**IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[2018] SGHC 36**

Originating Summons No 392 of 2017

In the Matter of Section 210(1) of the Companies Act (Cap. 50)

And

In the Matter of Empire Capital Resources Pte. Ltd.

Empire Capital Resources Pte. Ltd.

… *Applicant*

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# JUDGMENT

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[Companies] — [Schemes of arrangement]

## TABLE OF CONTENTS

# *Re*: Empire Capital Resources Pte Ltd

**[2018] SGHC 36**

High Court — Originating Summons No 392 of 2017
Aedit Abdullah J
6 November 2017, 18 January 2018; 8 November 2017

19 February 2018 Judgment reserved.

**Aedit Abdullah J:**

## Introduction

1 By this application, leave is sought under s 210 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act") to convene a meeting of creditors to consider a proposed scheme of arrangement ("the proposed scheme"). A number of points of opposition are taken up by the objecting creditors Pathfinder Strategic Credit LP and BC Investment LLC ("the Noteholders"), including that the proposed scheme falls outside the ambit of s 210 as it involves the improper release of claims against third parties; that there has been insufficient disclosure; and that the creditors should be grouped in more than one class for voting. I have concluded that the scheme meeting may be convened, but with two classes of voters.

## Background

2 Related companies to the Applicant previously sought leave to convene meetings of creditors to approve schemes of arrangement. These efforts however came to naught. The present application, the latest attempt, is opposed by creditors who had also previously opposed the earlier applications.

3 Two note programmes were obtained by the Berau Group. The first was the issuance of US$450,000,000 by Berau Capital Resources Pte Ltd ("BCR"), with 12.5% guaranteed senior secured notes due 8 July 2015 ("the 2015 Notes"). The second was the issuance of US$500,000,000 by PT Berau Coal Energy Tbk ("BCE"), with 7.25% guaranteed senior secured notes due 13 March 2017 ("the 2017 Notes"). Empire Capital Resources Pte Ltd ("the Applicant") was a guarantor of the 2015 Notes and 2017 Notes (collectively, "the Existing Notes").[1]

### *Previous proceedings*

4 Prior to the 2015 Notes falling due, on 6 July 2015, BCR commenced OS 630/2015 for a moratorium under s 210(10) of the Companies Act ("the First Moratorium") as BCR was unable to make the required payments. The First Moratorium was granted and allowed negotiations between Pathfinder Strategic Credit LP and other members of a former *ad hoc* committee of noteholders ("the *Ad Hoc* Committee") on a potential restructuring of the Existing Notes.[2] On 3 March 2016, the court dismissed BCR's application in HC/SUM 84/2016 for an extension of the First Moratorium.[3]

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1 Applicant's skeletal submissions dated 22 September 2017 at para 5.

2 Applicant's skeletal submissions dated 22 September 2017 at paras 8-9; Skeletal submissions of (1) Pathfinder Strategic Credit LP and (2) BC Investment LLC dated 22 September 2017 at paras 17-22.

5 On 1 June 2016, OS 550/2016 and OS 551/2016 were filed by BCR and BCE respectively. BCR applied to be placed under judicial management while BCE applied for a moratorium under s 210(10) of the Companies Act.[4] On 2 November 2016, OS 550/2016 and OS 551/2016 were withdrawn.[5]

6 On 11 November 2016, BCR filed OS 1175/2016 and BCE filed OS 1180/2016 under s 210(1) of the Companies Act. Under these proceedings, BCR and BCE respectively proposed schemes of arrangement to restructure the notes that had been issued by them ("the 2016 proposed schemes").[6]

7 On 9 April 2017, BCR and BCE withdrew OS 1175/2016 and OS 1180/2016 respectively and the Applicant commenced the present proceedings under s 210 of the Companies Act for leave to convene a meeting of creditors to consider the proposed scheme.[7]

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3 Applicant's skeletal submissions dated 22 September 2017 at para 26; Skeletal submissions of (1) Pathfinder Strategic Credit LP and (2) BC Investment LLC dated 22 September 2017 at para 22.

4 Applicant's skeletal submissions dated 22 September 2017 at para 46; Skeletal submissions of (1) Pathfinder Strategic Credit LP and (2) BC Investment LLC dated 22 September 2017 at paras 23-25.

5 Applicant's skeletal submissions dated 22 September 2017 at para 50; Skeletal submissions of (1) Pathfinder Strategic Credit LP and (2) BC Investment LLC dated 22 September 2017 at para 25.

6 Applicant's skeletal submissions dated 22 September 2017 at para 51; Skeletal submissions of (1) Pathfinder Strategic Credit LP and (2) BC Investment LLC dated 22 September 2017 at paras 26-28.

7 Applicant's skeletal submissions dated 22 September 2017 at para 65; Skeletal submissions of (1) Pathfinder Strategic Credit LP and (2) BC Investment LLC dated 22 September 2017 at paras 29-30.

***The proposed scheme***

8 Under the proposed scheme, the liabilities of the Applicant and that of related entities including BCE and BCR under the Existing Notes could be discharged. In exchange for the discharge of liabilities, new notes will be issued to the existing noteholders by PT Berau Coal and guaranteed by BCE ("the New Notes"). Noteholders who do not accept the proposal by the stipulated deadline will not be given interests in the New Notes, unless they subsequently so accept before a second stipulated date.[8]

9 Unlike the 2016 proposed schemes, there will be no reverse Dutch auction, and the New Notes will not be subordinated. The New Notes will attract interests of LIBOR plus 1% per annum, with a tenor of 10 years.[9]

10 It is contemplated that secondary proceedings will be instituted under Chapter 15 in the US if the proposed scheme is approved.[10]

**The Applicant's case**

***Relevant considerations at this stage of the proceedings***

11 The Applicant argues that leave should be granted for a creditors' meeting to be convened to consider the proposed scheme. It is emphasised that the present application is only the first stage. While composition of the voting classes is a relevant consideration, the court does not consider the merits and fairness of the scheme, as the court is only concerned with the court's

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8 Applicant's skeletal submissions dated 22 September 2017 at paras 73-74.

9 Applicant's skeletal submissions dated 22 September 2017 at para 75.

10 Applicant's skeletal submissions dated 22 September 2017 at para 80.

jurisdiction to sanction the scheme if it proceeds: *The Royal Bank of Scotland NV v TT International Ltd* [2012] 2 SLR 213 ("*TT International (No 1)*")[11].

12 Several of the Noteholders' objections relate to matters which are not before the court at this stage: supposed breaches of contractual obligations and court orders by the Berau Group, the unfairness of the proposed scheme and the prejudice to the Noteholders in respect of the action brought in New York.[12]

***Structure of proposed scheme***

13 The Applicant further argues that the inclusion of guarantors in schemes of arrangement, as in the proposed scheme, is not uncommon and cites the case of *Daewoo Singapore Pte Ltd v CEL Tractors* [2001] 2 SLR(R) 791 ("*Daewoo Singapore*") as an example. The related companies are integral because they are principal debtors in relation to the Existing Notes. The Applicant is not a mere guarantor, but is a principal debtor under the indentures, and can be sued for the full sum in both sets of notes. The proposed third-party releases are ancillary and coextensive. The joint obligors guarantee the Applicant's liability as the Applicant guarantees theirs. In any event, *Re Lehman Brothers International (Europe) (No 2)* [2009] EWCA Civ 1161 ("*Re Lehman Brothers*") cited by the Noteholders did not rule that it was a requirement that the third-party liability must be ancillary to the arrangement between the company and its creditors. All that it decided was that third-party claims could be released if such a claim recovered the same loss as a claim between the company and its creditors. There is sufficient connection in the present circumstances.[13]

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11 Applicant's skeletal submissions dated 22 September 2017 at paras 83-84.

12 Applicant's skeletal submissions dated 22 September 2017 at paras 87-94.

13 Applicant's skeletal submissions dated 22 September 2017 at paras 127-128; Applicant's reply submissions dated 2 November 2017 at paras 23-38.

14 Any claim against the third parties would result in claims against the Applicant because of subrogation.[14]

15 As for the Noteholders' argument that there is no genuine give and take in the proposed scheme, this is really an argument that fresh funding is not being provided. This is untrue as new notes would be issued, with a 54.5% return.[15] The Noteholders' argument that there is an expropriation of the rights of the creditors in the proposed scheme is also merely a repetition of its argument that there is no real give and take in the proposed scheme.[16]

16 In addition, contrary to the Noteholders' submission, no security and hence no proprietary rights, are involved here. A distinction is drawn between being secured creditors and beneficiaries under a trust: *Re Lehman Brothers*. The existence of security does not alter the noteholders' positon as creditors.[17]

17 The Noteholders' argument that Indonesian law alternatives to a scheme have not been properly examined is not material at this stage.[18]

18 None of the points raised by the Noteholders touch the court's jurisdiction and are not relevant at this state.

19 No abuse was committed by the Applicant. Instead, it was the Noteholders who committed abuse.[19]

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14 Applicant's reply submissions dated 2 November 2017 at para 41.

15 Applicant's reply submissions dated 2 November 2017 at para 42.

16 Applicant's reply submissions dated 2 November 2017 at paras 110-111.

17 Applicant's reply submissions dated 2 November 2017 at para 43.

18 Applicant's reply submissions dated 2 November 2017 at para 58.

19 Applicant's reply submissions dated 2 November 2017 at paras 89-108.

***Classification***

20 With regard to the appropriate classification of creditors, the Applicant argues that a single voting class is sufficient.[20]

***Financial disclosure***

21 Sufficient financial disclosure has been made. What constitutes material non-disclosure is to be considered in relation to classification, the likelihood of success of the meeting or possible abuse: *Re Punj Lloyd Pte Ltd* [2015] SGHC 321 ("*Punj Lloyd*"). The Noteholders complaints concerning inadequate disclosure are irrelevant to the question of classification. In addition, in the present case, there is no indication of a blocking majority against the proposed scheme. The Noteholders rely on *Re Econ Corp Ltd* [2004] 1 SLR(R) 273 ("*Re Econ Corp*") but that was a sanction case. In any event, the Berau Group has given as much information as possible without breaching Indonesian laws. As for the Noteholder's argument that the information disclosed is unreliable, the observations in *Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd* [2003] 3 SLR(R) 629 ("*Wah Yuen*") relied upon by the Noteholders were concerned with the sanction stage. Further, *Re Heron International NV* [1994] 1 BCLC 667 (*"Re Heron"*) highlights that the information required to be disclosed even at the sanction stage is dependent on the specific facts, and inequality of information is not necessarily fatal. Information relating to commercial viability of the scheme is relevant as the sanction sage, as in *TT International (No 1),* but not at the leave stage, as in the present case. The Noteholder's argument that the Applicant should provide

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[20] Applicant's skeletal submissions dated 22 September 2017 at paras 96-108; Applicant's reply submissions dated 2 November 2017 at paras 46-61.

greater detail on the possible alternatives to the proposed scheme is also unrealistic.[21]

22 As for the argument that it should be made clear whether or not the authors of a position assessment prepared for the Applicant on the fairness of the scheme ("the Position Assessment") are prepared to accept responsibility for that assessment, there is no requirement for this to be given, and the authors have in any event given a clear assessment. In relation to the purported deficiencies in the Position Assessment highlighted by the Noteholders' expert, the applicant is happy to put the Noteholders' experts' reports before the creditors. Notwithstanding, the Applicant's position is that mistakes were made by the Noteholders' expert in various respects.[22]

***Moratorium***

23 A moratorium is required to ensure the Berau Group is protected from hostile litigation until the meeting is held. The Applicant also submitted that the court has an inherent jurisdiction to grant a moratorium that extends to proceedings outside Singapore, citing *Pacific Andes Resources Development Ltd* [2016] SGHC 210 ("*Pacific Andes*"). In addition, under s 211B of the Companies Act, the moratorium granted by the court may have extraterritorial effect. Under s 211C, the court may grant a moratorium in respect of subsidiaries and holding companies.[23]

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21 Applicant's skeletal submissions dated 22 September 2017 at paras 109-116; Applicant's reply submissions dated 2 November 2017 at paras 64-83.

22 Applicant's reply submissions dated 2 November 2017 at paras 80-88

23 Applicant's skeletal submissions dated 22 September 2017 at paras 117-125.

**The Noteholders' Case**

***Structure of proposed scheme***

24 The Noteholders argue that the proposed scheme is not properly structured. What is proposed is not a compromise between the Applicant and its creditors; it seeks to improperly release third parties, *ie,* the issuers of the Existing Notes. While third-party releases were recognised in *Daewoo Singapore*, there are limits to such release, as shown in English cases such as *Re Lehman Brothers*. Following the guidance in such cases, the proposed scheme fails the requirements as it is proposed only by a mere guarantor and is intended to dilute the vote of opposing creditors. In addition, the third-party debt is not ancillary or contingent to the debt owed by the Applicant, but is rather the other way around; such release of the third-party claims is not necessary to the compromise with the applicant; there is no genuine give and take in the proposed scheme, and the rights of the creditors against the third parties are proprietary not personal.[24]

***Classification***

25 The class of creditors have been improperly constituted, as the 2015 noteholders and 2017 noteholders should be placed in different classes. The two sets of notes are separate but interdependent arrangements, issued by different issuers based in different jurisdictions, with different obligors and guarantors. In addition, the 2015 noteholders will recover 38.5% to 44.9% more returns than the 2017 noteholders, with each set having separate security. Cases in which a difference in recovery rate did not necessitate separation into different classes may be distinguished from the present case. *Wah Yuen* involved minor

[24] Skeletal submissions of (1) Pathfinder Strategic Credit LP and (2) BC Investment LLC dated 22 September 2017 at paras 45-66.

differences in recovery, among other things, while *In the matter of DTEK Finance Pls, In the Matter of the Companies Act 2006* [2016] EWHC 3562 (Ch) ("*DTEK*") and *In the Matter of Metinvest BV* [2016] EWHC 79 (Ch) ("*Metinvest*") are distinguishable as they each involved a single issuer of multiple series of notes, and did not involve a scheme in which the recoveries between the different notes would have been different in liquidation.[25]

***Financial disclosure***

26 Insufficient financial disclosure has been given. All material information that could impinge on the financial interests of the creditors should be disclosed under s 211 of the Companies Act and under common law. The information thus far disclosed do not fulfil the requirements of being sufficient to allow an assessment as to the returns from the proposed scheme and the commercial viability of the implementation of the scheme. Information on the status of the parent company's finances and possible alternatives to the proposed scheme have not been disclosed. The Applicant also has not disclosed whether or not the authors of the Position Assessment are prepared to accept responsibility for that assessment. The reliability and currency of the financial information disclosed are also questioned by the Noteholders.[26]

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25 Skeletal submissions of (1) Pathfinder Strategic Credit LP and (2) BC Investment LLC dated 22 September 2017 at paras 68-76; Skeletal reply submissions of (1) Pathfinder Strategic Credit LP and (2) BC Investment LLC dated 2 November 2017 at paras 28-30.

26 Skeletal submissions of (1) Pathfinder Strategic Credit LP and (2) BC Investment LLC dated 22 September 2017 at paras 77-91.

***Moratorium***

27 The relief sought by the Applicant is procedurally defective as the time period for which the moratorium is sought has already expired. Even if the moratorium is granted, it should not have any extra-territorial effect.[27]

***Abuse of process and jurisdiction***

28 There has also been abuse of the processes of the court. Repeated applications have been made by the Berau Group. Multiple applications should be the exception and not the norm.[28]

29 In further arguments submitted in the oral hearings, the Noteholders reiterated their argument that there was no jurisdiction for the court to grant leave for the scheme meeting to be convened as the release of third parties here goes beyond what is permitted.[29]

***Expropriation of rights***

30 The proposed scheme also amounts to an expropriation of rights' of the creditors. It is not a compromise, as it does not involve any give and take. An unfair scheme will not be allowed to go forward: *Re MIM Holdings Ltd* [2003] 45 ACSR 554. Expropriation is also relevant in determining whether there is abuse of process. The proposed scheme unfairly targets the Noteholders, as opposed to other creditors.[30]

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27 Skeletal submissions of (1) Pathfinder Strategic Credit LP and (2) BC Investment LLC dated 22 September 2017 at paras 137-153.

28 Skeletal submissions of (1) Pathfinder Strategic Credit LP and (2) BC Investment LLC dated 22 September 2017 at paras 100-118.

29 Certified Transcript dated 6 November 2017 at pp 8-11.

30 Skeletal submissions of (1) Pathfinder Strategic Credit LP and (2) BC Investment LLC

**The Decision**

31 I am satisfied that leave should be given for the meeting to be called, but with the creditors to be grouped into two separate classes.

**Analysis**

32 The analysis will consider the overall approach in scheme applications; the objections to the structure of the proposed scheme; the objections raised in terms of the proposed single voting class; the lack of proper disclosure and the allegation of abuse of process.

***Approach in leave and sanctions***

33 The approach to be taken was laid down in *TT International (No 1),* and its guidance has been reiterated in numerous cases since. At paragraph 62 of the judgment, the Court of Appeal noted, after considering Lord Millet NPJ's suggestion that classification of creditors is a matter left to the sanction stage:

> 62 … In our view, even if there is a need at this stage to hear potentially dissenting creditors, such a hearing could usually be conducted expeditiously and summarily. Having considered the relative advantages of both approaches, we are inclined to prefer the approach in the Practice Statement which commends itself for the greater degree of certainty it injects into the process of passing a scheme. The adoption of this procedure in Singapore requires the company's solicitors, when applying for an order to summon the scheme creditors' meeting, to unreservedly disclose all material information to the court to assist it in arriving at a properly considered determination on how the scheme creditors' meeting is to be conducted. Any issues in relation to a possible need for separate meetings for different classes of creditors ought to be unambiguously brought to the attention of the court hearing the application. As

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dated 22 September 2017 at paras 119-136; Skeletal reply submissions of (1) Pathfinder Strategic Credit LP and (2) BC Investment LLC dated 2 November 2017 at paras 24-25.

time is ordinarily of the essence in such applications, all scheme related matters (including appeals therefrom) should be heard on an expedited basis.

63 Following the court's consideration of the issues raised by the applicant and the creditors in relation to the creditors' meetings for the proposed scheme, it may give directions for the calling of scheme creditors' meeting(s). However, two points should be noted. First, the court should not consider the merits and fairness of the scheme at this stage, as this stage really concerns the court's jurisdiction to sanction the scheme later if it proceeds. In this regard, *Re Telewest* ([45] *supra*) at [14] (approved by the English Court of Appeal in *Re Telewest Communications plc* [2005] BCC 29 ("*Re Telewest Communications plc*") at [9]) is instructive:

> In considering the primary position of the opposing bondholders, *it is important to keep in mind the function of the court at this stage. This is an application by the companies for leave to convene meetings to consider the schemes. It is emphatically not a hearing to consider the merits and fairness of the schemes.* Those aspects are among the principal matters for decision at the later hearing to sanction the schemes, if they are approved by the statutory majorities of creditors. *The matters for consideration at this stage concern the jurisdiction of the court to sanction the scheme if it proceeds. There is no point in the court convening meetings to consider the scheme if it can be seen now that it will lack the jurisdiction to sanction it later. This is principally a matter of the composition of classes. … and the practice now is to deal so far as possible with issues of class composition at the first stage of the application for leave to convene meetings.* There might exceptionally be other issues which would go to jurisdiction and could be properly raised at this stage: see *Re Savoy Hotel Ltd* [1981] Ch 351. *What the court should not do is to consider the fairness of the scheme with a view to deciding whether at the later hearing it will or will not sanction it.* [emphasis added]

64 Second, it should be borne in mind that where there is no realistic prospect of a scheme receiving the requisite approval, the court should not act in vain in granting the application for meetings to be convened: see *Re Ng Huat Foundations Pte Ltd* [2005] SGHC 112 at [9]. This is something that the applicant's solicitors and the proposed scheme manager should take into account prior to making an application for leave to convene a scheme creditors' meeting. A failure to make a conscientious assessment of the likely prospects of scheme approval may result in adverse costs orders.

34 The Court of Appeal thus found that at the leave stage, when the applicant seeks the permission of the court under s 210 of the Companies Act to convene a meeting of creditors, the following principles apply:

(a) The court is primarily concerned with the proper exercise of its power to approve the convening of the meeting.

(b) It does not generally consider the merits or otherwise of the scheme at this stage.

(c) The court will consider the proper classification of creditors for the purposes of voting.

(d) The court also examines if there is a realistic prospect of the proposal being approved.

35 In *Punj Lloyd*, I noted at [29] that abuse of process may be an additional reason for the court declining to approve the calling of the meeting. While this is not expressly mentioned as a ground in s 210; the ground flows from the proper invocation of that section. The court will not allow the mechanism of s 210 to be used for instance to simply gain time or frustrate the enforcement by creditors of their rights.

36 What must be emphasised in particular is that the merits or otherwise of the scheme is really to be left to the creditors to determine in the meeting. Unless something untoward arises in respect of the conduct of the meeting, or some other matter goes to the procedural fairness of the voting process, the court would generally not step in as the statute contemplates that the determination of the viability or otherwise of the scheme is a matter for the creditors to determine in their own respective interests. But because of the binding nature of the vote if the required threshold is reached and the approval of the court is thereafter

obtained, matters going to the fairness of the process should be addressed at the leave stage. That explains why the composition of the voting classes should be determined at that point. In addition, anything that indicates that the process is being used for other purposes, including delay or gamesmanship, would be relevantly taken up by the court at the leave stage.

37 It is also appropriate for the court to consider matters relating to the scope of the scheme at the leave stage if there is a question about whether what is proposed is properly a compromise or arrangement between the company and its creditors within the meaning of the empower section, *ie*, s 210.

38 Here, the Noteholders describe their concerns over whether the proposed scheme is truly a compromise as "jurisdictional issues". This is aligned with similar usage in previous cases. On reflection, I do not consider these issues are properly "jurisdictional" but rather are more concerned with the scope of the powers of the court. Strictly jurisdictional matters are those pertaining to whether the court can be seised of a particular matter. Here, what the Noteholders have taken issue with is the power of the court to allow the release of the claims against the third parties to be the subject matter of the scheme, and hence the vote. That goes to what the court can or cannot do and is thus to my mind a question of the power of the court. Another way to frame the question raised is whether the scope of the power under s 210 extends to such a scheme. Neither goes to the question of whether the court is properly seised of the matter.

***The structure of the proposed scheme***

39 The proposal contemplates the surrendering or release of claims against various companies in the Berau Group in the Existing Notes as follows:

(a) the two issuers, BCR in respect of the 2015 Notes, and BCE in respect of the 2017 Notes;

(b) the Applicant company, Empire Capital Resources Pte Ltd; and

(c) various other companies which had also given guarantees in respect of the Existing Notes.

Such release is in return for the issuing of new notes in place of the Existing Notes, to be issued by PT Berau Coal.

*Scheme proposed by guarantor*

40 What differs in this case from the usual run of scheme proposals is that the Applicant is a guarantor of the Existing Notes, rather than an issuer. There have already been previous proposals by the actual issuers to restructure. Those attempts have failed.

41 The Noteholders argue that leave should be denied as the Applicant is merely a guarantor seeking to release the primary obligors. The Applicant has also combined two separate debt obligations into a single scheme; that is, there is a deliberate dilation. The release of the third-party claims is also not ancillary to or contingent on the release of primary claims against the scheme company. Nor is it necessary to have such a release in a compromise with the scheme company. The Applicant's debts could in fact be compromised without affecting the debts of BCE and BCR. There is no genuine give and take as no consideration is provided for the release, and no fresh funding. Furthermore, the creditors' rights are proprietary as security was given to the noteholders. The Noteholders argue that this application is unprecedented given that it is the guarantor applying for a restructuring. It is also contended that such an

arrangement appears to be motivated by a desire to justify the combining of the two sets of noteholders into a single voting class.[31]

42 The Noteholders in further arguments sent in by letter after the oral hearing, reiterated these points.[32] It is submitted that claims against a primary debtor, such as BCR and BCE in the present case, cannot be included in a scheme entered into by a guarantor of those debts and its creditors. The recognised categories of release of claims against third parties are those where the third parties are contingent or potential creditors of the company. Cases of release of guarantor or insurer liability are thus examples of such contingent liability by the company. It is said that an impact is required on the company in the absence of the third-party release. Here, both BCE and BCR are entirely third parties, that will not ever be creditors in relation to the debts to be covered by the scheme.

43 In response, the Applicant submits that arguments as to the merits and fairness of the scheme should not be heard at this stage. The Applicant is not a mere guarantor, but is a principal debtor under the Existing Notes and can be sued for the full sum under each note. In fact, the Applicant's liability under the Existing Notes is as extensive as those of the issuers and other guarantors, and *vice versa*. A claim against BCE or BCR would seek to recover the same loss as a claim against the Applicant, and is thus sufficiently connected to the debt owed by the Applicant. The third-party releases are therefore appropriate. Nor could it be said that the third party-releases are not necessary to the compromise with the Applicant. A claim against any of the companies would result in a claim

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31 Skeletal submissions of (1) Pathfinder Strategic Credit LP and (2) BC Investment LLC dated 22 September 2017 at paras 45-66.

32 Letter to court dated 22 December 2017 at paras 6-16.

against the Applicant through subrogation. Fresh funding is indeed being provided. The interests of the noteholders are not proprietary, within the meaning laid down in *Re Lehman Brothers*.[33]

44 In my judgment, the scheme's propriety must be measured by the statute. Section 210(1) of the Companies Act reads:

> Where a compromise or arrangement is proposed between –
>
> (a) A company and its creditors or any class of them;
>
> …
>
> the Court may, on the application in a summary way of any person referred to in subsection (2), order a meeting of the creditors … or a class of such persons, to be summoned in such manner as the Court directs.

The company is included as a person in subsection (2).

45 The statute permits a compromise or arrangement by a company with its creditors to be approved, implemented and binding even those creditors who oppose it provided that the various requirements, including the voting thresholds, are met.

46 What the provision requires is that (leaving out members in this particular instance):

(a) there is a company;

(b) proposing a compromise or arrangement; and

(c) involving its creditors.

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[33] Applicant's reply submissions dated 2 November 2017 at paras 23-38.

The fact here that the Applicant's obligation as a guarantor is contingent does not obstruct the application; contingent creditors were for instance part of the scheme in *TT International (No 1)*.

47 The main area of dispute in this regard is whether there is a compromise or arrangement that is proposed. The phrase is not defined in the Companies Act. In practice, the phrase has been construed broadly, as in *Re Uniq plc* [2011] EWHC 749 (Ch) ("*Re Uniq plc*") and the discussion by Professor Jennifer Payne in *Schemes of Arrangement: Theory, Structure and Operation* (Cambridge University Press, 2014). In *Re Uniq plc,* while the scheme would involve a reduction in the equity stake of the existing shareholders, it was sufficient that some benefit would accrue to them as there would be relief from the obligations of a pension scheme in deficit. In addition, as noted by Professor Payne at p 21 of *Schemes of Arrangement: Theory, Structure and Operation*:

> For both 'compromises' and 'arrangements' the courts have required that the scheme involve some element of give and take, and not simply amount to a surrender or confiscation.

This essentially entails some giving up of rights or assertion of rights by the creditors, in return for something from the company.

48 It is argued by the Noteholders that what was proposed was not a compromise or arrangement within the meaning of the Companies Act, as what was being given up by the creditors was a right in respect of a third party. This is not a question about the express wording of s 210. Section 210 does not expressly exclude the present factual situation. It is instead a question about the proper scope of s 210. The question really is whether there are some proposals which by their nature fall out of the proper ambit of s 210, by affecting claims against parties other than the applicant company.

49 The core concern of s 210 is with claims in respect of the applicant company held by the creditors (we are not concerned with members in this context). The question is whether beyond that, could claims held by the creditors against third parties be given up through the scheme and should any dissentient creditor be bound by the votes of others.

*The test for releases of claims against third parties*

50 The Noteholders rely on English cases, which they say show that release would not be appropriate here. The Applicant does not take significant issue with the test propounded in these cases, but argues firstly, that these are considerations for the sanction stage, and secondly that they are in any event not breached here.

England

51 The Noteholders rely on the summary of the broad thrust of the English cases in *Schemes of Arrangements: Theory, Structure and Operation* by Professor Payne at p 31, which reads as follows:

> [T]he English Court has accepted that it has jurisdiction to require creditors of a company, as part of the compromise or arrangement of their primary claims against the company, to release guarantees that they had in respect of the same debts, and to authorise the execution of deeds of release on their behalf, as long as (i) the compromise involves genuine give and take between the third party and the company's creditors; (ii) the creditor's rights against the third party are sufficiently closely connected with its rights as creditor against the scheme company; (iii) the creditor's rights against the third party are personal, not proprietary; and (iv) the creditor benefits from the release of its rights against the third party, to the extent that if it were to exercise them this would adversely affect what it might recover under the scheme.

52 This analysis appears to be predicated on the decision in *Re: La Seda de Barcelona SA* [2010] EWHC 1364 (Ch) ("*La Seda*"), a decision of Mrs Justice

Proudman in the High Court of Justice Chancery Division which in turn appears to be premised on the approach of US cases. This approach does appear to be in line with the decision of the English Court of Appeal, just shortly before *La Seda,* in *R*e *Lehman Brothers,* in which Patten LJ highlighted and considered the following factors:

(a) The scheme should be an arrangement between the company and its creditors: at [58]. The English Court of Appeal rejected the broad proposition that the court could sanction the removal of rights not held as creditor: at [66].

(b) A creditor is someone who has a monetary claim against the company, including contingent claims, and includes creditors with security: at [58] and [60].

(c) A proprietary claim is not a claim in respect of a debt or liability of a company. It is noteworthy that the actual result was a dismissal of the sanction application as the scheme was concerned with distribution of property held on trust for creditors which the English Court of Appeal found was a proprietary claim and not a claim in respect of a debt or liability of the company: at [67].

(d) The term "arrangement" is given a relatively unrestricted meaning: at [61]. An arrangement may include the release of contractual rights or rights of action against related third parties necessary in order to give effect to the arrangement proposed for the disposition of the debts and liabilities of the company to its own creditors. It excludes rights over their own property held by the company for their benefit as opposed to property held as security: at [65].

Longmore LJ agreed with judgments of Patten LJ and Lord Neuberger of Abbotsbury MR. The judgment of Lord Neuberger MR was primarily concerned with rejecting the argument that the scheme could affect the proprietary arrangements made. In the course of that judgment, Lord Neuberger MR stated that *Re T&N Ltd (No 3)* [2007] 1 BCLC 563 ("*Re T&N Ltd (No 3)*") was near the outer limits of the scope of s 895 of the 2006 UK Companies Act, and characterised *Re T&N Ltd (No 3)* as being concerned with third-party rights contingent on the existence of the creditors' claims against the company: at [83].

53 The judgments in *Re Lehman Brothers* must really be understood as being primarily concerned with the question whether a scheme could encompass property held on trust. That underscores the analysis of *Re T&N Ltd (No 3)* and *Fowler v Lindholm, in the matter of Opes Prime Stockbroking Limited* [2009] FCAFC 125. In explaining the earlier decision of *Re T&N Ltd (No 3)*, the English Court of Appeal focused on whether the release of third-party claims were ancillary or necessary to the applicant company's arrangements with the creditors. The English Court of Appeal found in that case that the court's jurisdiction would extend to the approval of schemes releasing rights against third parties which were designed to recover on the same basis (at [63]). *Re T&N Ltd (No 3)* was concerned with insurance claims, and thus the explanation in *Re Lehman Brothers* was expressed in terms of whether the recovery was of the same loss, but the principle would presumably be the same for other forms of claims. In addition, while Lord Neuberger MR stated that *Re T&N Ltd (No 3)* was close to the outer limits of s 895 of the 2006 UK Companies Act, this would seem to be because in *Re T&N Ltd (No 3),* the applicant company's liabilities were only remotely affected in the scheme – that is, in substance, only the claims against the third party were affected.

54 Professor Payne has postulated in *Schemes of Arrangements: Theory, Structure and Operation* that release of third-party claims can be permitted where this is necessary to give effect to the arrangements between the company and members, that is where the claims to be released are based on the same company / shareholder or company / creditor relationship as the compromise or arrangement under the scheme (at p 31). While Professor Payne did not elaborate on what amounts to the same relationship, if taken strictly, this approach may be unduly restrictive. Differences would be expected in the relationships. What should matter is whether there is a sufficient connection or nexus between the various claims, and the situation between the applicant and the creditors. A totally separate and unrelated liability between these creditors and the third party, should not be brought into the scheme mechanism in this way – that would to my mind be beyond the scope of the statutory provisions.

Australia

55 In comparison to the position in England, the Australian approach, or at least one Australian approach, as exemplified by cases such as *Re Opes Prime Stockbroking Ltd* [2009] FCA 813 ("*Re Opes*"), is fairly broad. The focus is on the existence of an adequate nexus (at [55]). A similar stance was taken in *Bacnet Pty Ltd v Lift Capital Partners Pty Ltd* [2010] 183 FCR 384. Though the approach in the *Re Opes* was doubted in *City of Swan* v *Lehman Brothers Australia Ltd* [2009] FCAFC 130 ("*City of Swan*"), the broad approach was maintained as the court in *City of Swan* did not rule expressly on the correctness of the approach in *Re Opes* as this was not necessary for the determination of that case. In Australia therefore, it would seem that give and take need not be between the creditors and the company, but between creditors and third parties.

56 In *Re Opes*, Finkelstein J in the Federal Court of Australia had to consider a scheme under which the creditors of the applicant were to also release claims against banks, another company in the same group, the liquidators of that third-party company, and receivers. Finkelstein J considered a number of cases including *Daewoo Singapore*. After reviewing what were termed "pro-release" cases, Finkelstein J said at [48]:

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

57 After considering US cases, which were noted to point to the utility of a broad construction, Finkelstein J said at [55]:

> … I have no doubt … that I should follow the approach in the pro-release cases to which I have referred. In other words, provided there is a sufficient nexus between a release and the relationship between the creditor and the scheme company, the scheme can validly incorporate the release. There is a sufficient nexus here for any number of reasons, including, most importantly, that the creditors' claims against the Opes companies and their claims against the banks largely (and in many cases completely) overlap, the schemes are in settlement of interlocking claims and, in the absence of the release, none of the claims would be compromised.

Finkelstein J identified indications of connection in that case as stemming from overlap, interlocking and impact. These are all certainly manifestations of connection or nexus. I do not understand Finkelstein J as stipulating that any one or any combination was necessary – these were just instances of the broader concept of connection.

Singapore

58 In Singapore, the Court of Appeal's decision in *Daewoo Singapore* recognised that third-party releases may be permitted in a scheme but did not stipulate a test to determine when it would be appropriate. *Daewoo Singapore* concerned a scheme in which a guarantee by a director of the applicant company would be released by the creditor. The Court of Appeal noted at [23]:

> On the first question, we can see no reason in principle why a scheme of arrangement or compromise under s 210 of the Companies Act cannot incorporate such a term. No cases have been cited to us to say that such a term cannot be embodied in a scheme. After all, a scheme of arrangement or compromise proposed by a company to be made with its creditors or a class of creditors under s 210 of the Companies Act is no more than a proposal to vary or modify its obligations in relation to its debts and liabilities owed to its creditors or a class of creditors on certain terms and conditions. In seeking so to vary or modify its obligations, there is nothing to prevent the company from proposing, as part of a wider scheme, *inter alia*, a term to the effect that, in consideration of what the company has provided under the scheme, the creditors will, upon implementation of the scheme, discharge not only the debts and liabilities of the company but also the liabilities of the guarantors for the same debts and liabilities of the company.

The Court of Appeal then emphasised that it was not for the court to determine what is agreeable (at [23]):

> Whether such a term is agreeable to its creditors is a different matter; it all depends on the circumstances of the case and what the company has to offer under the scheme as a *quid pro quo* for the discharge of these liabilities.

59 The Court of Appeal's decision in *Daewoo Singapore* does manifest a number of important principles:

(a) Section 210 is broad enough to cover a situation in which a third party is released by the creditors.

(b) The agreeability of what is proposed is a matter for the creditors and is a reflection of the creditors' determination of whether the *quid pro quo* offered by the company is desirable.

60 This to my mind reflects the general approach in Singapore that it is for the creditors to weigh what is in their interests, and conversely it is for the company to propose an attractive enough proposition. The court does not generally substitute its determination of what is appropriate at the leave stage. If sufficient votes are obtained at the scheme meeting to approve the scheme at the sanction hearing, the court essentially determines, by considering what is commercially reasonable, whether the proposal is sound. There is nothing in *SK Engineering & Construction Co Ltd v Conchubar Aromatics Ltd and another appeal* [2017] 2 SLR 898 that goes against this.

61 Flowing from that, a third-party release is not in itself something that is to be guarded against and restricted. What must be excluded is any use of s 210 to further collateral purposes, bringing in a transaction that is wholly unconnected with the company that is applying for leave for the scheme meeting to be called. That to my mind would be served by requiring that it be demonstrated that there is a nexus or connection between the applicant company's debt and the third party's debt. Where one is a guarantee for the other, that connection would generally be made out. Which one is primary and which is secondary is immaterial.

62 Similarly, whether the third-party claims are personal or proprietary would seem a secondary issue; if there is a connection, I cannot see that the *quid pro quo* could not be put forward to the creditors under s 210. The cases previously cited do seem to require that the third-party claims being released should be personal and not proprietary. I am not certain that such a restriction is needed. If sufficiently connected to the applicant's own liabilities, it would seem immaterial whether the creditors' rights against the third parties are personal or proprietary.

63 I accept however that where the claims against the applicant company are purely proprietary, such claims cannot form the basis of a scheme of arrangement as the holder of the property is not a creditor of the company and would follow with respect the approach of the English court in *Re Lehman Brothers*: see *Re Lehman Brothers* at [59]. In addition, I agree with the English court that secured creditors are still creditors – their security exists and is only enforceable to the extent that the underlying indebtedness continues: see *Re Lehman Brothers* at [60].

64 The exclusion of purely proprietary claims relates to the need to establish that the right in question is one of creditor-debtor, rather than ownership. Security rights do not confer a proprietary claim for the purposes of this analysis; until the point of enforcement of security, these rights are secondary to the creditor-debtor relationship. It may be that there are certain security interests for which this distinction may be blurred. These will need to be considered case by case.

65 What matters is thus the nexus or connection between what is proposed and the liability of the applicant company. Breaking it down further, there must be some connection between the applicant company's debt and what is sought

to be released. If there is no such connection, then the proposal would fall outside the ambit of the statute. What amounts to a sufficient connection cannot be laid down with any definitiveness: but a wholly unconnected debt would certainly fail.

66 A clearly excluded situation would be where the creditors' claim is wholly unrelated to the applicant company. Some connection or linkage from the applicant company's debt to the creditors would be needed as there would otherwise be nothing for s 210 to bite on. On the other hand, such agreement would overstep the bounds if it were in respect of something wholly unrelated to the company, as that would clearly be beyond the ambit of the statutory provision and the object of the Companies Act. In such a situation, there would seem to be little if any basis for the mandatory nature of the s 210 regime to be made applicable.

67 Third-party releases have been permitted, as is evident in the cases referred to by both sides. Indeed, it would be unduly restrictive to prohibit the release of any liability of any person other than the debtor company, if it and the creditors are content to so agree.

68 The Noteholders' further arguments contend that the permitted categories of third-party release require that there be some impact on the scheme company. There is a superficial attractiveness to this, but I do not think in the end it really assists in determining the proper scope of a s 210 scheme. All things may have an impact on another – much depends on how broadly and loosely one wants to use the term.

69 On the present facts, in one sense, as argued by the Noteholders, there is no impact: BCE and BCR are distinct entities from the Applicant. On the other,

if the debts of BCE and BCR are not released there may indeed be, and perhaps probably be, an impact on the Applicant, since they are part of the same group. At the very least the creditworthiness of the group may be adversely affected, which would be a sufficient impact on the Applicant.

70 Seen in that light, I cannot see that there is any advantage to the approach of considering the impact as opposed to weighing any nexus or connection. The same result would follow if one looks at real consequences as the yardstick.

71 Nor is it made out that this application is for any collateral or improper purpose. The Noteholders suggested that the inclusion of the claims against the third party is an excuse to classify the two sets of notes together in a single class. The question of class composition is examined below; there was no substantiation of the allegation of the collateral purpose in the third-party release.

72 The Noteholders have also taken issue with the fact that the obligation to be compromised is in the form of a guarantee. Section 210 is not limited to obligations or claims of a specific type. The language used is broad. There is nothing in the nature of a guarantee that would prevent it coming within s 210. What matters is if there is sufficient connection, or nexus, between the compromise and the company. On the facts here, the guarantees were part of the financing structure that the creditors subscribed to. This again points to the question being left to the creditors in a meeting.

73 In any event, even if the approach in *Re Lehman Brothers* was adopted, the same result would to my mind follow. In the circumstances of the present case, the release of the claims against the third party would be sufficiently ancillary to the arrangement in respect of the Applicant's debt. The claims are

connected to the Applicant's debt as they were part of the same structure or web of rights and liabilities to support the indebtedness of the Applicant and its related companies to the creditors. The other objections raised by the Noteholders in the application of *Re Lehman Brothers* would not bar approval. The creditors' claims here were not proprietary in the sense considered in *Re Lehman Brothers* and the other English cases. The Noteholders argue that they were given security; but the existence of a security arrangement does not render the interest proprietary, as was made clear in *Re Lehman Brothers*. What is sought to be released is the contractual debt owed by the issuers. The prohibition in *Re Lehman Brothers* was targeted at the release of actual property rights, such as those held under a trust.

*Conclusion as to the structure of the scheme*

74 I am satisfied that the proposed scheme falls within the ambit of s 210, and within the permitted scope as recognised in *Daewoo Singapore*. That approach coincides with the test developed in *Re Opes*, which I believe should represent the law, so as to allow s 210 to be used flexibly to further legitimate commercial ends. It is ultimately up to the creditors as a voting group to decide whether they wish to move forward. The interests of the minority are sufficiently protected by the s 210 regime, particularly by the need for a super majority. If the English cases lead to a different conclusion, I respectfully decline to follow them.

***Classification***

75 The Noteholders take issue with the proposal of taking both the 2015 noteholders and the 2017 noteholders as a single class and argue that differences in the returns, and the issuers which were based in different jurisdictions, point to the need to have different classes. The Applicant argues however that the

2015 Notes and 2017 Notes are interdependent arrangements. In any event, the Applicant argues that any difference would not call for the separation of the two sets of creditors, as the differences are not so dissimilar that they would be unable to consult together before they vote.

*The test*

76 The approach was laid down in *Re UDL Holdings Limited & Ors* [2002] 1 HKC 172 ("*UDL Holdings*"). The essential question is whether the creditors have rights that are so dissimilar that they cannot sensibly consult together with a view to their common interest and must be given separate meetings (see *UDL Holdings* at p 184). The Court of Final Appeal of the Hong Kong SAR, referred as well to the observation of Chadwick LJ in *Re Hawk Insurance Co Ltd* [2001] 2 BCLC 480 ("*Re Hawk Insurance*") that whether a single meeting is enough depends on whether what is proposed is a single composite arrangement or in fact separate but interdependent arrangements with different classes (see *UDL Holdings* at p 179).

*Application to facts*

77 The Noteholders argue on the basis of *Re Hawk Insurance* that what is proposed are separate but interdependent arrangements, citing previous proposals by the Berau Group. The fact that the issuers were based in different jurisdictions, with BCR in Singapore and BCE in Indonesia is also material. It is said that this was an attempt to circumvent jurisdictional objections in respect of BCE, by amalgamating two schemes into one. There are different obligors and guarantors of the two notes. The recovery differs between the two sets of notes. The Noteholders further argue that *DTEK* and *Metinvest* are distinguishable and not material.[34]

78 The Applicants argue that a single voting class is sufficient citing the cases of *Wah Yuen, DTEK* and *Metinvest*. It is possible for the 2015 and 2017 noteholders to consult together with regard to their common interest. The two sets of notes are linked. Furthermore, it is not disputed that the notes are interdependent arrangements. The scheme proposed is a composite one, covering both sets; a similar situation was accepted in *UDL Holdings*. *Re T&N Ltd (No 3)*, cited by the Noteholders, illustrates when claims would be found to be the same. As for the argument that the 2017 noteholders would have been entitled to raise jurisdictional objections, the Berau Group is not obliged to carry out restructuring through an entity that is not resident in the forum and the Noteholders are able to raise their concerns to other creditors at the scheme meeting and the sanction hearing. There is little distinction between the two sets of notes.[35]

79 The fact that the Existing Notes were issued by different companies within the Berau Group did not necessarily mean that they should be classed differently. While there would be third-party releases of these issuers, the scheme applicant is common to both. What needs to be weighed is whether the two sets of Noteholders could sensibly, as stipulated by *Wah Yuen*, consult together because of different rights.

80 As for the difference in recovery, while the Noteholders argue that the difference is not sufficiently shown to be a small difference, citing Re *Indah Kiat International Finance Company BV* [2016] EWHC 246 (Ch) ("*Indah*

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[34] Skeletal submissions of (1) Pathfinder Strategic Credit LP and (2) BC Investment LLC dated 22 September 2017 at paras 68-76; Skeletal reply submissions of (1) Pathfinder Strategic Credit LP and (2) BC Investment LLC dated 2 November 2017 at paras 28-29.

[35] Applicant's reply submissions dated 2 November 2017 at paras 46-59.

*Kiat*") on the appropriate demonstration of evidence, some difference in levels of recovery is tolerable simply because the court has to take a practical approach – that is the upshot of the case in *Wah Yuen*. In some instances, equal recovery will be possible, in others not. Creditors generally may have different expectations of returns. What matters is whether that difference is such that they cannot reasonably deliberate as a group. While there was some difference in returns, this was not to my mind sufficient to conclude that it was inappropriate to have a single class. Though there may be differing rates of return, the two sets of noteholders could sensibly consult together.

81 But what is material is that third-party releases are to be given in respect to each issuer. While the creditors may have a common element in the form of the guarantee by the applicant company, as well as other commonalities, the fact that the creditors have other rights exercisable against different entities, would seem on its own to call for separation into different classes. The considerations that may come into play in weighing whether any release is to be given, and what should be the price of such release, would seem to be the sort that could attract different results, which would mean that there would be little common interest. It is only against this backdrop, any difference in returns would then serve as an additional pointer towards separation.

82 There was some question of what percentages were in support. What is required is at least having a proportion of support that puts the scheme within some opportunity for approval – I have expressed this in past cases as being in striking distance. From what I could see of the percentages as indicated: 25.28% and 4.9% of the outstanding principal amount of the 2015 and 2017 notes respectively are held by the Noteholders. These percentages do not necessarily indicate that that the scheme is doomed to failure, and I would not bar the calling of the meeting on those grounds. In particular, I note that there has been some

fluctuation in the composition of the opposing noteholders, and it may be that there may be some change by the meeting. It may be otherwise if the opposing noteholder is a single entity; in such a case it may be that a 25% opposition expressed at the leave stage may mean that that the meeting should not be called.

83 I should note that the Noteholders raised another point that BCE is an Indonesian entity, and thus jurisdictional issues would have to be taken into account. I did not however consider that this point could be taken that far on its own in this regard.

***Financial disclosure***

*84* The Noteholders took issue with what has been disclosed thus far. The Noteholders say that their expert has raised pertinent issues. The Noteholders cite the requirement in s 211(1) of the Companies Act that there be a statement explaining the effect of the compromise or arrangement. Whatever that could impinge on the financial interest of the creditors, so as to allow them to make informed decisions should be disclosed: *The Royal Bank of Scotland NV v TT International (No 2)* [2012] 4 SLR 1182 ("*TT International (No 2)*"), *Wah Yuen*, *Indah Kiat* and *Re Heron*. The cases indicate that sufficient information should be given to assess that the returns are greater than in liquidation and that information on the parent company's finances should be provided as well: *Re Econ Corp*. Up to date information must be provided: *Re Heron.* The commercial viability of the implementation of the scheme should also be disclosed: *TT International (No 2)*; as well as possible alternatives and basis for the predicted outcomes: *Re Van Gansewinkel Groep BV and others* [2015] EWHC 2151 (Ch) ("*Re Van Gansewinkel*"), and the willingness of the authors of the Position Assessment to accept responsibility: *Indah Kiat*. It was argued that none of these were provided or substantiated by the Applicants here. The

Noteholders also contend that financial information that is based on unaudited information is not reliable, citing *Wah Yuen*. How the finances of the Berau Group have deteriorated over the past few years has not been substantiated. It is not possible for each noteholder to investigate the groups affairs and financial condition, despite the invitation made in the Position Assessment. The Applicant contends that they are unable to give further information because of the restrictions under Indonesian law, but nothing has been given to substantiate this.[36]

85 The Noteholders further point to the view of their independent expert that the Applicant has not given sufficient information for the noteholders to make an informed decision when voting, in view of the dearth of information given, the absence of any opinion on the reasonableness and completeness of the information and absence of details and other statements. It is also said that the Position Assessment falls short of the standard in Singapore, and that the recoveries are not likely to be greater than in liquidation. The Applicant has failed to address these concerns.[37]

86 The Applicant argues otherwise. Most of the cases cited by the Noteholders were concerned with the sanction stage including *Wah Yuen, Re Econ Corp*, *TT International (No 2)* and *Re Heron*. Furthermore, the court in *Re Heron* noted that what is required to be supplied is dependent on the facts, and that inequality in information is not necessarily fatal, depending on the practicalities of the situation. Berau Group has supplied what it could. The Applicants emphasise that the Noteholders are entitled to make their views

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[36] Skeletal submissions of (1) Pathfinder Strategic Credit LP and (2) BC Investment LLC dated 22 September 2017 at paras 77-91.

[37] Skeletal submissions of (1) Pathfinder Strategic Credit LP and (2) BC Investment LLC dated 22 September 2017 at paras 92-99.

known, but yet have not been open in sharing their documents with the rest of the creditors. As to the acceptance of responsibility for the matters stated in the Position Assessment, no case authority has been cited that would support such a requirement. The Applicants are happy to put the Noteholders' expert report before the other creditors, but the Noteholders' expert has in any event made a number of errors. Furthermore, his concerns are about improvements to the scheme, which are not material at the leave sage.[38]

87 I accept that a number of the cases cited by the Noteholders in respect of this issue were concerned with the granting of sanction by the court, and are thus of limited usefulness to the present case, which concerns only the convening of the creditors' meeting.

88 While *Indah Kiat* was, in contrast to the other cases cited, concerned with an application for leave rather than sanction or approval, I do not think that Snowden J's statement in *Indah Kiat* can be taken as far as the Noteholders contend. There were specific concerns present in that case which are absent here. The evidence that was before the court and creditors was opaque, especially as regards the supporting creditor, whose identity was not fully disclosed. It was also only incorporated a few months before the application, with two directors, who appear to have been nominee directors, and who were its shareholders with a Cayman fund. The implication was that the supporting creditor was only a nominee for or under the control of some other person. Additionally, another company in the group had obtained sanction from a Bermudian Court on the basis of perjured evidence. It is in the context of these concerns that the court's determination that there should be more information and full analysis of the alternatives, as well as on the responsibility of the

[38] Applicant's reply submissions dated 2 November 2017 at paras 62-88.

authors needs to be taken against. The application in that case was also taken in the background of litigation in the United States, and just after the centre of main interests was shifted to England. Another significant factor in that case was that it was adjourned for six weeks primarily to allow creditors more time to consider. However, I note that Snowden J also highlighted the inadequacy of the disclosure separately.

89 Given these concerns and deficiencies, and the impact of the supporting creditor's connection with the applicant, and thus on the scheme composition, it is not surprising that the application was adjourned by Snowden J. A case similar to *Indah Kiat* may be decided the same way in Singapore, but I suspect the basis for such a decision would be doubt about the *bona fides* of the proposal. If there is woefully inadequate information, the meeting ought not be called, as the circumstances would indicate lack of *bona fides*, and possibly an attempt to game the system, by fending off creditors with a s 210 moratorium.

90 Here any deficiency in the information provided did not go that far. There may have been shortcomings, but nothing to indicate such concern that it should be removed. Creditors can voice their concerns or lack thereof in a meeting, and vote accordingly. Importantly, the Applicant has also indicated that it is ready to disseminate the documents of the Noteholders' expert for consideration by the other creditors. The Noteholders are however not receptive to this because it does not believe that it would be helpful to creditors to upload hundreds of pages of the independent expert report, which taken in isolation, would not have made sense to the reader. If indeed the Noteholders were concerned about the lack of information available to the rest, they should be ready to share. As they are not in fact completely ready to do so, they cannot really complain about what is sent out.

91 Certainly, some failure to provide information could amount to an abuse of process. But the present case is far from such a situation. I thus accept that the information provided at this stage is sufficient. While there may be some deficiencies, the consequences lie at the hands of the creditors. If they consider the information insufficient to attract their support, they are free to reject the scheme.

92 The Noteholders also contend that insufficient notice was sent out of the hearings herein, contrary to the requirements in *TT International (No 1)*; it is said that the Applicant should have given notice of the issues taken up in respect of the jurisdiction or power of the court.[39] The Applicant however contends that notice was given of the hearing by way of the announcements, and *TT International (No 1)* did not adopt wholesale the UK Practice Statement, contrary to the Noteholders suggestion.[40]

93 I do accept that we have not adopted the UK Practice Statement wholly, and that applications are *ex parte* generally. Nonetheless, the courts have instituted various measures to ensure that matters are properly canvassed. The noteholders would have been well aware of the application in any event through the pre-trial conferences, and the other creditors would have been informed that there was an application being made. The notice would not need to include all the various possible issues that opposing creditors may raise. That is really for the creditors themselves to take advice on. What should be included would be sufficient detail of the normal matters that the court would look at, including the

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[39] Skeletal reply submissions of (1) Pathfinder Strategic Credit LP and (2) BC Investment LLC dated 2 November 2017 Paras 72-77.

[40] Applicant's reply submissions dated 2 November 2017 at paras 9-13.

voting classes. I do not think it can be said that there was inadequate notice sent out.

***Abuse of process***

94 Various allegations of abuse of process were raised by each side. The Noteholders argue on the basis of Irish authorities, that the court can find that repeated applications can amount to an abuse of process*: In the matter of the Companies Act 1993 to 2009, and in the matter of Vantive Holdings and others* [2009] IESC 69 ("*Re Vantive Holdings*"), *Re McInerney Homes Ltd and others* [2011] IESC 31. Here, there were multiple applications, a sudden improved offer late in the day, deliberate and tactical discontinuance, multiple moratoria, and an attempt to wear out creditors. The Noteholders also argued that statutory restrictions were also imposed in the new amendments to the Companies Act to prevent abuse.[41]

95 The Applicant contends that the previous applications just showed the efforts that were made by the Berau Group to find a workable compromise for the creditors' benefit. The Irish cases cited by the Noteholders are distinguishable as under Irish law, court protection is invoked, with an automatic moratorium. The absence of such an automatic moratorium in the present case removes the mischief targeted by the Irish decisions. In addition, the Irish cases are also distinguishable on the facts for various reasons, including that there were points raised which had been determined earlier.[42]

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41 Skeletal submissions of (1) Pathfinder Strategic Credit LP and (2) BC Investment LLC dated 22 September 2017 at paras 100-118.

42 Applicant's reply submissions dated 2 November 2017 at paras 89-108.

96 In the end, while in my view some of the previous proceedings could have been avoided, I did not find that there was anything that amounted to abuse of process by either side. Importantly, there is nothing to bar the present application being pursued. The fact that a number of related applications may have been filed previously is not by itself a bar. There may be various reasons behind such applications, not all of which may be either nefarious or indicative of bad faith. It is only when the court is able to draw the conclusion that the applications have consistently been made with no hope or on tenuous grounds that an inference of bad faith will be drawn.

97 If the Irish authorities cited by the Noteholders go further than this, I would respectfully decline to follow their approach.

***Moratorium***

98 The Applicant sought a moratorium in respect of foreign proceedings outside Singapore. The present proceedings fell outside the 2017 amendments to the Companies Act, which came into force only after the application was filed.

99 The Applicant referred to the inherent jurisdiction of the court recognised in *Pacific Andes*, at least to the extent where it is necessary to protect a scheme that has received sanction. It is argued that the court's jurisdiction should be exercised where leave is granted for a meeting to be convened.[43]

100 I am of the view that any inherent jurisdiction should generally not be exercised to affect proceedings overseas. The circumstances where such conduct outside the territorial jurisdiction of the court should be circumscribed

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[43] Applicant's skeletal submissions dated 22 September 2017 at paras 118-126.

are to my mind limited. The fact that s 211B of the Companies Act now permits moratoria to have extra-territorial effect does not change matters. That is a statutory extension; it does not by itself provide an impetus for common law or inherent jurisdiction to be so extended. The moratorium granted will be only within Singapore and for a period of time to cover any application for sanction should the meeting vote in favour of the scheme. The specific order will be detailed separately in directions.

**Further arguments**

101 After the conclusion of the oral hearing, when I indicated that I would reserve judgment in the light of the novel issues raised, the Noteholders instructed Senior Counsel, who then, while acknowledging that oral arguments had concluded, sent in further arguments reiterating particularly the contention that the proposed scheme went beyond what is permitted. Senior Counsel indicated he had done so to assist the court.

102 Given the circumstances, and out of courtesy to Senior Counsel, I requested a response from the Applicant, who maintained their earlier arguments. While the Noteholders continued to press for an oral hearing, I informed parties that this was neither necessary nor appropriate: nothing new was added.

*103* I reiterate what I have just said recently in my judgment in *Re: Zetta Jet Pte Ltd and Others* [2018] SGHC 16, that once oral arguments have concluded, leave should be obtained from the court before further arguments are thrown in. I would emphasise that the courts would lean against allowing further arguments after oral hearings unless good reasons are shown: there must be finality to the process.

**Conclusion**

104 I will thus grant leave for the scheme meeting to be called, but with separate classes for the two sets of noteholders. A moratorium is ordered, but with only local territorial effect, and up to a date after the meeting is to be convened, or other order of court. Directions for the settling of detailed orders will be given separately by letter.

105 Directions for cost arguments will also be given separately.

Aedit Abdullah
Judge

Nair Suresh Sukumaran, Foo Li-Jen Nicole and Tan Tse Hsien, Bryan (Chen Shixian) (Nair & Co LLC) for the Applicant;
Philip Jeyaretnam SC (instructed counsel) (Dentons Rodyk & Davidson LLP), Andrew Chan, Alexander Yeo and Jo Tay (Allen & Gledhill LLP) for the 2nd Non-Party and 3rd Non-Party.