Re Reliance National Asia Re Pte Ltd
[2007] SGHC 206

Case Number : OS 986/2006, SUM 3905/2007

Decision Date : 30 November 2007

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Palaniappan S (Straits Law Practice LLC) for The Oriental Insurance Co Ltd; Ashok Kumar and Margaret Ling (Allen & Gledhill LLP) for Reliance National Asia Re Pte Ltd

Parties : —

Companies – Schemes of arrangement – Nature – Whether scheme operating as order of court or as statutory contract – Application by creditor for extension of time to file proof of debt under approved scheme – Whether court having jurisdiction to extend time – Section 210 Companies Act (Cap 50, 2006 Rev Ed)

30 November 2007

Judith Prakash J

1 The Oriental Insurance Co Ltd ("Oriental") is a state owned insurance company incorporated in India. It is a creditor of Reliance National Asia Re Pte Ltd ("Reliance"), a company incorporated in Singapore. Oriental's claim, as a creditor, was for a sum of US$19,031,656. In these proceedings, Oriental applied for a three week extension of time to submit its Proof of Debt pursuant to the Scheme of Compromise and Arrangement entered into between Reliance and its creditors.

2 The sole issue to be decided was whether the court has the jurisdiction to extend the time period for a creditor to file its proof of debt *after* the court has granted its approval for a scheme of arrangement under s 210 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act"). At the conclusion of the hearing, I decided that the answer to the question posed was in the negative and, accordingly, dismissed the application. I now give my reasons for doing so.

Facts

3 Reliance was incorporated in July 1996 and was in the business of undertaking general reinsurance. From 2000, however, it had financial difficulties and, as a result, it was no longer feasible for Reliance to continue business. After 2000, existing contracts were not renewed for subsequent years and Reliance ceased writing business altogether. Its management decided that the best option for Reliance would be to enter into a voluntary run-off. This was put in place in April 2001. During the process of run-off, reconciliations were performed for outstanding balances and this led to the collection of outstanding premiums and settlement of claims.

4 Nevertheless, because the costs of run-off constituted a significant expenditure and the run-off was not expected to be completed for many years, Reliance decided that the most efficient and effective method of making full payment to its creditors in the shortest time would be to put into effect a solvent scheme of arrangement under s 210 of the Act (the "Scheme"). The Scheme would have the effect of concluding the run-off of Reliance's business earlier than would be the case if it were to continue until all claims had materialised and had been agreed and paid in the normal course.

5 On 18 November 2005, Reliance sent a letter to all its creditors ("the Scheme Creditors"), including Oriental, informing them about the Scheme. This letter was sent to Oriental's general address at A-25/27, Asaf Ali Road, New Delhi 110002, India ("general address").

6 On 19 May 2006, Reliance applied to the High Court for permission to convene the creditors' meeting as required under s 210 of the Act.

7 By an Order of Court dated 2 June 2006, a meeting of the Scheme Creditors was ordered to be convened for the purposes of considering whether the Scheme should be approved ("the Court Meeting"). On 16 June 2006, Reliance sent the Notice of Meeting ("the Notice"), the Explanatory Statement of the Scheme, and the Scheme to Oriental at its general address. The Proxy Form, Voting Form and specimen Proof of Debt form were also bound together with the documents. It was not disputed that Oriental received these documents.

8 The Notice stated that the High Court had directed there to be a meeting of the Scheme Creditors on 26 September 2006. Paragraph 2.1.1 of the Explanatory Statement defines a Scheme Creditor as "a person who is or claims to be a creditor of the Company". It was accepted that Oriental is a Scheme Creditor under the Scheme.

9 The binding effect of a scheme of arrangement that was sanctioned by the court was explained at page 4 of the Explanatory Statement as follows:

> Under the Act, the Scheme will become binding and effective when it is approved by the necessary majority of the Scheme Creditors at the Court Meeting convened by the court, sanctioned by the Court and an office copy of the Approval Order is lodged with the Registrar of Companies in Singapore.

Importantly, paragraph 2.2.1 of the Explanatory Statement sets out when and how payments under the Scheme were to be effected:

> **2.2.1 Payment under the Scheme**
>
> (a) The Company shall pay or procure to be paid to each Scheme Creditor, *who has delivered a Proof of Debt to the Scheme Manager at the Specified Address on or before 14 May 2007*, an amount in the Reference Currency equal to their Approved Scheme Claim. Payment to the Scheme Creditors in respect of their Approved Scheme Claims shall only be made by the Company after all Scheme Claims have been determined by the Scheme Manager and all Disputed Claims have been adjudicated by the Independent Adjudicator…
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> *(b) In the event that any Scheme Creditors fails to submit a Proof of Debt to the Scheme Manager at the Specified Address by the Claims Cut-Off date, that Scheme Creditor shall not be entitled to any payment of his Scheme Claim with effect from the Claims Cut-Off Date, and:*
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> *(i) the Company shall be completely, and absolutely released and discharged from all claims, obligations and liabilities* (whether actual, contingent or otherwise) *and indebtedness* (whether as principal debtor or surety) of the *Company to that Scheme Creditor* whatsoever and howsoever raising out of or in connection with any and all agreements, transactions, dealings and matters effected or entered into or occurring at any time prior to the Court Meeting Date (including but not limited to the Scheme Claims of such Scheme Creditor);
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> (ii) that Scheme Creditor shall, if called upon so to do, execute and deliver to the Company

such forms of release and discharge thereof on such terms as the Company may reasonably require; and

(iii) that Scheme Creditor shall forthwith, and in any event at the request of the Company discontinue and terminate, without any order as to costs, any and all legal proceedings commenced by it against the Company in any jurisdiction for or in this connection.

[emphasis added]

Thus, in order to receive payment under the Scheme, all Scheme Creditors had to file their Proofs of Debt on or before the Claims Cut-off date, *ie* 14 May 2007.

10 Paragraph 3.3.2 of the Explanatory Statement also explained the effect of lodging a Proof of Debt form after the Claims Cut-Off date:

3.3.2 Lodgement After Claims Cut-Off Date

Any Proofs of Debt received by the Scheme Manager after the Claims Cut-Off Date *shall not be admitted by the Scheme Manager* for the purpose of the Scheme.

If any Scheme Creditor fails to submit their Proof of Debt by the Claims Cut-Off Date, that Scheme Creditor's Scheme Claim *shall be valued at zero*.

[emphasis added]

Similarly, clause 3.2 of the Scheme provides:

3.2 The value of all Scheme Claims of any Scheme Creditor who fails to submit a Proof of Debt on or before the Claims Cut-Off Date *shall be deemed to be zero*. For the avoidance of doubt, and as an independent stipulation, in such a situation, the relevant Scheme Creditor shall be bound by the terms of the Scheme.

11 On 15 September 2006, Oriental sent the completed Voting Form and Proxy Form to Reliance, and requested Reliance to attend the Court Meeting on Oriental's behalf. Oriental voted in favour of the Scheme and appointed the Chairman of the Court Meeting as its proxy.

12 On 26 September 2006, the Court Meeting was held. A majority in number and a majority of three fourths in value of the Scheme Creditors, voting in person or by proxy, voted in favour of the Scheme. Reliance applied to the High Court on17 October 2006 for the Scheme to be sanctioned.

13 On 18 October 2006, Reliance sent a letter to Oriental at its general address and addressed the letter to Mr S L Mohan ("Mr Mohan"), who was known to Reliance as a senior executive of Oriental. The letter notified Oriental that Reliance had applied to the High Court for the Scheme to be sanctioned. A copy of the Notice of Hearing, which stated that the matter was to be heard on 7 November 2006 at 10.00 a.m., was enclosed with the letter.

14 On 7 November 2006, the High Court sanctioned the Scheme. On 14 November 2006, Reliance wrote to Oriental and informed Oriental of the same. The letter was sent to Oriental's general address and was addressed to Mr Mohan. The letter then continued:

Accordingly, the Scheme is now effective and applies to all Scheme Creditors regardless of whether and how they voted at the Court Meeting. Steps will now be taken to implement the

terms of the Scheme.

You should note that, under the terms of the Scheme, all Scheme Creditors will have to file their Proofs of Debt to the Scheme Managers, namely Whittington Asia Pacific Pte Ltd at the Specified Address (i.e. 1 George Street, #16-03 One George Street, Singapore 049145) by the Claims Cut-Off Date, ie. by **14 May 2007**. A copy of the Proof of Debt form is enclosed for your necessary action.

[emphasis in original]

A Proof of Debt Form was enclosed with the letter. Under the heading "INSTRUCTIONS FOR COMPLETION OF THE PROOF OF DEBT FORM", it was stated as follows:

The deadline for submitting completed Proof of Debt Forms is the Claims Cut-Off Date, being 12.00 midnight Singapore time on 14 May 2007 the Claims Cut-Off Date. Returned Proof of Debt Forms must reach the Scheme Manager on or before this date. If a Scheme Creditor does not complete and return a Proof of Debt Form to the Scheme Manager by the Claims Cut-Off Date, that Scheme Creditor's Scheme Claims shall be deemed to be zero.

[all emphasis in original]

15 Oriental alleged that it did not receive both the letters of 18 October 2006 and 14 November 2006. Its position was that the letters: (a) had not been sent to the address provided in the Voting Form and Proxy Form; and (b) were addressed to Mr Mohan, who had retired from the Company in February 2005. Oriental also pointed out that as it had a very large work force of some 16,000 employees and 1,000 offices all over India, letters that were not addressed to the correct individuals might go missing.

16 After November 2006, Reliance sent six e-mail reminders to Oriental to remind the latter to submit its Proof of Debt before 14 May 2007. The first three reminders were sent to Oriental Insurance at the address "oic@oriental.nic.in" on 11 January 2007, 13 February 2007 and 13 March 2007. The Proof of Debt form was attached to the e-mails. Reliance had apparently obtained this e-mail address from the Insurance Directory of Asia 2004/2005. Oriental's position was that it had not received these e-mails as the e-mail address "oic@oriental.nic.in" had been terminated as early as 1 April 2005.

17 The later three reminders were sent to Mr M K Jindal, who had been identified in the Voting Form sent by Oriental as the "General Manager (Technical)" of Oriental. These reminders were sent on 11 April 2007, 2 May 2007 and 10 May 2007 to the e-mail address "mkjindal@orientalinsurance.co.in", which had been inserted by Oriental in the Voting Form. Once again, the Proof of Debt form was attached to the e-mails. Oriental alleged that Mr Jindal also did not receive these e-mails.

18 Reliance alleged that they had also tried to contact Oriental on 11 May 2007 twice, via the fax number which they had obtained from Oriental's fax dated 15 September 2006. Both attempts were unsuccessful.

19 According to Oriental, it first came to know about its failure to file its Proof of Debt form in time when it was informed of the same by the Indian Insurance Regulatory Authority (which had in turn been notified by the Monetary Authority of Singapore). On being apprised of this, Oriental sent a letter on 16 July 2007 to the Scheme Manager and requested further information on the procedure

relating to the submission of monetary claims. The Scheme Manager replied that as Oriental had failed to submit its Proof of Debt by the Claims Cut-Off date, its claim of US$19,031,656 was deemed to have zero value.

20 Oriental thus applied, on 4 September 2007, under O 3 r 4 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) seeking a three-week extension of time to file its Proof of Debt under the Scheme.

Statutory provisions and mechanism

21 Section 210 of the Act, which governs compromises and schemes of arrangements, is *in pari materia* with s 425 of the UK Companies Act 1985 (c. 6) and s 411 of the Australian Corporations Act 2001 (Cth). The mechanisms stipulated in these provisions for effecting schemes of arrangement are similar and useful guidance may be sought from the Australian and English case authorities.

22 While the issue that arose in these proceedings was a relatively narrow and defined one, it had to be analysed, in my view, within the entire framework of principles and procedures that govern compromises and schemes of arrangements. There are three stages by which a scheme of arrangement becomes binding on the company and its members and/or creditors:

> **Stage 1** — an application must be made to court under s 210(1) of the Act for an order that one or more meetings of members and/or creditors be summoned;
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> **Stage 2** — the scheme proposals must be put before these meeting(s) and approved by the requisite majority of each class; and
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> **Stage 3** — if (and only if) the proposals are so approved at the meeting(s) may the court, in its discretion, sanction the scheme.

Each of these stages serves a distinct purpose. At the first stage, the court directs how the meeting or meetings are to be summoned. The court is concerned to ensure that those who are to be affected by the proposed arrangement have the opportunity of being present, in person or by proxy, at the meeting(s). The second stage confirms that the proposals are acceptable to at least a majority in number. Finally, at the third stage, the court is concerned to ensure that: (a) the statutory provisions have been complied with; (b) the class was fairly represented by those who attended the meeting and the statutory majority were acting *bona fide* and were not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and (c) the arrangement is such as a man of business would have reasonably approved: *Re Hawk Insurance Co Ltd* [2002] BCC 300 at [12] and *Re Anglo-Continental Supply Co Ltd* [1922] 2 Ch 723.

23 Safeguards have thus been drawn up at every stage to ensure that *before* the scheme is sanctioned, members or creditors are fully informed and have ample opportunity to raise objections, either at the meeting(s) or before the court. In particular, s 211(1) of the Act requires that every notice summoning a meeting should be accompanied with a statement explaining the effect of the compromise or arrangement and stating any material interests of the directors. The mechanism is designed in a manner to ensure that all objections to the proposals will be aired *before* the court makes the final decision as to whether to sanction the scheme. This is to ensure that certainty and finality will be preserved once the court has sanctioned the scheme.

24 In line with such design, the courts have expressed reluctance to allow creditors to raise objections *after* the court has sanctioned the scheme. In *Chew Eu Hock Construction Co Pte Ltd v Central Provident Fund Board* [2003] SGHC 199, a scheme of arrangement was proposed and the

plaintiff, by an order of court, convened a meeting. The defendant was duly informed of the meeting but did not attend it. After the scheme was sanctioned and became effective, the defendant raised objections to the scheme. The High Court noted at [26] that the defendant had registered its objections "far too late…well after the order sanctioning the scheme had been obtained and lodged with the Registry of Companies" and that "to accept the defendants' objections at such a late stage would be unfair, unreasonable and prejudicial" to the parties involved in the scheme. The court held at [27] and [29] that the defendant should have objected to the scheme of arrangement *before* the court had sanctioned it and to hold otherwise would mean that, despite the court's approval, there could never be any *certainty* to the validity of the scheme. This would result in great inconvenience to companies, creditors, shareholders and the community. In a similar vein, Lord Hoffmann in *Kempe v Ambassador Insurance* [1998] 1 WLR 271 ("*Kempe*"), observed (at 276), "if creditors felt that in providing fixed time limits the scheme was creating traps into which the unwary might fall, the time to raise this question was when the scheme was under consideration or by way of objection when the court was asked to give its sanction".

25 Thus, *after* the scheme is sanctioned, the court should necessarily be slow to hear further objections, or to make any amendments to the scheme, that could and should have been raised at an earlier stage. The overarching principle here is one of clarity, certainty and finality, without which a scheme of arrangement cannot be efficaciously implemented. On the facts of the present application, it should be highlighted that paragraph 3.1.2 of the Explanatory Statement expressly alerts Scheme Creditors that they may raise their objections at the meeting and at the court hearing for sanction. It provides:

> **3.1.2 Right of Scheme Creditors**
>
> An opportunity will be given at the Court Meeting for Scheme Creditors to raise any questions and to voice any objections they may have in relation to the Scheme. Provided that the Scheme is approved by the Scheme Creditors at the Court Meeting, Scheme Creditors are also entitled to attend the hearings of the Company's application to the Court to sanction the Scheme…

26 Having been informed of its rights (and there was no dispute that Oriental received the Explanatory Statement), and having voted in favour of the Scheme, I considered that it was too late, at this stage, for Oriental to raise objections to the form of, or consequences of non-compliance with the time lines provided for in, the Scheme.

Nature of the court sanctioned scheme

27 There is some controversy as to whether a scheme of arrangement derives its efficacy from an order of court, or from the statute, and thus whether it operates as a statutory contract based on a number of ingredients. This is important because where a scheme operates as an order of court, the court can extend time under O 3 r 4 of the Rules of Court, whereas such discretion is not available where the scheme operates as a statutory contract.

28 In *Kempe* ([24] *supra*), the Privy Council explained that a scheme did not operate merely as an agreement between the parties affected but had the binding force of statute once an application to court had been made and the consent of the relevant parties and the sanction of the court had been obtained — it was the statute which gave binding force to the scheme when there had been a combination of the three acts. The scheme in *Kempe* imposed a 21-day time limit for the filing of applications to reverse or vary any rejection by the liquidators of creditors' claims. The creditors approved the scheme and it was sanctioned by the court. The applicant's notice of claim was rejected by the liquidators but the former did not challenge the latter's decision within the 21-day

time limit. It then sought a court order that the time limit be enlarged pursuant to *inter alia* the inherent jurisdiction of the court. The Bermuda Court of Appeal extended the time for making the application but this was reversed on appeal to the Privy Council. Lord Hoffman, who delivered the judgment of the court, explained the nature and effect of a scheme. As his observations are particularly relevant to the present case, they will be quoted at length. Lord Hoffman observed at p 276:

> It is true that the sanction of the court is necessary for the scheme to become binding and that it takes effect when the order expressing that sanction is delivered to the registrar. *But this is not enough to enable one to say that the court (rather than the liquidators who proposed the scheme or the creditors who agreed to it) has by its order made the scheme.* It is rather like saying that because royal assent is required for an Act of Parliament, a statute is an expression of the royal will. Under section 99 [of the Bermuda Act, which corresponds to s 425 of the UK Act] it is for the liquidators to propose the scheme, for the creditors by the necessary majority to agree to it and for the court to sanction it. *It is the statute which gives binding force to the scheme when there has been a combination of these three acts*, just as the rules of the constitution give validity to acts duly passed by the Queen in Parliament: see *In re Garner's Motors Ltd* [1937] Ch. 594, 589–599 and *Devi v People's Bank of Northern India Ltd* [1938] 4 All E.R. 377, 343.
>
> It is of course true that the sanction of the court is by no means a formality. Furthermore, in giving its sanction, the court has an inherent jurisdiction to correct any obvious mistakes in the documents which sets out the scheme. But it cannot alter the substance of the scheme and impose upon the creditors an arrangement to which they did not agree. The question of whether the time limits in the scheme are fixed or flexible is in their Lordships' opinion one of substance. Mr. Crystal accepts that if there is jurisdiction to enlarge the period for filing an appeal against the rejection of a claim, there must also have been jurisdiction to extend the final filing deadline for filing the original claims. *But their Lordships think that this would have been a material alteration, detracting from the certainty and expedition which were the chief objects of the scheme. If creditors felt that in providing fixed time limits the scheme was creating traps into which the unwary might fall, the time to raise this question was when the scheme was under consideration or by way of objection when the court was asked to give its sanction.*
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> [emphasis added]

29 The statutory provisions do not confer powers, and their only effect at any time is to make up for, by recourse to the procedure prescribed, the absence of the individual agreement by every member of the class to be bound which would otherwise be necessary to give the scheme validity: *In Re Guardian Assurance Co* [1917] Ch 431 at 441.

30 Similar sentiments were echoed by the Court of Appeal in *Daewoo Singapore Pte Ltd v CEL Tractors Pte Ltd* [2001] 4 SLR 35. Yong Pung How CJ, delivering the judgment of the court, observed as follows at [24]:

> The binding effect of the scheme is given by the court order approving the scheme… the section is intended to provide a machinery (1) for overcoming the impossibility or impracticability of obtaining the individual consent of every member of the class intended to be bound thereby, and (2) for preventing, in appropriate circumstances, a minority of class members frustrating a beneficial scheme.

A scheme that has been sanctioned by the court thus operates as a "statutory contract imposed by

law": *Wangsini Sdn Bhd v Grand United Holdings Bhd* [1998] 5 MLJ 345; *Re Garner's Motors Ltd* [1937] Ch 594 at 598. (*Kempe* has been followed in Hong Kong in *Re Universal Dockyard Ltd* [2003] HKCU 407 at [20]).

31 The Australian courts have, however, adopted a different view. In *Caratti v Hillman* [1974] WAR 92 ("*Caratti*"), the Supreme Court of Western Australia held that a sanctioned scheme operated as an order of court and thus the Rules of Court were available to permit the court to extend the period for lodgement of claims by creditors. *Caratti* was followed by the Supreme Court of New South Wales in *Ray Brooks Pty Ltd v New South Wales Grains Board (No 2)* [2002] NSWSC 1175. The court in the latter case, however, appeared to follow *Caratti* over *Kempe* not as a matter of principle, but of precedent (at [90]).

32 In my view, the English position is more persuasive than the Australian one and I therefore adopted it in this case. At the very core of every sanctioned scheme lies a statutory contract of compromise that fully informed creditors have agreed to. The statutory provision exists primarily to overcome the impossibility of obtaining the individual consent of each and every member. Theoretically speaking, it is not impossible for such a scheme to be effective even *without* the court's sanction if the company and *all* its creditors agree to the proposal, *ie,* there are no dissentients. The scheme then operates purely by way of contract. Of course, in reality, this is rarely achievable (especially in big companies), but the point is that the sanction of the court adds no magic to the scheme, other than to bind dissentient members to a scheme which the court accepts as fair and reasonable. As will be elaborated on later, where the statutory requirements have been satisfied, the discretion of the court in deciding whether to sanction the scheme is limited. In this sense, one can view the source of efficacy of the scheme as the statutory provisions, and not, strictly speaking, the court order sanctioning the scheme. This is, of course, not to detract from the fact that the court retains an inherent jurisdiction to correct any obvious errors in the scheme, which will now be addressed.

Ambit of court's discretion in sanctioning scheme

33 I will now consider the ambit of the court's discretion in sanctioning a Scheme. In my view, these principles are relevant as they form part of the framework in which the issue should be analysed.

34 It has been emphasised on numerous occasions that the court is not a mere rubber stamp and that the sanction of the court is not a formality: *Re The British Aviation Insurance Co Ltd* [2005] EWHC 1621 (Ch) at [69]; *Kempe* ([24] *supra*) at [69]. Thus, where the court is not satisfied as to the matters set out at [22] above, it is not required to sanction the scheme. In such circumstances, an Australian or Singapore court may, by way of s 411(6) of the Corporations Act and s 210(4) of the Companies Act respectively, grant its approval "subject to such alterations or conditions as it thinks just".

35 Generally speaking, however, in relation to the fairness and reasonableness of the scheme, the courts have reiterated that they have a limited supervisory role and are reluctant to substitute their own commercial judgment for that of the members and/or creditors. Thus, in *Re English Scottish and Australian Chartered Bank* [1893] 3 Ch 385, Lindley LJ made the following oft-quoted observation at 406:

> [T]he Court does not simply register the resolution come to by the creditors or the shareholders, as the case may be. If the creditors are acting on sufficient information and with time to consider what they are about, and are acting honestly, they are, I apprehend, *much better judges of*

what is to their commercial advantage than the Court can be. I do not say it is conclusive, because there might be some blot in a scheme which had passed that had been unobserved and which was pointed out later.

While, therefore, I protest that we are not to register their decisions, but to see that they have been properly convened and have been properly consulted, and have considered the matter from a proper point of view, that is, with a view to the interests of the class to which they belong and are empowered to bind, *the Court ought to be slow to differ from them. It should do so without hesitation if there is anything wrong; but it ought not to do so, in my judgment, unless something is brought to the attention of the Court to shew that there has been some material oversight or miscarriage.*

[emphasis added]

36 Thus, save in the circumstances where the class had not been properly constituted, or the meeting had not considered the matter with a view to the interests of the class which it was empowered to bind, or the chairman did not conduct the meeting substantially in accordance with the procedure laid down by the court, the court should be slow to differ from the outcome of the meeting. I am of the opinion that this cautious approach of the courts is in line with the view that at the core of the scheme is a commercial arrangement the terms of which have been agreed to between the company and a majority of the creditors, albeit one that has to be sanctioned by the court for binding effect. The jurisdiction of the court in sanctioning a scheme is succinctly summarised by Chadwick LJ in *Re Hawk Insurance Co Ltd* [2001] EWCA Civ 241 at [52]:

… I am conscious that the jurisdiction conferred on the court is limited to sanctioning the scheme that has been approved by the creditors. *The court should be cautious before rewriting a scheme to accord with its own notions of proper draftmanship. If the change is merely cosmetic, it is unnecessary; if it is more than cosmetic, then the scheme as sanctioned is not the scheme that has been approved by the meeting of creditors.*

[emphasis added]

In my view, this supports the position adopted in *Kempe*, *viz,* that a scheme derives its force *via* a statutory contract. The fact remains that the court is most reluctant to interfere with the commercial plans of the creditors and will generally sanction a scheme that it accepts as procedurally fair and substantially reasonable.

Can a sanctioned scheme be amended?

37 While the applicant in the present case did not seek to amend the scheme, in my view, the principles governing this issue are important as they form another part of the framework in which the issue should be analysed.

38 Once a scheme of arrangement has been sanctioned and registered, it may only be amended in *very limited circumstances*. This is effected through the exercise of the court's inherent jurisdiction. Thus, a court sanctioned scheme may be set aside where consent to it has been obtained by fraud (*Fletcher v Royal Automobile Club Ltd* [2000] 1 BCLC 331), or where there are any "obvious mistakes" in the document (*Kempe,* [24] *supra* at p 276). The general principle, however, is that the court cannot alter the *substance* of the scheme and impose upon creditors arrangements to which they did not agree (*Kempe* at p 276). It has been held that an amendment to time limits set out in a scheme constitutes a "material alternation" (*Kempe* at p 276) and an "amendment of substance" (*Re Forklift*

Sales (SA) Pte Ltd 3 SASR 21 at 24 ("*Re Forklift*")).

39 In this context, it is also relevant to point out that there where an original scheme has been approved by the court and has not yet been carried through to completion, it may later be amended by *another scheme* approved by the court: *Re Elliott's MF Services Pty Ltd* [1965] VR 756 ("*Re Elliott's")*. This means that the three step procedure set out in s 210 of the Act will have to be followed again — the court cannot amend an approved scheme without an amending scheme: *BTS Bearing Pty Ltd v Transmission Supplies Pty Ltd* (1983) 8 ACLR 287. This principle has also been recognised by the Privy Council in *Devi v People's Bank of Northern India* [1938] 4 All ER 337, which was a case where an original scheme having been sanctioned by the court (and not fully implemented), an amended scheme was later sanctioned by the court and was held by the Privy Council to be binding and not capable of being varied or departed from by the mere acquiescence of the shareholders and creditors. In *Re Forklift* ([38] *supra*), after the original scheme had been sanctioned by the court, the scheme manager convened a meeting, proposing amendments to the scheme, including *inter alia* a proposal that altered the date at which tax losses were to be ascertained. These proposals were approved and resolutions were passed. When an application was made to the court to amend the original scheme, the court held that it had *no jurisdiction* to do so – the whole procedure under the Australian equivalent of our s 210 had to be gone through again before the court would consider the amendment, and this had not been done on the facts.

40 In my view, this proposition is in tandem with the principle that the court has no jurisdiction to alter the substance of the scheme and impose upon creditors an arrangement to which they had not agreed. The s 210 procedure would need to be adhered to rigorously in any application for amendment to schemes of arrangement and the safeguards therein would ensure that terms to which the majority of the creditors do not agree will not be imposed on them – the original scheme is amended by the creditors, *not* by the court. Even then, the court is naturally reluctant to reopen creditor's rights and obligations: *Re Elliott's* ([39] *supra* at 757). This strengthens the view that a scheme of arrangement should be viewed as a statutory contract the terms of which have been agreed to by the parties rather than imposed on them by an order of court. Where the amendments sought are material or substantial, the court has no jurisdiction to grant such amendments and thereby impose on creditors something which they had not considered or agreed to.

Application to the facts

41 The basis on which Oriental sought an extension of time was O 3 r 4 of the Rules of Court. As I accepted the English position enunciated in *Kempe* ([24] *supra*), and this was not a case of fraud or obvious mistake, I found that there was no jurisdiction to grant such an extension of time.

42 While it is recognised that there may be cases where the court may consider that there would be a miscarriage of justice if such an extension of time was not granted, even if there were jurisdiction to give an extension on that basis, in my view, the facts of this case did not merit the court's indulgence. First, Reliance had alerted and reminded Oriental on numerous occasions about the Claims Cut-Off date and that Oriental was required to file its Proof of Debt before that date. It was also made very clear to Oriental that Proofs of Debt filed after that date would not be considered and those claims would be extinguished. I find Oriental's arguments that they did not receive the Proof of Debt forms unconvincing as the forms were sent to them no less than six times. The letter of 14 November 2006, attaching the form, was sent to Oriental's general address, which was the address which earlier correspondence was sent to and received. The email address "mkjindal@orientalinsurance.co.in", where some of the emails were sent, was provided in the voting form submitted by Oriental on 15 September 2006. In my view, Reliance had done as much as it could to notify Oriental of the necessity to file its Proof of Debt before the Claims Cut-Off date.

43 Second, Oriental was not a dissenting creditor who was bound to the scheme against its will, but had instead voted in favour of the scheme, albeit by way of proxy. It did not lie in its mouth to subsequently complain that there was insufficient time provided for creditors to lodge their Proofs of Debt. The timelines for the Scheme were clearly set out in the documentation that it was furnished with even before the Scheme was approved.

44 Third, contrary to Oriental's arguments that Reliance would suffer minimal prejudice if the present application was allowed, I was of the view that there would be serious repercussions if this application was allowed, not only for Reliance, but also for future schemes of arrangement. The most weighty consequence is that the certainty, efficacy and finality of schemes such as the present would be severely compromised. If, on the facts of the present case, an application to extend time had been granted, the threshold for future creditors to seek an extension of time would be very low. There will then be no certainty and finality in a scheme such as the present because every time a creditor obtained an extension of time, all the claims will have to be re-adjudicated. Much delay, which would be prejudicial to the scheme, will also ensue. This will be further complicated if, for example, interim dividends have already been paid out under the scheme, such as in *Kempe* ([24] *supra*). In fact, counsel for Reliance informed the court at the hearing that, were this application to be allowed, the entire scheme might have to be abandoned. This was in light of the very nature and object of the Scheme, *viz,* to adjudicate and settle all claims more expeditiously than would be the case if Reliance continued to be in run-off. In complex commercial arrangements such as the present where parties are legally advised and are fully informed, I am of the view that, the court should lean towards certainty as this is the course that is fairest and of most benefit to scheme creditors taken as a whole.

45 Before concluding, I should add that Oriental tendered an additional case after the hearing. This was the Australian case of *Re AGL Gas Networks* 37 ACSR 441 ("*Re AGL*"). I was not bound to consider this case as it was not raised during the hearing. Nevertheless, I would state that this case would not have affected my judgment in any event, since I had already taken a different view from the Australian courts on the jurisdiction issue. Additionally, *Re AGL* is distinguishable on its facts as the court there was considering a rather different fact situation. In that case, a deadline set by scheme provisions governing the post-approval implementation phrase was missed by a few minutes and there was no mechanism, short of seeking relief from the court, for the extremely technical and inconsequential non-compliance with the terms of the scheme to be rectified. The court noted that the amendment was in no way prejudicial to the members and in fact, serious adverse consequences would result if the amendment was *not* allowed. The facts of the present case are quite different because the extension of time sought here was not merely a technical alteration but an alteration of substance, and importantly, the Scheme Creditors would suffer prejudice and delay if the extension of time had been allowed.

46 The application was therefore dismissed with costs.