the Cayman Islands in *In the Matter of Little Sheep Group Ltd* (20 January 2012) (Grand Court, Cayman Islands) ("*Little Sheep*"). In *Little Sheep*, the company applied for the court to order a meeting of its members to consider a scheme for the purpose of privatising the company. A Headcount Test applied: the scheme would only bind the members upon approval by a majority in number. As was the case in *Re PCCW*, most of the shares were registered in the name of a nominee for CCASS. There thus arose the question of how (the nominee for) CCASS should vote in the meeting for the approval of the scheme. Order 102 r 21(6) of the Grand Court Rules 1995 (Revised Edition) (Cayman Islands) ("the Grand Court Rules") stated:

> The Court shall give such directions as may be necessary for the purpose of enabling it to determine whether or not the statutory majorities will have been achieved. *If all or substantially all of the shares or debt instruments to which the proposed scheme relates are registered in the name of one or more custodians or clearing houses, the Court **may** direct that –*
>
> (a) such custodian or clearing house ***may cast votes both for and against the proposed scheme*** in accordance with the instructions of the clients;
>
> (b) such custodian or clearing house *shall* ***specify the number of votes cast in favour of the scheme*** and the number of clients or members on whose instructions they are cast ***and the number of votes cast against the proposed scheme*** and the number of clients or members on whose instructions they are cast.

55 Counsel for the company submitted that CCASS should be treated as having one vote in number with the vote cast *either* for *or* against the scheme, based on instructions from its participants ("the Participants") ("the One Vote Approach"). Under the One Vote Approach, if more of the Participants instructed CCASS to vote for the scheme than those instructing CCASS to vote against it, CCASS would cast its single vote for the scheme; and vice versa. The

One Vote Approach differs from the Split Vote Approach, under which CCASS would have cast one vote both for *and* against the scheme unless there was unanimity in the instructions it received from the Participants. It is important to note that the Split Vote Approach was not proposed in *Little Sheep*. It does not appear that Jones J was referred to *Re Equitable Life*. Further, although Jones J referred to *Re PCCW*, it does not appear that this was cited as authority for the Split Vote Approach.

56 Jones J rejected the One Vote Approach at [8] as follows:

> … the effect of treating CCASS as one member (with one vote) for the purpose of ascertaining the "majority in number" without regard to the number of Participants from whom instructions are received is *not only inconsistent with the purpose of section 86, but would be highly artificial and could conceivably produce a result which is commercially unacceptable.* ***The approach make it easier for an opponent of the Scheme to defeat it by the simple mechanism of having a nominal number of its shares registered in the names of the requisite number of individuals who agreed to vote against it. In this way it would be possible for someone having a minimal economic interest in the Company to hold it to ransom and demand a higher price for his shares****. Conversely, it would make it easier for the Company's management to guarantee that the majority in number will be achieved by making the same kind of arrangements.* ***The approach mandated by [O 102 r 21(6)(b)] is intended to mitigate against manipulation of this sort****.* [emphasis added in italics and bold italics]

57 It is clear that Jones J was concerned that if the One Vote Approach were adopted, parties would be able to manipulate the vote by using share-splitting to influence how that vote was cast. After rejecting the One Vote Approach, Jones J discussed *Re PCCW* at [13]. He noted that the court in *Re PCCW* held that if a material number of votes were influenced by manipulative practices, the court would accord less weight to the fact that the scheme was approved by the requisite majority. This could address inappropriate share-splitting. But Jones J observed that this would only address share-splitting by those in favour

of a scheme. If share-splitting was carried out by those against a scheme, such that the scheme was never approved, "the question of whether or not to sanction it would never come before the court": see *Little Sheep* at [13].

58 I pause to note that the situation that troubled Jones J in *Little Sheep* – share-splitting by those against a scheme – arose in *In re Dee Valley Group plc* [2018] Ch 55 ("*Re Dee Valley*"). There, the chairman of a shareholders' meeting convened to vote on a proposed scheme disallowed the votes of certain shareholders opposed to the scheme. Sir Geoffrey Vos C upheld the chairman's decision because the evidence showed that the relevant shareholders had taken part in a share-splitting exercise to defeat the scheme. In *SK Engineering & Construction Co Ltd v Conchubar Aromatics Ltd and another appeal* [2017] 2 SLR 898, Chao Hick Tin JA, delivering the Court of Appeal's judgment, discussed vote-splitting and observed at [71] that it would engage the issue of whether "those who attended the meeting were fairly representative of the class of creditors or the class of members", citing the observations of the Court of Appeal 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*") at [70]. Chao JA went on to discuss *Re PCCW* and *Re Dee Valley*, and added at [78] that "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". It is thus clear that our courts will take a firm stance against share-splitting or vote-splitting carried out to manipulate the vote, in both shareholders' and creditors' schemes of arrangement. Where such share-splitting or vote splitting occurs, the court would very rarely be satisfied that "the scheme is one which a man of business or an intelligent and honest man, being a member of the class concerned and acting in respect of his interest, would reasonably approve": see *TT International* at [70]. Accordingly, such a scheme would very rarely if ever be sanctioned by the court.

59 Returning now to Jones J's analysis in *Little Sheep*, Jones J considered that O 102 r 21(6) of the Grand Court Rules provided for the court to adopt the Multiple Votes Approach, and this was for the purpose of enabling the court to address manipulation of the vote by share-splitting. Jones J understood the Multiple Votes Approach to be "mandated" by O 102 r 21(6). He accordingly adopted that approach, ordering that "CCASS [would] be treated as a multiple-headed member for the purposes of the head-count", with the number of votes attributable to CCASS determined by the number of participants in CCASS giving instructions to CCASS for the vote: see *Little Sheep* at [18].

60 Shortly after the decision in *Little Sheep*, the Grand Court of the Cayman Islands considered that case in *In the Matter of Alibaba.com Ltd* (1 May 2012) (Grand Court, Cayman Islands) ("*Alibaba 1*"). This was another application to the court for a meeting of shareholders to be convened to consider a proposed shareholder scheme for the privatisation of a company. Again, a substantial amount of the shares were held by a nominee for CCASS.

61 Counsel for the company and its majority shareholder submitted that *Little Sheep* should not be followed for the following reasons among others. First, the Multiple Votes Approach was inconsistent with the Split Vote Approach, which had been endorsed in England and Hong Kong, and which was not referred to in *Little Sheep*. Second, O 102 r 21(6) of the Grand Court Rules did not change the common law position. Third, although the Multiple Votes Approach was reflected in a Practice Direction ("the Practice Direction"), which provided that "[t]he majority in number will be calculated *on the basis of the number of clients or members giving instructions to the custodian or clearing house*" [emphasis added], little weight should be given to the Practice Direction because it was inconsistent with the established common law position.

62 Cresswell J stated that since he was a judge of co-ordinate jurisdiction to Jones J, he "would be inclined to follow his decision", which was consistent with the Practice Direction. But he declined to decide the point and instead ordered that the relevant custodian or clearing house or nominee was entitled to cast votes both for and against the scheme, but was to specify the number of such votes and the number of clients or members on whose instructions they were cast. In short, Cresswell J's order was neutral as between the Split Vote Approach and the Multiple Votes Approach, leaving it open to the court to decide subsequently, if it were necessary, which approach was preferable.

63 Subsequently, Cresswell J issued a supplemental judgment in relation to the same scheme: see *In the Matter of Alibaba.com Ltd* (1 June 2012) (Grand Court, Cayman Islands) ("*Alibaba 2*"). Cresswell J noted that, in relation to the scheme before him, the Headcount Test was satisfied on both the Split Vote Approach and the Multiple Votes Approach. There was accordingly no need to decide which was more appropriate. Nonetheless, Cresswell J stressed counsel's contention that the Practice Direction was inconsistent with "the traditional approach of the courts in all common law jurisdictions", *ie*, the Split Vote Approach, opining that "the opportunity might be taken (if thought appropriate) to confirm or re-consider [the Practice Direction]" [emphasis added]. It is clear from this that Cresswell J had reservations over the Multiple Votes Approach.

64 The Multiple Votes Approach was applied more recently in the Cayman Islands in *In the Matter of Uni-Asia Holdings Ltd* (16 May 2017) (Grand Court, Cayman Islands) ("*Uni-Asia*"). In that case, Segal J noted *Little Sheep* and *Alibaba 1* and indicated that he was "content to follow these decisions and the practice sanctioned by the Practice Direction *without the need to conduct my own detailed review of the authorities or the analysis on which they are based*" [emphasis added]: see *Uni-Asia* at [5]. It is evident that Segal J considered that

the position in the Cayman Islands had been settled by *Little Sheep and Alibaba 1* and therefore did not see a need to consider the matter afresh.

The Fractional Votes Approach

65 A third approach was taken by the Royal Court of Jersey in *In the Matter of a Representation by Computer Patent Annuities Holdings Ltd* [2010] JRC 11 ("*Computer Patent Annuities Holdings*"), which again involved a shareholder scheme. The scheme shareholders were 18 nominee companies holding for 305 beneficial owners. The company proposed two approaches for the purpose of determining whether the scheme had been approved by a majority in number of members present and voting. The first approach was the Split Vote Approach. The second approach was the Fractional Votes Approach, under which "each scheme shareholder [was] allocated one vote, which vote [was] subdivided into fractions of a vote in accordance with the number of that scheme shareholder's underlying beneficiaries": see *Computer Patent Annuities Holdings* at [18(ii)]. If the beneficial owners of a share voted both for and against the scheme, the nominee's one vote would be divided to reflect this accordingly.

66 The court made these remarks about the Split Vote Approach at [19]:

> The first alternative could lead to absurd remarks: *if for each scheme shareholder a majority of beneficial owners vote in favour, with one voting against, the 90% threshold could be exceeded without a majority in number.* There is also *a risk of deadlock in the event that all of the nominees split their votes, even if the underlying beneficial owners are overwhelmingly in favour of the proposal.* [emphasis added]

This is the same point made by *Payne* noted at [34] above: under the Split Vote Approach, a scheme may not be approved even if an overwhelming majority in value of the shareholders or creditors approve the scheme, because the absence of unanimity means that the Headcount Test is not satisfied.

67 Having rejected the Split Vote Approach, the court in *Computer Patent Annuities Holding* adopted the Fractional Votes Approach at [20].

68 In short, the court in *Computer Patent Annuities Holding* considered that the Fractional Votes Approach would more accurately reflect the wishes of the ultimate beneficial shareholders than the Split Vote Approach. However, apart from *Computer Patent Annuities Holding*, I was not shown any other authority in support of the Fractional Votes Approach.

Analysis

69 Having carefully considered the authorities, I came to the view that it was appropriate to adopt the Split Vote Approach for the following reasons.

70 First, in my judgment, there is a principled basis for the Split Vote Approach. Where a bond is held through a global custodian arrangement, and the Contingent Creditor Analysis does not apply, there is typically only one creditor, the person whom the issuer covenants to pay, who is usually the common depository or the trustee. That creditor only has one vote (in number). Therefore, it cannot cast multiple votes; the Multiple Votes Approach cannot be adopted. But where the ultimate beneficial owners take conflicting positions on a vote, the creditor cannot cast its one vote in number simply for or against. Such a course would fail to reflect the opposing positions of the ultimate beneficial owners. Hence, the One Vote Approach also cannot be adopted. Since the creditor has only one vote, and should exercise this vote in reflection of the opposing views of those it represents, it should cast its single vote, for the purposes of the vote in number, both for and against, to reflect the conflicting positions of those it represents. This is the Split Vote Approach.

71 Turning now to the vote in value, the measure is the value of the debt for and against the proposed scheme of arrangement. If there is a difference in the views of the ultimate beneficial owners, that difference will result in a split in value along the lines of for and against. The difference cannot translate into a nil vote, because the point of reference is not headcount but value. Hence, unlike the vote in number, the creditor's vote can and should be segregated to reflect the positions of the ultimate beneficial owners of the debt.

72 At first sight, the Split Vote Approach might seem questionable because under that approach, the creditor apparently exercises two votes for the purpose of the Headcount Test – one for and one against – although it only holds one vote. This was noted by Lloyd J in *Re Equitable Life* (see [51] above). But the critical point is that the two votes cancel each other out (see *Re PCCW* at [193], cited at [52] above). Hence, *in substance*, the creditor casts *one* null vote rather than two votes. In this light, there is no conceptual difficulty with the Split Vote Approach because the creditor or shareholder is not *in substance* given twice the number of votes it is entitled to.

73 There were two other difficulties with the Multiple Votes Approach:

(a) First, I accepted the Judicial Managers' submission that adopting the Multiple Votes Approach would undermine reg 73 of the Regulations. As I have noted, the effect of reg 73 is that contingent creditors may not vote in meetings held under ss 227M–227N of the Act (see [42] above). The Judicial Managers submitted that if BMT's vote counted for as many votes as there were contingent creditors, this would circumvent reg 73. I agreed. Under the Multiple Vote Approach, the wishes of each contingent creditor would be counted in the vote for the purpose of the Headcount Test as if each had voted in its own name. *But* *this is exactly what reg 73 prohibits*. The Multiple Votes Approach would effectively lead to the same result as the Contingent Creditor Analysis, notwithstanding that this was ruled out by the clear language of reg 73. I noted that for the purposes of the vote in value, the Noteholders were being recognised notwithstanding that they were contingent creditors. However, in my judgment, this was not equivalent to applying the Contingent Creditor Analysis. Under that approach, each contingent creditor has a *direct right to vote* in the scheme of arrangement, arising from its direct rights against the debtor company. Recognising the value of the notes held by the Noteholders for and against the scheme would not similarly entail conferring them a direct right to vote in the scheme. It simply allows the court to properly assess the weight of the value of the vote.

(b) Second, it seemed that the Multiple Votes Approach had been adopted in the Cayman Islands based on specific provisions applicable under the law of that jurisdiction: O 102 r 21(6) of the Grand Court Rules and the Practice Direction. There were no similar provisions under our law. Furthermore, doubts had been expressed in the Cayman Islands about the Multiple Votes Approach in *Alibaba 2* (see [63] above).

74 I recognise that under the Split Vote Approach, the Headcount Test will not be satisfied if the underlying beneficial owners do not unanimously approve a scheme (see [34] and [66] above). But in my judgment, the answer is to rely on the Contingent Creditor Analysis to the extent that analysis may apply.

75 In sum, I decided that for the purpose of meetings held under ss 227M–227N of the Act, and in relation to the vote on number, BMT should vote one vote for and one vote against in the event that there was no unanimity among

the Noteholders as to how BMT should exercise its vote. For the purposes of the vote in value, BMT would vote "x" in terms of the vote in value for, and "y" in terms of the vote in value against (with "x" and "y" reflecting the value of the notes held by the Noteholders who were in favour and against the scheme respectively) (see [49] above).

76 I now turn to the BMT Expenses Issue.

The BMT Expenses Issue

77 BMT applied for an order that its expenses in performing its duties under the Deed be charged on and paid out of Swiber's property in priority to other debts (see [20(c)] above).

Section 227J(3) of the Act and the liquidation expenses principle

78 Section 227J(3) of the Act states:

> **Vacation of office and release**
>
> **227J.—** …
>
> (3) *Where at any time a person ceases to be a judicial manager of a company whether by virtue of this section or by reason of his death* —
>
>> (a) any sums payable in respect of any debts or liabilities incurred while he was a judicial manager under *contracts entered into by him in the carrying out of his functions*; and
>>
>> (b) *any remuneration and expenses properly incurred by him*,
>
> shall be charged on and paid out of the property of the company in his custody or under his control in priority to all other debts, except those subject to a security to which section 227H(2) applies.
>
> [emphasis added]

79 Section 227J(3) provides for two types of debt to be charged on and paid out of the company's property in priority to other debts:

> (a) first, any sums due in respect of debts and liabilities incurred by the judicial manager "under *contracts entered into by him* in the carrying out of his functions" [emphasis added] (s 227J(3)(*a*)); and
>
> (b) second, remuneration and expenses properly incurred by the judicial manager (s 227J(3)(*b*)).

80 In my judgment, BMT's expenses did not fall within either ss 227J(3)(*a*) or 227(3)(*b*). I turn first to s 227J(3)(*a*). As I have noted, the prayer in Summons 4055 for BMT's expenses was framed in the terms of s 227J(3)(*a*): it sought an order that BMT's costs "be treated as debts incurred under contracts *entered into by the Judicial Managers* in carrying out their functions …" [emphasis added] (see [20(c)] and [23(c)] above). But Mr Nair did not rely on s 227J(3)(*a*) in oral submissions. This was unsurprising. Section 227J(3)(*a*) plainly did not apply to BMT's expenses in carrying out its duties under the Deed because the Deed was entered into by *Swiber prior to the judicial management*. The Deed was *not* entered into by the Judicial Managers in carrying out their functions.

81 In reaching this conclusion, I had regard to the decision of the House of Lords in *Centre Reinsurance International Co and others v Freakley and others* [2006] 1 WLR 2863 ("*Centre Reinsurance*"). In that case, the court discussed ss 19(3)–(5) of the Insolvency Act 1986 (c 45) (UK) ("the 1986 Act") which is substantially similar to s 227J(3) of the Act. The parallels are unsurprising. Our judicial management regime was based on the administration procedure in the Insolvency Act 1985 (c 65) (UK) ("the 1985 Act"): see *Re Job Associates (Pte) Ltd (under judicial management)* [1992] 1 SLR(R) 299 at [21]; T C Choong & V K Rajah, *Judicial Management in Singapore* (Butterworths, 1990) at p 6. The

English regime was introduced in the 1985 Act and then consolidated in the 1986 Act: see Ian F Fletcher, *The Law of Insolvency* (Sweet & Maxwell, 2017) ("*Fletcher*") at para 16–001. Section 19(3)–19(5) of the 1986 Act stated:

> **Vacation of office**
>
> …
>
> (3) Where at any time a person ceases to be administrator, the following subsections apply.
>
> (4) His *remuneration and any expenses properly incurred by him* shall be charged on and paid out of any property of the company which is in his custody or under his control at that time in priority to any security to which section 15(1) then applies.
>
> (5) Any sums payable in respect of *debts or liabilities incurred, while he was administrator, under contracts entered into by him or a predecessor of his in the carrying out of his or the predecessor's functions* shall be charged on and paid out of any such property as is mentioned in subsection (4) in priority to any charge arising under that subsection.
>
> [emphasis added]

82 Given that s 227J(3) appeared to be based on the administration regime in England, I took guidance from the reasoning in *Centre Reinsurance* where the court interpreted the provisions equivalent to s 227J(3) under English law. In *Centre Reinsurance*, the company had entered into a liability insurance policy before going into administration. The presentation of the administration petition triggered a condition in the policy under which the insurers had the sole right to handle and defend claims against the company. The insurers submitted that s 19(5) of the 1985 Act conferred statutory priority on their claims against the company for reimbursement of their expenses in handling the claims. Lord Hoffmann (with whom the rest of the House of Lords agreed) rejected this argument at [14], emphasising that the administrator "had nothing to do with either the contracts under which the liabilities were incurred or the contract which gave the insurers authority to incur them on behalf of the company". The relevant contracts in *Centre Reinsurance* had been entered into by the company

before the company went into administration. By parity of reasoning, I decided that s 227J(3)(*a*) could not confer priority on BMT's expenses incurred under the Deed, which was executed before Swiber went into judicial management.

83 I note in passing that there was some argument over whether the Judicial Managers had adopted the Deed. Mr Nair argued that they did so by their letter dated 2 November 2016 (see [16] above) in disclaiming personal liability under the Deed, because it was only possible to disclaim personal liability in relation to a contract under s 227I(2) of the Act if that contract had been adopted. The Judicial Managers denied that they had adopted the Deed. Ultimately, it was unnecessary for me to decide whether the Deed had been adopted because the test under s 227J(3)(*a*) is not whether the contract has been *adopted* by the judicial manager, but rather whether it was *entered into* by the judicial manager (see Lee Eng Beng, "Personal Liability of Judicial Managers and Receivers under the Companies Act" (1996) 8 SAcLJ 249 at 252–253).

84 Section 227J(3)(*b*) of the Act – which Mr Nair sought to rely on in oral submissions before me – did not assist BMT either. In *Centre Reinsurance*, Lord Hoffmann made the following remarks at [9] in relation to s 19(4) of the 1986 Act, which is substantially similar to s 227J(3)(*b*):

> … subsection (4) deals with claims against the company ***by the administrator himself*** and subsection (5) deals with claims against the company *by third parties*. Claims ***by the administrator*** may be either for remuneration or for expenses, that is to say, for goods and services supplied to the company *for which the administrator has paid or chosen to make himself liable but* ***for which he has not yet reimbursed himself out of the company's assets***. [emphasis added in italics and bold italics]

85 In this light, it seemed that the principal function of s 227J(3)(*b*) was to confer priority on claims by *the judicial manager, and not third parties*, against the company for his or her remuneration, and for expenses for which the judicial

manager made himself or herself liable to third parties. On this basis, BMT's claim for expenses it incurred in performing its duties under the Deed clearly fell outside the scope of s 227J(3)(*b*) of the Act.

86 However, Mr Nair argued that BMT's expenses in performing the Deed should be treated as expenses of the judicial management under the liquidation expenses principle. If this was correct, BMT's expenses may have fallen within the scope of s 227J(3)(*b*) and therefore had priority over other debts.

87 Under the liquidation expenses principle, certain debts or liabilities may be treated as expenses of the winding-up to be paid in priority to other unsecured debts. In *Chee Kheong Mah Chaly and others v Liquidators of Baring Futures (Singapore) Pte Ltd* [2003] 2 SLR(R) 571 ("*Chee Kheong Mah Chaly*"), the Court of Appeal observed at [51] that the principle "relates to post-liquidation liabilities incurred by a liquidator for the purposes of the winding-up", but noted at [52] that it had been "extended to expenses incurred by a liquidator over *the continued use of property*" [emphasis added]. The court cited at [55] Nicholls LJ's statement in *In re Atlantic* (at 522C) that the principle "applies also to continuing obligations under existing contracts such as leases which the liquidator chooses to continue for the benefit of the winding up".

88 The liquidation expenses principle developed, of course, in the context of liquidation. But in *In re Atlantic*, Nicholls LJ, delivering the judgment of the English Court of Appeal, held at 527E–G that the principle was applicable to administrations under the English administration procedure, with the important caveat that debts or liabilities that fell within the scope of that principle in the context of liquidation would not automatically be treated as expenses of the administration to be paid in priority to other unsecured debts. In arriving at the view that the liquidation expenses principle was applicable to administrations,

Nicholls LJ emphasised at 527C–D that an administration order, similar to a liquidation order, triggered a statutory moratorium on the commencement or continuation of proceedings against the distressed company. Nicholls LJ also observed at 527E that the court has the power to direct the administrator on the conduct of the liquidation. But Nicholls LJ opined at 527G–528F that a different approach was necessary in administrations because it was not necessarily the case that companies in administration were at the end of their lives, unlike those in liquidation. Whether priority was warranted would depend on all of the facts, which would "vary widely from one case to the next" (at 528C).

89 As I have noted (see [81] above), our judicial management regime was based on the English administration procedure. In particular, a moratorium on proceedings also arises upon the making of a judicial management order under s 227D(4) of the Act. Therefore, as a matter of principle, it appeared that the liquidation expenses principle *was* applicable to judicial management.

90 Yet as Mr Zhu submitted, the liquidation expenses principle has been understood to extend only to certain liabilities incurred before the liquidation or administration: liabilities in respect of *property* that continued to be used by the liquidator or administrator for the company's benefit. This was how the Court of Appeal understood the scope of the principle in *Chee Keong Mah Chaly* at [52] (see [87] above). Again, in *In Re Atlantic*, Nicholls LJ said that the principle applied to continuing obligations under "existing contracts *such as leases*" [emphasis added] (see [87] above). His subsequent observation at 522D that the principle "is of general application to the *outgoings on property the possession of which is retained* for the purpose of more advantageously winding up the affairs of the company" [emphasis added] reinforces the point that the principle is limited to liabilities relating to property used for the benefit of the company. In this light, the expenses incurred by BMT in carrying out its duties under the

Deed fell outside the scope of the liquidation expenses principle, even assuming the principle applied (with appropriate modifications) to judicial management. I thus concluded that the liquidation expenses principle did not apply and hence, BMT's claim for expenses fell outside the scope of s 227J(3)(*b*) of the Act.

The principle in ex p James

91 BMT also invoked the principle in *ex p James* (see [23(c)] above). But in my judgment, that principle did not assist BMT either.

92 Under the principle in *ex p James*, a court will order a court-appointed officer administering an insolvent estate to return monies received by the estate after the insolvency proceedings began, where those monies were paid under a mistake or in circumstances where it is unfair for the estate to retain the monies. The principle has two key consequences where it applies (see Tracey Evans Chan, "Revisiting *Ex Parte James*" [2003] SJLS 557 ("*Chan*") at p 563):

(a) First, where a claim against an insolvent individual or company accrues after insolvency proceedings commence, that claim is generally not provable in those insolvency proceedings. Yet where the principle in *ex p James* applies, the post-insolvency claim is recognised for the purposes of the distribution of the insolvent estate.

(b) Second, and significantly, because under the principle the court directs its officer to return the full value of the benefit, a party who successfully invokes the principle obtains "*de facto* insolvency priority over all other preferential and unsecured creditors to the extent that his recovery exceeds his *pro rata* dividend": *Chan* at p 563.

93 The leading local case on the principle is *Re PCChip*. There*,* a company was wound up by the court. Subsequently, a bank mistakenly paid monies to the company. It then requested the liquidators to refund the monies paid. Upon an application by the liquidators for directions, Lee Seiu Kin JC (as he then was) ordered the liquidators to refund the monies, relying on the principle in *ex p James*. Lee JC first held at [10] that the principle established in *ex p James* was that "a court would order its officers to act in an exemplary manner and do the right and proper thing". He then referred at [17] to *In re Clark (A Bankrupt), Ex parte The Trustee v Texaco Ltd* [1975] 1 WLR 559, where it was held that the principle would apply if the following four conditions were satisfied.

> (a) There must be some form of *enrichment of the assets of the bankrupt by the claimant.*
>
> (b) The claimant *must not be in a position to submit an ordinary proof of debt.*
>
> (c) In all the circumstances of the case *an honest person would consider that it would only be fair to return the money to the claimant.*
>
> (d) The principle applies only to the extent necessary to *nullify the enrichment of the estate.*
>
> [emphasis added]

94 What was material here was the first condition, the requirement that the assets of the insolvent person were enriched by the claimant. In *Re PCChip*, Lee JC noted at [18] that this was "the basic requirement for the application of the principle and a universal feature of all the cases in which it has been applied". In this case, Swiber was not enriched by BMT's performance of its duties under the Deed. As I pointed out to Mr Nair, it was the Noteholders (and more indirectly, the ultimate beneficial holders of the Notes) who would be enriched by BMT's performance of its duties. Swiber itself would not benefit from BMT's execution of its duties. Thus, the first condition for the principle in *ex p James* was not met. I therefore concluded that the principle did not apply.

95 I note in passing that the basis of the principle in *ex p James* is unclear. Traditionally, as Lee JC noted in *Re PCChip* (see [93] above), the principle was justified on the basis that officers administering an insolvent estate, as officers of the court, are required to act honourably and honestly. It has been observed, however, that the principle developed (and was justified based on the traditional rationale) at a time where the law of unjust enrichment was in its infancy (see *Fletcher* at para 8-052), and commentators have suggested that the principle is "based on the need to prevent unjust enrichment": see *Chitty on Contracts* vol 1 (H G Beale gen ed) (Sweet & Maxwell, 32nd Ed, 2015) at para 29-044. Yet it is unclear that the unjust enrichment rationale is satisfactory: see Lee Eng Beng, "Insolvency Law" (2001) 2 SAL Ann Rev 239 at para 14.24. The law of unjust enrichment may explain why a claim arises. But why does that claim have *de facto* priority over other claims against the insolvent estate? It seems the answer, if any, is to be found in understanding the principle as an application of the liquidation expenses principle, or as based on the need for fair treatment of certain post-insolvency claims: see *Chan*. But ultimately, it was unnecessary for me to delve further into these vexed theoretical issues in this application.

96 For these reasons, I declined to order that BMT's costs in performing its duties under the Deed be charged on and paid out of Swiber's property in priority to other debts. I add the following observation. BMT's application for its expenses in performing its duties under the Deed was for a portion of the estate to be used to defray the costs of enforcing the rights of a particular group of creditors, the Noteholders (and, indirectly, the ultimate beneficial holders of the Notes). However, this would have been at the expense of the other creditors. In this light, in my judgment, the order sought by BMT was wrong in principle.

97 Moreover, cl 8.1(*b*)(ii) of the Deed provided that BMT was not bound to take any steps to enforce Swiber's duties in relation to the Notes unless it had been indemnified to its satisfaction by the Noteholders (see [7]–[8] above). In other words, the Deed set out a mechanism for BMT to be indemnified by *the Noteholders, not Swiber*, for its expenses in enforcing Swiber's duties relating to the Notes. Mr Nair submitted that the mechanism was not workable, because the beneficial holders of the Notes could not realistically organise themselves to provide instructions to BMT and to indemnify BMT for its expenses. But as I pointed out to Mr Nair, that was a bilateral problem between BMT and the beneficial holders of the Notes, which could not be solved by conferring priority on BMT's claim for its expenses, to the detriment of the other creditors. Having said that, the issue highlighted by Mr Nair presents a practical problem. It is meaningless to have a mechanism that cannot operate in reality. This is an important issue as noteholders who are not organised or cannot organise themselves may not have their voices heard in the insolvency process. This is not at all satisfactory. It is an issue that needs further consideration so that a realistic and workable mechanism is devised. Ideally, such a mechanism should be addressed at the point of issuance of the bonds.

98 I turn finally to the Trust Certificate Holders Expenses Issue.

The Trust Certificate Holders Expenses Issue

99 The Trust Certificate Holders argued that Swiber should be ordered to pay their costs of and incidental to the application. In support of this submission, the Trust Certificate Holders relied on *Re NRMA Ltd No 5131 of 1999* (2000) 33 ACSR 595 ("*Re NRMA*") and several cases which had applied the principles laid down in *Re NRMA*. In *Re NRMA*, two mutual companies applied to the court for orders that meetings of members be convened to approve a proposed

scheme of arrangement. The application was opposed by some members of the companies ("the objectors"). At the start of the hearing of the application, one of the objectors applied for the court to order that the companies contribute to or indemnify the objectors for their costs. Santow J dismissed the application on the basis that he had yet to consider the substance of the objections. In this connection, Santow J set out the following principles at [45]:

> (i) The ordinary rule is that *the scheme companies pay the objector's costs* and do not suffer cost orders against them.
>
> (ii) However, this is subject to the objections *not being frivolous or without substance* but rather such as to be *properly and justifiably advanced*, even if unsuccessfully. …
>
> (iii) These principles reflect the fact that ***the scheme procedure unavoidably must provide an independent court forum*** on two separate occasions – for convening and then to approve the scheme. ***The court will often be assisted by having a contradictor at either stage***. It must not be forgotten that the end point of most schemes, if adjudged sufficiently fair and achieving the statutory majorities, is compulsory acquisition of the member's property and ***the court is no rubber stamp in that process***.
>
> [emphasis added in italics and bold italics]

In short, Santow J held that a scheme company would generally be ordered to bear the costs of objectors to the scheme if the objections were "properly and justifiably advanced" rather than "frivolous or without substance". Importantly, Santow J did not suggest that the principles he set out applied outside the context of applications for the convening of meetings to approve a scheme and for the approval of proposed schemes. On the contrary, on his analysis, the principles flowed from the court's role in the scheme procedure and the fact that objections to the scheme would often assist the court in discharging that role. There is substance in this approach as regards scheme applications.

100 The Trust Certificate Holders submitted, citing *Re NRMA*, that Swiber should be ordered to bear their costs of and incidental to the applications since

their submissions were not "frivolous or without substance". However, I was not persuaded that the principles in *Re NRMA* – which, as noted above, were laid down in the context of applications for the convening of scheme meetings and the approval of schemes – should apply to this application, which did not concern a scheme of arrangement at all and was an application for directions on the conduct of the judicial management. I therefore declined to order that Swiber bear the Trust Certificate Holders' costs of and incidental to the applications.

Conclusion

101 Finally, I considered whether I should make any costs order in favour of the Judicial Managers given that they had prevailed on the issues raised by BMT in this application. Mr Zhu accepted very fairly that there should be no order as to costs in relation to the Right to Vote and Vote Issues, because these engaged important legal issues in relation to which the Judicial Managers may have had to seek directions from the court if BMT had not filed this application. However, Mr Zhu sought costs in relation to the BMT Expenses Issue. Having considered the point, I decided that I should make no order as to costs because the Right to Vote and Vote Issues were the focus of this application and occupied most of the time in the hearings.

102 In conclusion, I made the following orders:

(a) For the purpose of meetings summoned under ss 227M–227N of the Act, the right to vote as creditor in relation to the Notes would be vested in BMT.

(b) For the purpose of meetings summoned under s 227X read with s 210 of the Act, the Noteholders as defined in the Trust Deed were entitled to vote as contingent creditors if the Notes were subject to a scheme and the Noteholders were classified as scheme creditors.

(c) For the purpose of voting in meetings summoned under ss 227M–227N of the Act, BMT would vote:

(i) in terms of the vote in value, "x" in terms of the vote in value for, and "y" in terms of the vote in value against;

(ii) in terms of the vote on number:

(A) in the event the vote in value was split, one vote for and one vote against; and

(B) in the event of unanimity of the vote on value, one vote only for or against as the case may be;

(d) There would be no order on prayers 3 and 4 of Summons 4055 (see [20(c)]–[20(d)] above).

(e) There would be no order as to costs.

Kannan Ramesh
Judge

Wilson Zhu, Sim Kwan Kiat and Chan Min Hui (Rajah & Tann Singapore LLP) for the Judicial Managers;
Suresh Sukumaran Nair and Nicole Foo (Nair & Co LLC) for British and Malayan Trustees Ltd;
Andrew Chan Chee Yin, Andrew Teo Jun Yi and Arjun Rajagopalan (Allen & Gledhill LLP) for the Trust Certificate Holders;

Wong Pei Ting (Allen & Gledhill LLP) for United Overseas Bank Ltd (as the Security Agent for United Overseas Bank Ltd, the Governor and Company of the Bank of Ireland, Bank of America, NA and UniCredit Bank AG);
Mabel Tan (Virtus Law LLP) for ICBC.