

**PIAT C E & ORS v HAREL FRERES LIMITED & ANOR**

2014 SCJ 32

**Co 624(m)/11 and Co 630(m)/11**

**IN THE SUPREME COURT OF MAURITIUS**

**(BANKRUPTCY DIVISION)**

In the matter of:-

1. Charles Edouard Piat
2. Marc Harel

**APPLICANTS**

v.

1. Harel Frères Limited
2. Terra Mauricia Limited

**RESPONDENTS**

AND

In the presence of:-

1. The Financial Services Commission
2. The Registrar of Companies

**CO-RESPONDENTS**

AND

In the matter of:-

1. Société Atlanta
2. Société Avanturine
3. Société Bayeux
4. Société Coutances
5. Société Paimpol
6. Société Ecarel
7. Société Jucarel
8. Société Socarel
9. Société Azurite
10. Société Beryl
11. Société Coraline
12. Société Onyx
13. Société Topaze
14. Barthelemy Harel
15. Succession of JM Antoine Harel
16. Société Astro
17. Société Helix
18. Société IOTA
19. Société Pluton
20. Société Vega
21. ME Olga Sangle-Ferrière
22. Société Geosol

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**JUDGMENT**

Both cases have been consolidated as the same issues have been raised. They were entered following the approval of a Scheme of Arrangement at a special shareholders' meeting where the applicants voted against the resolutions tabled and later some of them made it known that the resolutions taken were defective and therefore null and void. At the same time, there was a request for buy-out which was turned down. At no time did the applicants enter a case to challenge the approval of the Court regarding the Scheme of Arrangement submitted to it after the shareholders' meeting on the grounds put forward in the present applications for compensation.

Pursuant to section 178 of the Companies Act 2001 (the Act), the applicants in both cases are moving the Court to require "*the Company or any other person to pay compensation*" on the ground that "*The affairs of the Company have been, or are being, or likely to be, conducted in a manner that is, or any act or acts of the company have been, or are likely to be, oppressive, unfairly discriminatory, or unfairly prejudicial to that person in that capacity or in any other capacity.*" The same grounds seeking compensation have been put forward in both applications.

**THE UNDISPUTED FACTS**

- (i) An application was made to the Court on the 20<sup>th</sup> September 2011 by Harel Frères Ltd. (HFL) in respect of a Scheme of Arrangement between HFL and Terra Mauricia Ltd. (TML) (vide Annex 1 of 1<sup>st</sup> applicant's affidavit) under sections 261-264 of the Act which is under Part XVIII of the Act;
- (ii) On the 28<sup>th</sup> September 2011, the Court ordered that a notice be published in two dailies of wide circulation and to submit to the Court any observation or objection from the parties concerned by the end of October 2011;

(iii) As there were no objections, the Scheme was approved on the 7<sup>th</sup> November 2011 with conditions attached (infra);

(iv) A special meeting of shareholders was convened on the 23<sup>rd</sup> November 2011 at HarelMallac Building to consider and vote on four resolutions, namely:

(a) First resolution to be voted as an ordinary resolution:

“To approve, pursuant to a Scheme of Arrangement (“the Scheme”) under sections 261 to 264 of the Companies Act 2001, the exchange of shares of the Company for shares in TML, a new company, in the ratio of 1:1, that is, one (1) ordinary share of the Company for one (1) ordinary share of TML”;

(b) Second resolution to be voted as ordinary resolution:

“To approve the listing of shares of TML on the Official List of the Stock Exchange of Mauritius Ltd. (“SEM”) under the “Investment Segment” on the first trading day following the date the Scheme is to be effective”;

(c) Third resolution to be voted as an ordinary resolution:

“To approve the Information Memorandum dated 05 October 2011 in respect of the Scheme which also includes the Listing particulars prepared in connection with the Listing of the shares of TML on the Official List of the SEM”;

(d) Fourth resolution to be voted as an ordinary resolution:

“To authorise the Board of Directors of the Company to do all such things and undertake all such acts as may be required to give effect to the foregoing resolutions, to implement the Scheme and to list the shares of TML on the Official List of SEM”.

(v) Those four resolutions were approved by the majority of the shareholders except for the applicants who in letters sent to the Secretary of the Company stated that the decisions taken were flawed (infra) and asked for buy-out which was refused.

#### **CONTENTIONS OF APPLICANTS IN CO 425/11**

On the 1<sup>st</sup> December 2011, the applicants in Co 425/11 wrote to the Secretary of the HFL claiming that the Scheme and the resolutions voted were flawed and defective (Annex 3). The same reasons have been advanced in the present application under its paragraph 5 which reads as follows:

- “(a) TML and HFL constituted a circular cross-holding buying out in between themselves subsidiary/holding companies, shares in contravention with section 83 of the Companies Act 2001 and that the attention of the Honourable Judge of the Bankruptcy Division of the Supreme Court had not been drawn to the same when petitioning the Court on an ex parte basis;
- (a) The Scheme was in fact a disguised two stage amalgamation where the protection of the minority shareholders' interests had been circumvented and that the mandatory buy-out provided by sections 108, 110 and 246(3)(e) of the Companies Act 2001 had been removed. The attention of the Honourable Judge of the Bankruptcy Division of the Supreme Court had not been drawn to the same when petitioning the Court on an ex parte basis;
- (b) The Scheme ought to have been subject to a Special Resolution pursuant to section 105 of the Companies Act 2001 but also due to the fact it is a Major Transaction as defined in section 130(2) of the Companies Act 2001. The attention of the Honourable Judge of the Bankruptcy Division of the Supreme Court had not been drawn to the same when petitioning the Court on an ex parte basis;
- (c) The Scheme made under sections 261 to 264 of the Companies Act 2001, the sanction of the Bankruptcy Division of the Supreme Court could only be made after the Special Meeting when the Court would have had the opportunity of taking cognisance of the views of the dissenting minority shareholders. In petitioning the Court before the Special meeting and obtaining a blanket prior approval the Company had induced the Court in error and failed to proceed according to settled procedure and in so doing deprived minority shareholders of the Court protection.
- (d) The wording of the resolutions did not reflect or mirror the Court Order;

- (e) The notice sent to the shareholders was consequently defective in as much as it ought to have been by way of special resolution, with the rights of dissenting minority shareholders under section 108 specifically set out, and with the same wording as in the Court order;
- (f) The shareholders not having been properly informed and/or wrongly informed, those shareholders did not attend or represented (more than 30% of the total shareholding) as well as the proxies sent are defective. As a result the votes of the proxies ought to be cancelled and/or disregarded;
- (g) The Scheme is in fact a change in the existing control of the Company by the creation of a holding company (TML). It is to all intents and purposes the Scheme amounted to a takeover of HFL pursuant to section 94(2) of the Securities Act 2005 and the Securities (Takeover) Rules 2010. No mandatory offer to the minority shareholders of the Company was made as provided for under section 33 of the Securities (Takeover) Rules 2010. The attention of the Honourable Judge of the Bankruptcy Division of the Supreme Court had not been drawn to the same when petitioning the Court on an ex parte basis."

The secretary of HFL replied to their letters on the 7<sup>th</sup> December 2011 (Annexes 4 and 5) rejecting their requests to buy-back their shares at a fair value on the ground that the request was '*totally misconceived both in point of fact and in point of law*'. It has also been stated that the Company threatened to take action against them should any action by the applicants delay the completion of the Scheme. They aver that the threat was an intrusion of the board of directors in the realm of shareholders' rights and represented oppression by the Company on dissenting shareholders. The applicants aver that the value of the assets of the Company was stated in the Information Memorandum to the shareholders to be in excess of Rs14 billion. They claim that, having regard to the valuation of PricewaterhouseCoopers and Deloitte and Touche made in October 2009 in respect of a proposed amalgamation of the Company and The Mount Sugar Estates Limited and the share exchange which took place in July 2010 between the Company and Saint André Sugar Estate Company Limited, the present fair value of their shares cannot be less than the fair value of the shares of the Company for the Saint André Sugar Estate Company Limited share exchange. As the Company was mainly land based, the fair value in the light of the share exchange with Saint André Sugar Estate Company Limited would be in excess of Rs64 per share.

They further claim that by creating a holding (TML) on top of the HFL, the shareholders no longer directly controlled the operations of HFL. Since the latter is, by virtue

of the Scheme, now a subsidiary of TML, all decisions which formerly required shareholders' approval would now be taken by the Board of TML thereby taking away the control of the shareholders and allowing management to do as they wish.

#### **RESPONDENTS' CONTENTION IN REPLY TO THE APPLICANTS IN CN 425/11**

The respondents have averred that applicant Charles EdouardPiat has failed to disclose that he was the former director of Société Nemours and that he, together with the second applicant, had entered several cases before the Supreme Court seeking injunctive relief against the respondents, amongst others, in Co 200(m)/2003; Co 2006m/2003; main case 2021/2003; Co 2008m/2003; co 2122/2004, 67/09.

The respondents raised certain preliminary issues, namely:

- (a) The application has been wrongly filed by way of motion and affidavit.
- (b) The applicants, who were not parties to the Court application which sanctioned the Scheme of Arrangement (Case number Co 415/11), are in effect contesting the Court order which was issued as a result of the said application. They are resorting to the wrong procedure to do so.
- (c) All interested parties have not been put into cause. More particularly the other shareholders, who are eminently interested by the present application, have not been put into cause.
- (d) The present application constitutes an abuse of the process of the Court.

It has been averred that the Scheme of Arrangement is part of a larger restructuring exercise as explained in the Information Memorandum (annex 1 of respondents' affidavit) and the restructuring exercise comprises three broad steps:-

- (h) The Scheme, pursuant to which each shareholder of HFL obtains a share of TML for each share he holds in HFL;
- (ii) A reduction of capital of HFL, and a consequential distribution of the shares held by HFL in Harel Frères Investment (HFI) to TML, as a result of which HFI becomes a wholly owned subsidiary of TML;
- (iii) An amalgamation of HFI and TML with the result that the shares presently held by HFI in all its investee companies will be held directly by TML in those same investee companies.

It has been stated that the share of TML is traded at substantially the same price on the stock exchange as that of a HFL share following the completion of the Scheme. The Co-

defendant no. 1 to whom the Information Memorandum was registered made no comment. Alongside the Scheme was a whole rebranding exercise.

It has been averred that the applicants failed to disclose in their affidavit that the application for the approval of the Scheme was lodged on the 21<sup>st</sup> September 2011 and called before the Court on the 28<sup>th</sup> September 2011. The Court ordered that a notice be published in two dailies of wide circulation and also to submit to the Court any observation or objection from the parties concerned by the end of October 2011. Publication in the dailies was done. No observations or objections were made by any shareholder or other interested person following the publication and on the 7<sup>th</sup> November 2011, the Scheme of Arrangement was sanctioned subject to the approval of the shareholders of HFL and TML.

Following the approval of the Scheme of Arrangement, notice of meeting to shareholders of HFL for the 23<sup>rd</sup> November 2011 was given on the 7<sup>th</sup> November 2011 (Annex 2 of respondents' affidavit). By letter dated the 11<sup>th</sup> November 2011 from late J.M. Antoine Harel, the only complaint raised was the change of name of the Company from HFL to TML. (Annex 3 of respondents' affidavit). No other shareholders had expressed in writing their concern regarding the said Scheme.

On the 23<sup>rd</sup> November 2011, no shareholder objected to the holding of the special meeting or challenged that the decisions should be taken by special resolutions. The only reservation expressed by some shareholders related to the name (Annex 4 of respondents' affidavit). More than 75% of the shareholders present voted in favour of the resolutions. Written resolution of TML was also passed on the 25<sup>th</sup> November 2011 (Annex 5 of respondents' affidavit). Thereafter a series of letters were received on the 2<sup>nd</sup> December 2011 from other shareholders including some of the applicants (Annex 6 of respondents' affidavit) challenging the resolutions adopted.

Following those letters, the co-respondent no. 1 was written to on the 14<sup>th</sup> December 2011 refuting the applicants' allegations (Annex 7 of the respondents' affidavit) and replies were also sent to those shareholders who made complaints (Annex 8 of respondents' affidavit).

As a result of the present applications, HFL convened a board meeting of TML on the 30<sup>th</sup> December 2011 and resolved to amend the constitution of TML by adding a new clause 32 entitled 'Provisions with respect of the Scheme of Arrangement' in order to provide for the approval of the shareholders before any approval by the Board of HFL (Annex 9 of respondents' affidavit).

It has been averred that the issues mentioned in paragraphs 4 and 5 of the application were never raised before the special meeting. The respondents state that in the Scheme of Arrangement, shares of HFL were exchanged for shares in TML and that the sole shareholder of TML was HFL. They denied that the subsidiary is holding shares in the holding company. The share initially held by HFL in TML to incorporate the latter had been bought back and cancelled at completion. They claim that the issue had been specifically addressed by the learned judge under order (c). It was further addressed to in the shareholders' resolution of TML.

The respondents aver that none of the conditions as set out in section 108 of the Act are met in the circumstances of the present case. It has been stated that there was no amalgamation in the Scheme of Arrangement. The amalgamation took place in the context of the larger structuring exercise. Furthermore, there was no amalgamation between HFL and TML. Shareholders were given one TML share in exchange of one HFL share. The circumstances set out in sections 108, 110 and/or section 246 (3)(e) of the Act did not find their application in the present case. The respondents deny that there had been acquisition or disposal and aver that there was only an exchange of shares and consequently sections 105 or 130 of the Act were not applicable. It has been averred that under section 105 of the Act certain actions by a company must be authorised by special resolution and the prescribed list of actions does not include schemes of arrangement although it includes amalgamation and major transactions. It has been averred that the present Scheme does not result in an amalgamation or is a major transaction for HFL. The latter did not enter into any commitment of any kind in the context of the Scheme. HFL, the only shareholder of TML, approved the Scheme. It has not been denied that the Court Order was issued before the holding of the special meeting of the shareholders and it has been averred that in the Court Order, it has been specified that the sanction was subject to the approval of the shareholders of HFL and TML. It has been pointed out that more than 75% of the shareholders gave their consent. The respondents deny that it was necessary for the resolutions to be voted to mirror the Court Order and aver that the resolutions carried out were not contradictory to the Court Order. The respondents state that there was no reason why the Scheme should have been approved by special resolution. They deny that the shareholders had been misinformed or wrongly informed. They claim that no prejudice had been caused to the shareholders of HFL. They deny that there was a takeover and aver that it was only an exchange of shares. They claim that the dissenting shareholders were not entitled to any relief as alleged and even less to be bought out at an exorbitant price which would have been prejudicial to the interests of the Company. They aver that the applicants would want a buy-out on their terms and that the applicants never told the Court, when being

invited to do so, that they wished to be bought out or considered that they had to be bought out. Furthermore at the special meeting, the applicants never expressed their wish to be bought out. They had only a reservation regarding the change of name. They admit having in their reply to the applicants stated that the request to be bought out was misconceived both on facts and in law. They deny having threatened the applicants but simply reserved their rights to take action in the event that the applicants' action caused delay in the completion of the Scheme. They deny that there would be removal of control by the shareholders as alleged. They claim that shareholders retain all their rights. They deny that there was a share exchange in July 2010 between HFL and the Saint André Sugar Estate Company Limited but aver that there was an amalgamation in December 2010 and the issue of shares of HFL in consideration of the amalgamation. That amalgamation and that with the Mount Sugar Estates Company Limited were approved by special meeting of HFL and dissenting shareholders were given the right to be bought out in both cases. They aver that the applicants in CN 624/11 received shares from HFL following the amalgamations. They claim that the market value of the shares of HFL varied during the years from Rs12.10 and Rs39.10. It has been averred that the valuation conducted for the purpose of the amalgamations were relative valuation of the assets and liabilities of the companies concerned for the purpose of establishing an exchange ratio in order to issue shares of the HFL in consideration of the said amalgamations Such relative values specifically concerned such share issue and were in no case meant to be used for any other purpose.

The respondents aver that the applicants failed to state that the shareholders of TML are the very former shareholders of HFL in exactly the same proportion with none of their rights affected as they can vote in TML in the same way as they could have voted in HFL. Furthermore, it was never intended to leave the management in full control of the operations of HFL without the control of the shareholders. When the Board of Directors took cognizance of the statement made to the effect that the control of the HFL had allegedly moved from the shareholders to the management, it immediately decided to modify the Constitution of TML and HFL to show their good faith and give more comfort to the shareholders.

The respondents claim that no prejudice had been caused to the shareholders. They aver that the applicants had been treated fairly in the context of the Scheme which had been duly approved by the Court and on which they made no comments except regarding the name of HFL which would no longer be given predominance. They deny that there had been a takeover and aver that the rights are exercised at the level of TML and not HFL. They aver that section 178 of the Act finds no application in the present circumstances. They claim that the affairs of HFL have not been, or are not being and are not likely to be conducted in a

manner that is, and no acts of HFL have been, or are or are likely to be, oppressive, unfairly discriminatory or unfairly prejudicial to any shareholder including the applicants.

They deny that there had been circular holding, amalgamation, major transaction and that no mandatory offer is needed under the Takeover Rules. They aver that the correct procedure has been followed before the Court and the correct procedure followed and the lawful voting threshold adopted at the special meeting of the shareholders of HFL. They claim that there is no unfair prejudice following the amendment to the constitutions of HFL or TML and none established. Even if there was unfair prejudice, the remedies available raise complex issues of fact that cannot be thrashed out in the present proceedings. If buy-out is the correct remedy, then a valuation is necessary and this again raises complex issues which cannot be dealt with in the present proceedings.

They claim that the applicants have nothing to do with or care about the interests of HFL and that they were acting by greed and in their own selfish interest by attempting to cause HFL or any other person to purchase their shares and pay them compensation on their terms. They claim that substantial prejudice will be caused to the respondents and the other shareholders if ever the remedies prayed for are granted.

#### **REPLY OF APPLICANTS IN CN 624/11**

In reply to the affidavit of the respondents, to which I shall refer to only briefly as there have been averments maintaining what had been said earlier in the first affidavit, the applicants aver that there was no need to refer to the matters set out by the respondents in their paragraph 3 as they were irrelevant to the matter in issue which was an application under section 178 of the Act. They aver that there was no obligation as shareholders to bring to the notice of the Court following the publication as ordered of their objection and that they had only an obligation to vote at the shareholders' meeting. They claim that the action was properly directed against the respondents and that the correct procedure was adopted. The applicants note with concern that step 3 of the restructuring had not been fulfilled. They maintain that the intention of the management was to take over the full control of the operations of HFL, change the name of the HFL and rebrand HFL. They claim that a straight forward change of name of the company required a special resolution pursuant to section 36 of the Act and the removal of the direct control by the shareholders concerning the land development projects would not pass the votes of the shareholders. Whether it was called 'rebranding', it was in fact a change of name which ought to comply with section 36 of the Act. They aver that the minutes of the meeting revealed that there was a discussion regarding the change of name. By creating a holding company, TML, on top of HFL and making the purported restructuring by way of Scheme of Arrangement with ordinary

resolutions, HFL astutely circumvented section 36 of the Act. The applicants claim that they had no obligation to comment on the Information Memorandum and that they were only required to vote at the time of the resolution. They voted against the resolutions which were passed and the only issue in the present application is the prejudice caused to them. They aver that there were suggestions regarding the buy-out and exchange of shares, that the shareholders were not guided that a change of name required a special resolution and that the number of votes received by proxy was not mentioned and the proxies were obtained on incomplete or incorrect facts. The applicants add that they had no knowledge of the matters raised by the respondents in their paragraphs 22, 23, 24 and 26. They aver that the amendment brought to the constitution of TML by the Board of directors of TML could have been done only by a special resolution of its shareholders. They note that such amendment did not form part of the Scheme of Arrangement and the shareholders were not notified. They also note with concern that the purported amendment did not form part of the listing particulars and Information Memorandum. They claim that the amendment created a different class of shareholders as it was meant to preserve the rights of those shareholders who were members prior to the scheme. They make remark regarding the timing of the amendment. Comments were made regarding the issue of 'fair value'.

### **REBUTTAL BY THE RESPONDENTS**

In their affidavit dated the 21<sup>st</sup> March 2012, rebutting what had been said by the applicants in their affidavit of the 13<sup>th</sup> March 2012, much had been said about the cases entered previously by the various parties which need not require my attention any further as they are not relevant to the issue in hand. They aver that in the publication reference was made to any person wishing to make representation and not particularly to the creditors. They claim that since the applicants had failed to make any representation, they were therefore estopped from filing the present proceeding. They did not deny the fact that the applicants attended the meeting and they aver that at no time during the meeting did the applicants raise any issues which have been made the subject matter of the present action. They claim that the other shareholders ought to have been put into cause in view of the relief sought, which if granted, would cause intolerable burden on the company and the other shareholders.

They aver that the boards of HFL and TML gave their approval on the 9<sup>th</sup> March and 15<sup>th</sup> March respectively and that the implementation of the remaining steps of the restructuring exercise and cautionary measures were given publicity. They claim that HFL has not changed its name and the issue of change of name is not relevant to the present claim since the shareholders would be convened in April 2012 at a special meeting to

consider the issue of the proposed change of name. They deny the allegation that the executive was allegedly controlling the company for the simple reason that it was the shareholders who had the ultimate control and the members of the board of directors were appointed by the shareholders and some of whom were independent non-executive members. Regarding the lands of the Group, they aver that in the past they were dispersed in the hands of various subsidiaries and it was the present management which had all the lands recently placed with the holding company.

### **CONTENTION OF APPLICANTS IN CN630/11**

The same grounds had been advanced in support of their application as those put forward by the applicants in CN624/11 and I need not set them out again. On the 16<sup>th</sup> December 2011, the applicants in CN 630/11 wrote to the secretary of HFL informing the Company that they considered the Scheme and the resolutions voted to be flawed and defective and the same reasons as those advanced by the applicants in CN 624/11 averred. They are claiming a buy-out and compensation in a sum in excess of Rs64 per share held by them in the respondents.

### **RESPONDENTS' CONTENTION**

At the outset, it has been averred by the respondents that as applicants no. 17 and 18 had been dissolved since the 13<sup>th</sup> July 2011, Mr. Louis Denis Koenig has no authority to swear an affidavit on their behalf. Furthermore, as they had been dissolved, the shares previously held by them in HFL were distributed to the various former members of the said sociétés. The same applies to applicants no. 16 and 19 as they are defunct sociétés. Regarding applicant no. 11 (SociétéCoraline), they aver that no such société exists but however there is a SociétéCornaline which received 380,305 shares of HFL after the dissolution of Société Helix and it held 667,681 in HFL which were exchanged for the same number of shares in TML. Regarding applicant no. 15 (Succession J.M.AntoineHarel), they aver that the action out to have been entered in the names of all the heirs and parties entitled to the succession.

Finally the same points taken in reply to the first application have been put forward. Following letters received from some of the applicants, the respondents wrote to the FSC and replies were forwarded to them mentioning that their views were erroneous both in facts and in law. Following the applications in Court on the 28<sup>th</sup> and 30<sup>th</sup> December 2011, HFL convened a board meeting of TML amending the constitution of TML to include a new clause amongst which is '*the board shall not authorise or approve an ordinary resolution or a special resolution of HFL without the prior consent of the shareholders*'.

They aver that if the shareholders did not approve the Scheme, it would not have been implemented. Following the completion of the Scheme, they say that all sugar activities of the HF Group will remain with HFL, the wholly owned subsidiary of TML and all non-sugar investments of HFL would be transferred to TML. HFI, a wholly owned subsidiary of HFL, holding some of those investments, would be amalgamated subsequently with TML, the latter being the surviving company. Furthermore, TML would hold all investments of the HFL Group and its primary source of income would be dividends from subsidiaries, associated companies and other direct and indirect investment of the HFL Group. They aver that the re-organisation would not result in any acquisition or disposal of any asset or business activity of HFL Group nor would it result in the assumption of any liability by the HFL Group and that no shareholder would be adversely affected or suffers prejudice in any manner following the re-organisation.

They aver that none of the points raised in the present application have been raised by any of the applicants at the special meeting. They state that it was only a long time after the special meeting that comments were first raised by the applicants trying to use what took place in their own selfish interests namely getting a good price for their shares, well above the market values, to the detriment of the company and the majority of the shareholders.

They reiterate that within the Scheme of Arrangement, shares of HFL were exchanged against shares of TML. The sole shareholder of HFL is TML and HFL does not hold share in TML. The subsidiary is not holding share in its holding company. The share initially held by HFL in TML to incorporate TML has been brought back and cancelled at completion and this issue was addressed by the Judge and further addressed by the shareholders' resolution of TML.

They claim that none of the circumstances as set out under section 108 of the Act are met in the present case. They aver that there is no amalgamation in the Scheme and that the amalgamation takes place in the context of a larger restructuring exercise. Furthermore, there is no amalgamation between HFL and TML. Shareholders are given 1 share of TML in exchange of 1 share of HFL with the result that the shareholders find themselves in the same situation. They claim that the circumstances set out in sections 108, 110 and/or 246(3) of the Act do not find their application in the present case.

They aver that in the scheme there is no acquisition or disposal of shares but only an exchange of shares. Consequently, they claim that the circumstances set out in sections 105 or 130 of the Act and their provisions do not find their application in the present case. They do not deny that certain actions by a company must be authorized by special resolution. The prescribed list of actions does not include schemes of arrangements but includes

amalgamations and major transactions. They claim that since both HFL and TML survive after the scheme, there could not be an amalgamation. Furthermore, the scheme is not a major transaction for HFL as HFL does not enter into any commitment of any kind in the context of the scheme. HFL, the only shareholder of TML, has approved the scheme and the decision was made by unanimous decision of HFL in its capacity as sole shareholder of TML.

They aver that the Court order comprises of two stages. Firstly, publication of the Scheme of Arrangement was to be made in the press and that the shareholders were to be invited to submit their comments to the Court. Such publications were duly done in two dailies of wide circulation and no shareholder deemed it appropriate to make any comment within the delay. Secondly, after the publication, the order was itself subject to the approval of the shareholders of HFL and TML which approval was given by more than 75% of the shareholders of HFL voting at the special meeting. They claim that there is no prescribed procedure to apply to the Court for the approval of the Scheme and had the procedure followed been invalid, the applicants ought to have challenged it before the Court makes the order.

They deny that there was a need for the resolutions to mirror the Court order. They aver that the resolutions which were carried out were in line with the Court order and not contrary to it. Moreover, the very same Information Memorandum which was submitted to the Court was submitted to the shareholders. They claim that there was no reason for the Scheme to be approved by a special resolution the more so as section 108 of the Act does not find its application.

They deny that the shareholders were misinformed or wrongly informed of the scheme. They claim that the contrary is true and that no prejudice has been caused to any shareholder of HFL. Furthermore, the proxies were valid.

They deny that there was a takeover and reiterate that it was only an exchange of shares with no rights affected. They claim that no takeover situation had arose under the Securities (Takeover) Rules and that had there been a takeover situation, the offeror i.e. TML would have been required to make an offer on all voting shares of the offeree i.e. HFL not already held by the offeror which results thereafter in the offeror acquiring control of the offeree. They claim that under the Scheme, all the shares of HFL are exchanged for shares in TML and TML becomes the only shareholder of HFL. There are no voting shares of HFL that are not already held by TML upon completion of the scheme. Consequently, they deny that there was a question of mandatory offer on the facts and in law.

They contend that the dissenting shareholders are not entitled to any relief either as alleged or at all; even less to be brought out at such exorbitant price which would be prejudicial to the interests of the company.

They aver that the applicants want a buy-out on their terms and that the applicants never informed the Court when being invited to do that they wished to be bought out or considered that they had to be bought out. No such representation or objections were made even at the time of the special meeting save regarding the change of the name.

They do not deny having sent a reply to the applicants that their claim to be bought out was totally misconceived both on facts and in law. They deny that there is a removal of direct control by the shareholders either as alleged or at all. They claim that the shareholders retain all their rights and that the management cannot obtain control of the company having regards to the voting rights of the shareholders at the meetings.

They do not deny the amalgamation regarding Saint Andre Sugar Estate Company Limited and HFL as well as the amalgamation with The Mount Sugar Estates. They deny that the valuations conducted for the above-mentioned amalgamations could be used for the purposes of a disputed share buy-out.

They aver that the applicants have failed to state that the shareholders of TML are the very former shareholders of HFL in exactly the same proportion with no rights being affected. They amend the constitutions of TML and HFL to show their good faith and give more comfort to the shareholders regarding the control of the company.

They deny that the affairs of the company have been, are being and are likely to be, conducted in a manner that are oppressive, unfairly discriminatory or unfairly prejudicial to any shareholder, including the applicants.

They aver that substantial prejudice will be caused to the respondents and the other shareholders if ever the remedies prayed for by the applicants are granted by the Court and that the remedy would be granted behind the back of the other shareholders who have not been joined in the present case. They aver that if compensation is to be paid to all the applicants at the price of Rs64 per share as asked by them, this will cost HFL no less than Rs931,222,400 and which will cause severe prejudice to the company and its shareholders as the company will be purchasing shares at a much higher price than the market price and HFL will be deprived of sums needed for other projects it has.

#### **REPLY OF THE APPLICANTS IN Co (m) 630/11**

It is averred that applicants no. 17 and 18 have not been dissolved but have been liquidated and therefore, the deponent claims that he has the capacity to represent them. The deponent claims that he was aware that the shares held in applicants no. 17 and 18 were to be distributed and he has no knowledge if that was done and anyway the correspondences dated the 20<sup>th</sup> December 2011 sent by the respondents were addressed to their '*gérants*'. He claims that it was inelegant on the respondents to have informed those applicants that the transfer was recorded and new share certificates given on the 20<sup>th</sup> December 2011. Consequently, they aver that an amendment would be made.

Regarding applicants no. 16 and 19, although they were liquidated, the deponent claims that he has the authority to appear. The deponent claims that he was not aware that the shares of those two applicants had been transferred until the 20<sup>th</sup> December 2011 when so informed by the respondents and he intends to make an amendment putting the beneficiaries of those two applicants.

Regarding applicant no. 11, he agrees that there has been a typing error with the letter 'n' missing. Regarding applicant no. 15, he would be moving for an amendment to put the heirs of that applicant as parties.

He claims that the correct procedure has been adopted in respect of an application under section 178 of the Act. He avers that as the applicants were not made a party to the application for the Scheme of Arrangement, there was no obligation for them to intervene or make any representation before the Court since the applicants were convened at a special meeting to vote on specific resolutions. They claim that they could not be prejudiced prior to the decision taken at the special meeting. They aver that the procedure adopted by the respondents was entirely the responsibility of the respondents and that such procedure could not prevent the aggrieved and prejudiced shareholders from exercising the public order rights and protection as provided for under the Companies Act. The Court did not sanction the Scheme after the decision of the shareholders and the applicants aver that they are not contesting the order. They also aver that they have no obligation to comment on the Information Memorandum submitted by the directors.

They aver that the application was properly directed against the respondents only as provided for under section 178(3) of the Act. They claim that as the action concerned a buy-back of their shares at a 'fair value' which according to them was a fair value in respect of all the shareholders and thus the remaining and continuing shareholders cannot be prejudiced. Furthermore, they claim that the shares bought back by HFL could be re-issued.

They claim that step 3 has not been fulfilled yet and there has been no indication when that would be done. Consequently the 'larger restructuring' is still incomplete. They aver that the executive of HFL was seeking to takeover the full control of the operations of the company, change its name and re-brand the company and that for the change of name of a company, a special resolution is required as provided for under section 36 of the Act. By not resorting to a special resolution in the change of name, HFL has breached section 36. They claim that by creating a holding (respondent no. 2) on top of HFL and making a purported re-structuring by way of Scheme of Arrangement with ordinary resolutions, HFL astutely circumvented section 36 of the Act.

They aver that their only obligation was to vote on the resolutions and not to raise any obstacle. Having voted against the resolutions which were passed and which caused them prejudice. The present application concerns compensation for the prejudice.

Remarks and comments were made regarding the change in the constitution of respondent no. 2 following the vote on the resolutions and the manner it was carried out which was not in the scheme of arrangement, the listing particulars and the Information Memorandum and whether the FSC or the SEM were made aware and had made comments. They claim that the amendment created a different class of shareholders impossible to monitor in practice since the new clause 32(h) designed to 'preserve rights' of those shareholders who were members prior to the Scheme and not to enhance the rights of the shareholders generally.

They aver that since the amendment was designed to 'preserve rights', it meant that without such amendment the rights of the shareholders, including the applicants, had been or were likely to be modified or varied which pursuant to section 114 of the Act required a special resolution and entitled the shareholders to have recourse to section 178 of the Act as provided for under section 114(2) of the Act. Comments were also made regarding amendments made by the respondents to the constitution after the Company had become a wholly owned subsidiary of respondent no. 2.

### **REPLY OF RESPONDENTS**

After making comments regarding those societies and the *locus standi* of the person who had sworn the affidavit, rejoinder was made to the comments and averments of the applicants which I need not reproduce as there was nothing new to the issues already put forward. There had been comments regarding the amendment to the constitution and they gave a different interpretation from that of the applicants.

## **APPLICANTS' SUBMISSIONS**

In their written submission, it has been said by their legal advisers that the claim is under section 178 of the Act following a Scheme of Arrangement made by the respondents which resulted in the applicants becoming prejudiced shareholders and entitling them to claim for a buy-out of their shares at a fair value or compensation in a sum in excess of Rs64 held by them.

It has been argued that prior to the Scheme, the position of the shareholders are as set out in the Information Memorandum. HFL held various investments and the major ones are held through a wholly owned subsidiary, Harel Frères Investment (HFI) and HFL held vast area of land in the North of the Island. With the implementation of the Scheme as can be gleaned from the TML Information Memorandum, the agricultural land previously held by HFL are controlled by a wholly owned subsidiary, Terragri, and the various investments held by HFI, are now held by TML. It has been submitted that whatever name given to the Scheme and the route adopted, the Scheme was nothing but the removal of lands under the direct control of the shareholders of HFL and the re-categorisation of HFL on the official list of SEM from sugar segment to investment segment. It was not stated in the Information Memorandum that there is a restriction for foreign shareholding in respect of the sugar sector and by re-categorisation of HFL in a different sector, the restriction no longer applies. It was submitted that it is a major change of direction and of control.

It has been argued that whatever route one takes, whether it is by way of amalgamation, arrangement, compromise, reconstruction, alteration of nature, demerger, spin-off restructuring, there is the protection of the dissenting minority shareholders by an exit route. It is mandatory and of public order which cannot be removed by a clause in the constitution of the company.

Similarly under the Securities Act and the Securities (Takeover) Rules 2010 when there is a takeover of a listed company as well as a change in the control, the mandatory protection of the minorities is triggered.

Consequently, the argument goes that if a Scheme, by whatever name it is called, is made in such a manner as it removes or deprives the dissatisfied minority shareholders from the protection afforded by public policy legislation, then such shareholders are 'prejudiced' and 'oppressed' and as such may have a recourse to the Court under section 178 of the Act.

Similarly, so it is argued, if a Scheme has for effect or result that the rights of shareholders are or will be varied or amended, there again shareholders may, pursuant to

section 114 of the Act have recourse to either the remedies provided for by sections 178 or 105 of the Act.

The complaint is that the Scheme was not a straightforward one but made in stages to circumvent the minority protection. It has been submitted that the Scheme consists of:-

- (a) The spin-off of all the lands of HFL into a subsidiary, if made in a straightforward manner, ought to have been by way of a special resolution and the special resolution would have triggered the mandatory buy-out provision. The spin-off was effected indirectly. Instead of transferring the lands to a wholly owned subsidiary of HFL, which would have effected a mandatory buy-out, a holding was placed on top of HFL. This was made possible by a holding-subsidiary transaction whereby the subsidiary, TML, purchased all the shares of its holding (HFL) in exchange of shares in the subsidiary in a one for one transaction. There was also the cancellation of the one share held by HFL in TML and there was no resolution for this step.
- (b) The transaction between TML and HFL is in breach of section 83 of the Act.
- (c) The creation of a wholly-owned subsidiary which then becomes the holding automatically triggers a takeover under section 33 of the Securities (Takeover) Rules in view of the fact that TML has acquired all the shares of HFL. This ought to have triggered the mandatory offer provisions of the takeover regulations. No mandatory offer was made.
- (d) Any breach of the Act or of the mandatory regulation or any defect in the Scheme due to the non-compliance with the Court order are per se 'prejudicial' and/or 'oppressive'. Reference was made to Morison's Company and Securities law at paragraph 37.6.
- (e) The change of name of HFL into TML ought to have been done by special resolution and a change in the constitution of HFL. This would have triggered a mandatory buy-out. This was done by the creation of a wholly owned subsidiary and making the subsidiary to stand into the shoes of HFL and replacing it and thereby avoiding the buy-out.
- (f) The Scheme removed the direct 'hands on' control which the shareholders exercised through their votes on decisions relating to the lands of HFL. The removal of such direct control by placing the lands in a subsidiary, varied, amended, changed or altered the controlling rights which the shareholders of HFL had through their voting rights. When the respondents were informed of the flaws, a change in the constitution was effected to preserve the shareholders' rights and this to no avail and by virtue of section 114 of the Act, the provisions of section 178 of the Act are available to the applicants.

- (g) The amendment to the constitution ought to have been part of the Scheme or was made prior to the 31<sup>st</sup> December 2011 and ought to have been voted by way of special resolution by the shareholders of HFL which was not done. The change would have triggered the buy-out provision. The change was made after HFL became a wholly owned subsidiary of TML so that the buy-out obligations were removed and done away with.
- (h) The amalgamation of TML and HFI would have triggered the buy-out obligations. The Information Memorandum explained the proposed amalgamation to be approved by the shareholders but the information failed to comply with section 246(3)(e) of the Act. Although applicant no. 1 in CN 624/11 wrote to complain of the absence of the mandatory buy-out, he was informed that there was no mandatory buy-out thus depriving the applicants of the minority protection.

It has been submitted that the contention of the applicants as summarised in their respective applications are:-

- (a) The wording of the resolution does not reflect or mirror the Court order. It has been said that although in the Court order it was mentioned that authorisation was given to cancel the one share issued for the creation of TML, this did not form part of the resolutions voted by the shareholders. The notice to the shareholders and the minutes of the proceedings showed that there was no resolution on this item. Although the Court authorised the cancellation, the respondents failed to proceed with the purchase and cancellation as provided for under sections 69 and following of the Act. If carried out before the effective date, TML would not have passed the solvency test as per section 69(2)(v) of the Act and if carried out after the effective date, TML had to 'acquire its own share on a securities exchange' which must comply with section 69(3) of the Act.

The Court order was 'subject to the approval of the shareholders of HFL and TML'. There was no ambiguity of the Court order which made it clear that it was necessary for the shareholders of HFL to vote a resolution. That was not done and there is no resolution by the shareholders to cancel the one share so that HFL still holds that one share in TML in breach of section 83 of the Act. The defective Scheme entitles them to the relief under section 178 of the Act and it is for the respondents to show to the Court why the flaw should not annul completely the Scheme and renders it void.

- (b) The notice sent to the shareholders was defective in as much as it ought to have been by way of special resolution, with the rights of the dissenting minority shareholders under section 108 of the Act specifically set out, and with the same wording as in the Court order. The shareholders not having been properly informed and/or wrongly informed, (more than 30% of the total shareholding) did not attend the meeting or were not represented. These flow from the defect mentioned under (a). Consequently, the notice and proxies being defective, the Scheme could not hold good as it was not properly voted.
- (c) TML and HFL constituted a circular cross-holding buying out in between themselves, subsidiaries and holding companies, of shares contrary to section 83 of the Act. The Scheme is a change in the existing control of HFL by the creation of TML. The Scheme amounts to a takeover of HFL without the mandatory buy-out provisions. It was a disguised two stage amalgamation where the protection of the minority rights had been circumvented without the mandatory buy-out. They dispute the respondents' contention that it was a short form amalgamation under section 247 of the Act. The applicants claim that a short form amalgamation is carried out by a resolution of the respective boards of directors which was not the case and any breach amounted to 'unfairly prejudicial and oppressive' conduct.
- (d) The respondents misled the Court regarding the procedure for a Scheme of Arrangement which is very broad but where '*any risk is sufficiently guarded against by the fact that the sanction of the Court must be obtained*' (Vide: **Re Guardian Assurance Co. [1917 1 Ch 431]**). In exercising its discretion in approving a Scheme, the Court looks at the overall protection of the shareholders (vide Tolley's Company law at R 2013). Reference was made to the procedure and stand of the Court in different jurisdictions.
- (e) Reference was again made to the prejudice under section 178 of the Act and the variation of rights under section 114 of the Act. It has been said that the acts of the respondents constitute matters which are '*oppressive, unfairly discriminatory or unfairly prejudicial*'.
- (f) They refute the respondents' contention that the applicants had failed to put up any objection following the publication as ordered by the Court and state that any

prejudice occurred after the issue of the Judge's order and that the shareholders could have rejected the Scheme thus causing no prejudice to the applicants.

It has been submitted that section 112 of the Act finds no application as it was not the case of the respondents that the Scheme was defective and they did not seek the exemption in putting forward the grounds on which the Court could have exercised the exemption.

### **RESPONDENTS' SUBMISSION**

It has been submitted by the respondents that a statutory buy-out may arise by the combine effect of sections 105 and 108 of the Act and in a takeover situation under rule 33 of the Securities (Takeover) Rules 2010.

Under section 108 of the Act, a minority buy-out is triggered when the shareholder dissents with the totality of his voting rights in three situations as prescribed under section 105 of the Act. Firstly, when there is an alteration of the constitution of the company with a view to imposing or removing a restriction on the business or activities of the company. Secondly, in respect of the approval of a major transaction and thirdly, when there is the approval of an amalgamation under section 246 of the Act in respect of the long form amalgamation but not the short form amalgamation.

When there is a takeover, the acquirer, who gains control of the voting rights (the threshold of which is mentioned in the Rule), must provide a mandatory buy-out offer to the remaining shareholders (rule 33). However, the mandatory buy-out is not required when the change in control within the company is as a result of a restructuring of the company (rule 34).

It has been contended that since there had been no amalgamation under section 246 of the Act and there had been no takeover situation, the mandatory buy-out was not triggered. Reference was made to the article entitled 'Amalgamations, Schemes of Arrangement and Takeovers Regulation: Concerns of the Takeover Panel and the Need for Reform' by Scott Clune in the Canterbury Law Review (Vol 13, 2007) which reads as follows:-

*'The short form amalgamation process is set out in s. 222 of the Companies Act and allows for the amalgamation of wholly owned subsidiaries with their parent or other subsidiary companies in the group by way of board resolution. This being so, the mechanism is inapt to affect a change of control. This is in contrast to a standard amalgamation.'*

It has been argued that under section 178 of the Act, any shareholder who has been unfairly prejudiced in the commercial sense, can seek for the appropriate relief. Since the relief under section 178 of the Act is an equitable one, the failure of the applicants to object to the approval of the Scheme within the delay fixed by the Court debarred them from such relief.

It has been said that the restructuring took place within the group and not involving unrelated companies. The effective control of the group has remained intact after the Scheme as the shareholders of HFL are now the shareholders of TML in the same proportion.

It has been submitted that the whole restructure was elaborated and explained to the Court and the shareholders provided with the information. The restructure was carried out in phases, initiated for three reasons:(i) CSR efficiency under the applicable law; (ii) the liquidity of the investment and (iii) the segregation and pooling of assets. All was made for the benefit of the company and its shareholders and without breaching any existing covenants and agreements with other shareholders.

The result sought was only available by the procedure under sections 261 to 264 of Part VIII of the Act under '*Approval of Arrangements, Amalgamation and Compromises by the Court*' and which was not catered for in any other part of the Act. It was important that the numerous covenants HFL had agreed with its creditors should be preserved despite the restructuring. The Scheme under the control of the Court was with the sole objective of making TML the holding company before the streamlining of the asset base and which did not disturb or dilute the rights of all the shareholders of the public company.

It has been argued that there are two types of amalgamations in Part XVI namely under sections 246 and 247 of the Act and amalgamation has been defined as '*Two or more companies may amalgamate, and continue as one company, which may be one of the amalgamating companies, or may be a new company*'. It is only an amalgamation under section 246 of the Act which caters for buy-out and not under section 247 of the Act which is the short form of amalgamation.

It has been submitted that initially TML was a wholly owned subsidiary of HFL. Any amalgamation, if at all at this stage, for the purpose of restructure between TML and HFL, which is not the case as both companies survive, would be a short form which did not trigger any buy-out provisions. It has been denied that there had been a disguised process to circumvent buy-out and that on the fact and in law, the applicants' contention that there ought to be buy-out was erroneous.

Attention has been drawn to the fact that the amalgamation of TML and HFL was not within the Scheme for which sanction was sought and the whole restructuring process had been explained to the Court and the shareholders. The amalgamation of TML and HFL was under section 247 of the Act where a parent company is amalgamating with one of its directly or indirectly wholly owned subsidiaries. Although under section 247 of the Act there is no statutory requirement for shareholders' approval, a special resolution seeking same was nevertheless mandatorily required under Clause 18.2 of the amended and restated constitution of TML.

It has been argued that on the 15<sup>th</sup> March 2012, an Information Memorandum was issued for that purpose and it contained a declaration by the directors which made it clear that the amalgamation was under section 247 of the Act and the amalgamation became effective as from 1<sup>st</sup> July 2012.

Regarding the level of control of the shareholders of TML have in HFL, it has been argued that having regard to sections 103 to 106 of the Act, shareholders have control on the holding company as well as on the subsidiaries only through ordinary, special or unanimous resolutions in meetings or equivalent agreements signed in lieu of meetings. Management review is available to the shareholders should they wish to make any binding recommendations on the Board through a special resolution. Following the application, the boards of TML/HFL resolved on 30<sup>th</sup> December 2011, at pre-completion stage to amend their respective constitutions to provide for the control of shareholders of TML on HFL following the Scheme thus mirroring the powers TML shareholders had when they were direct shareholders of HFL. Co-respondent no. 1 was notified of the change in the constitution. In April 2012, when applicant no. 1 in CN 624/11 wrote claiming buyout under section 246(3) of the Act, he was informed that the amalgamation, being a short form one under section 247 of the Act, there was no buy-out.

It has been argued that the resolutions on the Information Memorandum were approved on the 13<sup>th</sup> April 2012 by 89.15% of the shareholders and that at the meeting, no shareholder raised any issue regarding alleged unfair prejudice. After the whole restructuring process, the shareholders of TML, on the 1<sup>st</sup> July 2012, held all the rights which they hitherto had as shareholders of HFL in relation to the powers they held as shareholders of HFL.

It has been submitted that the restructuring entailed a reshuffling of the asset base of the Harel Frères Group as well as a rebranding of the group to TML so as to advance the commercial interests of the group and the shareholders as a whole. The Scheme was the first phase of the restructuring exercise and it did not involve any company changing its name.

## **ANALYSIS**

I need not consider whether the proper procedure had been followed or whether some of the applicants in the second case have been properly represented for reasons which will become obvious. I shall consider whether there can be a claim under section 178 of the Act after the Scheme of Arrangement has been sanctioned by the Court. Indeed, the main issue raised is that the Scheme of Arrangement is a disguised form of amalgamation and what had been done was not by special resolution which under the various sections of the Act would carry out a mandatory buy-out namely change of name, major transaction and takeover in breach of the Securities (Takeover) Rules and consequently to entitle them to compensation under section 178 of the Act to which the respondents denied.

I shall deal firstly with the question of whether the claim was an abuse of the process of the Court having regards to the various issues raised to buttress the present applications but before doing so, it is therefore convenient to look again at what was the purport of the Scheme.

### **WHAT WAS THE SCHEME WHICH WAS APPROVED ALL ABOUT ?**

The Scheme was defined in the application to the Court as '*a Scheme of Arrangement pursuant to which the shares of HFL will be exchanged for shares in TML in the ratio of 1:1*'. The Memorandum Information is much more explicit regarding the Scheme of Arrangement which consists of three stages. It has been stated that the Board of directors of HFL have, on the 6<sup>th</sup> September 2011, resolved to restructure the Harel Frères Group and to incorporate TML to hold direct and indirect investments of the Harel Frères Group. The complete structuring of the Harel Frères Group would involve: (a) the Scheme; (b) the admission of shares of TML in the Official list of SEM on the effective date; (c) the transfer of the investments of HFL to TML (except for Belle Vue Milling Co. Ltd. and Société HBM which will continue to be directly owned by HFL) and (e)the amalgamation of HFI, presently a wholly owned subsidiary of HFL, with TML, under section 247 of the Act. It was said that the Scheme, if approved by the shareholders of HFL at a special meeting of HFL and by the Court, would be the first step in the restructuring process of HFL.

It was mentioned that in the Scheme, there would be (i) the exchange of HFL ordinary shares for TML ordinary shares in the ratio 1:1; (ii) the buy-back and cancellation of the ordinary share issued by TML to HFL; (iii) the admission to listing and trading of TML shares and the delisting of the HFL shares.

It was stated that the Scheme would not affect in any manner whatsoever or prejudice the shareholders of HFL as on the effective date TML would issue the exact number of shares issued and outstanding in the capital of HFL immediately prior to the shareholders of HFL in exchange of shares they held in HFL. The Scheme would also not affect the rights of the creditors of HFL as they would still continue to have full force and effect.

### **ORDER OF COURT**

On the 7<sup>th</sup> November 2011, the Bankruptcy Division of the Supreme Court made the following order subject to the approval of the shareholders of HFL and TML namely:

- “ (a) *Sanctions the Scheme of Arrangement as set out in Annex 6-1 to the affidavit dated the 20<sup>th</sup> September 2011 filed in support of the present petition so as to be binding on the petitioners and their respective shareholders and creditors and all persons concerned under the Scheme on the Effective Date;*
- (b) *Orders that the Scheme be a valid Scheme of Arrangement duly approved as such under the Companies Act 2001;*
- (c) *Authorizes TML to buy back and cancel the ordinary share issued to Harel Frères in the share capital of TML upon its incorporation so that TML issues the exact number of shares issued and outstanding in the capital of Harel Frères Ltd. immediately prior to the Effective Date to the shareholders of Harel Frères Ltd. in exchange for their shares in Harel Frères Ltd.;*
- (d) *Orders that all pledges created on the shares of Harel Frères Ltd. in favour of the relevant pledgee(s) up to the business day immediately preceding the Effective Date be substituted by corresponding pledges of the shares in TML in favour of the same pledgee (s) on the Effective Date.”*

In order to follow the legal issues raised and more especially whether there has been an abuse of the process of the Court, it is convenient at this stage to set out the relevant sections of the laws referred to by learned legal advisers in their submissions.

### **AMALGAMATION**

Part XVI of the Companies Act 2001 in its sections 245 and 246 provide the procedure for amalgamations without the intervention of the Court.

An amalgamation is the process where “*two or more companies join forces to continue as one company which may be one of the amalgamating companies or may be a new company*”. The amalgamation must comply with the conditions set out under section 245(1), (2) and (3) and in particular:

- (a) the name of the amalgamated company where it is the same as the name of one of the amalgamating companies;
- (b) the registered office of the amalgamated company;
- (c) the full name or names and residential address or addresses of the director or directors and the Secretary of the amalgamated company;
- (d) the address for service of the amalgamated company;
- (e) the share structure of the amalgamated company specifying-
  - (i) the number of shares of the company;
  - (ii) the rights, privileges, limitations, and conditions attached to each share of the company, if different from those set out in section 46(2);
- (f) the manner in which the shares of each amalgamating company are to be converted into shares of the amalgamated company;
- (g) where the shares of an amalgamating company are not to be converted into shares of the amalgamated company, the consideration that the holders of those shares are to receive instead of shares of the amalgamated company;
- (h) any payment to be made to a shareholder or director of an amalgamated company, other than a payment of the kind described in paragraph (g);
- (i) details of any arrangement necessary to complete the amalgamation and to provide for the subsequent management and operation of the amalgamated company; and
- (j) a copy of the proposed constitution of the amalgamated company.

The amalgamation proposal may specify the date on which the amalgamation is intended to become effective.

Where the shares of one of the amalgamating companies are held by or on behalf of another of the amalgamating companies, the amalgamation proposal:-

- (a) shall provide for the cancellation of those shares without payment or the provision of other consideration when the amalgamation becomes effective;
- (b) shall not provide for the conversion of those shares into shares of the amalgamated company.

The proposed amalgamation must be approved by the Board of each of the amalgamating companies. This is provided for by section 246 of the Act which reads as follows:-

- (1) The Board of each amalgamating company shall resolve that:-
  - (a) in its opinion, the amalgamation is in the best interest of the company; and
  - (b) it is satisfied on reasonable grounds that the amalgamated company, shall, immediately after the amalgamation becomes effective, satisfy the solvency test.
- (2) The directors who vote in favour of a resolution under (1) shall sign a certificate stating that, in their opinion, the conditions set out in that subsection are satisfied, and the grounds for that opinion.
- (3) The Board of each amalgamating company shall send to each shareholder of the company, not less than 28 days before the amalgamation is proposed to take effect-
  - (a) a copy of the amalgamation proposal;
  - (b) copies of the certificates given by the directors of each Board;
  - (c) a summary of the principal provisions of the constitution of the amalgamated company, if it has one;
  - (d) a statement that a copy of the constitution of the amalgamated company shall be supplied to any shareholder who requests it;
  - (e) a statement setting out the rights of the shareholders under section 108;
  - (f) a statement of any material interests of the directors in the proposal, whether in that capacity or otherwise; and
  - (g) such further information and explanation as may be necessary to enable a reasonable shareholder to understand the nature and implications for the company and its shareholders of the proposed amalgamation.
- (4) The Board of each amalgamating company shall, not less than 28 days before the amalgamation is proposed to take effect:-
  - (a) send a copy of the amalgamation proposed to every secured creditor of the company; and
  - (b) give public notice of the proposed amalgamation, including a statement that-

- (i) copies of the amalgamated proposal are available for inspection by the shareholder or creditor of an amalgamating company or any person to whom an amalgamating company is under an obligation at the registered office of the amalgamating companies and at such other places as may be specified during normal business hours; and
- (ii) a shareholder or a creditor of an amalgamating company or any person to whom an amalgamated company is under an obligation entitled to be supplied free of charge with a copy of the amalgamated proposal upon request to an amalgamating company.

(5) The amalgamation proposal shall be approved:-

- (a) by the shareholders of each amalgamating company, in accordance with section 105; and
- (b) where a provision in the amalgamated proposal would, if contained in an amendment to an amalgamating company's constitution or otherwise proposed in relation to that company, require the approval of an interest group, by special resolution of that interest group.

### **SHORT FORM OF AMALGAMATION**

There exists a short form of amalgamation under section 247 of the Act which needs not comply with the provisions of sections 245 or 246 of the Act as set out above. It does not therefore require the approval of the shareholders. This occurs in two situations.

Firstly, in the case where '***company A and one or more other companies that is or that are directly or indirectly wholly owned by it amalgamate and continue as company A***'.

The conditions to be fulfilled are:-

- (a) the amalgamation is approved by a resolution of the Board of each amalgamating company; and
- (b) each resolution provides that:-
  - (i) the shares of each amalgamating company, other than the amalgamated company, shall be cancelled without payment or other consideration;
  - (ii) the constitution of the amalgamated company, if it has one, shall be the same as the constitution of the company first referred to, if it has one; and

- (iii) the Board is satisfied on reasonable grounds that the amalgamated company shall, immediately after the amalgamation become effective, satisfy the solvency test.

The second scenario is where '***two or more companies, each of which is directly or indirectly wholly owned by the same company amalgamate and continue as one company***'.

Here again, the following conditions must be complied with:-

- (a) the amalgamation is approved by a resolution of the Board of each amalgamating company; and
- (b) each resolution provides that:-
  - (i) the shares of all but one of the amalgamating companies shall be cancelled without payment or other consideration;
  - (ii) the constitution of the amalgamated company, if it has one, shall be the same as the constitution of the amalgamating company whose shares are not cancelled, if it has one; and
  - (iii) the Board is satisfied on reasonable grounds that the amalgamated company shall, immediately, after the amalgamation becomes effective, satisfy the solvency test.

In both scenarios, the Board of each amalgamating company must, not less than 28 days before the amalgamation is proposed to take effect, give written notice of the proposed amalgamation to every secured creditor of the company. The resolutions approving the amalgamation taken together shall be deemed to constitute an amalgamation proposal that has been approved. The directors who vote in favour of a resolution, shall sign a certificate stating that, in their opinion, the conditions under the two scenarios are satisfied and the grounds for that opinion. Failure to do so would constitute an offence.

The Registrar of Companies must be furnished with a list of documents as provided for under section 248 of the Act in order for the Registrar to issue a certificate of amalgamation, a certificate of incorporation and to make the necessary entries in the Register of companies. The effective date of the amalgamation will be on the date as shown in the certificate. The Registrar of Companies will remove from the register the names of the other amalgamating companies except the one which has been specified in the amalgamating proposal to be the name of the amalgamated company.

## **POWER OF THE COURT**

Section 252 of the Act empowers the Court, subject to conditions, to make the following Orders in respect of an amalgamation effected under Part XVI:-

- (i) directing that effect shall not be given to the proposal;
- (ii) modifying the proposal in such manner as may be specified in the order;
- (iii) directing the company or its Board to reconsider the proposal or any part of it.

Those persons entitled to seize the Court before the effective date of the amalgamation are: a prejudiced shareholder or creditor of an amalgamating company or a person to whom an amalgamating company is under an obligation.

## **APPROVAL OF ARRANGEMENTS, AMALGAMATIONS AND COMPROMISES BY COURT**

Irrespective of the manner in which an amalgamation or compromise might be effected under Part XVI (Amalgamations) and Part XVII (Compromises with creditors), the Act has also, in its Part XVIII, under section 262, made provisions for the '*approval of arrangements, amalgamations and compromises by the Court*'. This section is usually resorted to by companies when the Boards consider that there might be some resistance on the part of the shareholders to a scheme and there is no automatic buy-out under Part XVIII. However, the Court still has powers to impose conditions such as buy-out for the dissentient shareholders under section 263 of the Act.

Under section 262 (1), it is provided that '*Notwithstanding the provisions of this Act or the constitution of a company, the Court may, on the application of a company or, with the leave of the Court, any shareholder or creditor of a company, order that an arrangement or amalgamation or compromises shall be binding on the company and on such other persons or classes of persons as the Court may specify and any such order may be made on such terms and conditions as the Court thinks fit.*'

Before making an order, the Court may, on the application of the company or any shareholder or creditor or other person who appears to the Court to be interested, or on its own motion, make any one or more of the following orders:

- (a) that notice of the application, together with such information relating to it as the Court thinks fit, be given in such form and in such manner and to such persons or classes of persons as the Court may specify;
- (b) directing the holding of a meeting or meetings of shareholders or any class of shareholders or creditors or any class of shareholders or creditors or any class of creditors of a company to consider and, if thought fit, to approve, in such manner as the court may specify, the proposed arrangement or amalgamation or compromises and, for that purpose, may determine the shareholders or creditors that constitute a class of shareholders or creditors of a company;
- (c) requiring that a report on the proposed arrangement or amalgamation or compromise be prepared for the Court by a person specified by the Court and, if the Court thinks fit, be supplied to the shareholders or any class of shareholders of a company or to any other person who appears to the Court to be interested;
- (d) regarding the payment of the costs incurred in the preparation of any such report;
- (e) regarding the persons who shall be entitled to appear and be heard on the application to approve the arrangement or amalgamation or compromise.

The Board has a duty, within 14 days of the order made by the Court, to ensure that a copy of the order is filed with the Registrar for registration.

The Court has been given further powers under section 263 of the Act to give effect to any arrangement or amalgamation or compromise approved under section 262 of the Act either by order approving the arrangement or amalgamation or compromise or by any subsequent order, provide for and prescribe terms and conditions relating to:

- (a) the transfer or vesting of real or personal property, assets, rights, powers, interests, liabilities, contracts and engagements;
- (b) the issue of shares, securities, or policies of any kind;
- (c) the continuation of legal proceedings;
- (d) the liquidation of any company;
- (e) the provisions to be made for persons who voted against the arrangement or amalgamation or compromises at any meeting called in accordance with any order made under subsection (2) of section 262 or who appeared before the

- Court in opposition to the application to approve the arrangement or amalgamation or compromise; or
- (f) such other matters that are necessary or desirable to give effect to the arrangement or amalgamation or compromise.

### **BUY-OUT PROVISIONS**

Section 108 of the Act provides the circumstances when a shareholder may require a company to purchase the shares. They are

- (a) a special resolution is passed under-
  - (i) section 105(1)(a) for the purpose of altering the constitution of a company with a view to imposing or removing a restriction on the business or activities of the company; or
  - (ii) section 150(1)(c) or (d); and
- (b) the shareholder-
  - (i) has cast all the votes, attached to the shares registered in his name and for which he is the beneficial owner, against the resolution; or
  - (ii) where the resolution to exercise the power was passed under section 117, but he did not sign the resolution.

Section 105 of the Act deals with the situations when a special resolution of the shareholders is needed and this irrespective of what the constitution provides. They are:-

- (a) adoption of a constitution or, if it has one, to alter or revoke the company's constitution;
- (b) reduction of the stated capital of the company under section 62;
- (c) approving a major transaction;
- (d) approving an amalgamation of the company under section 246;
- (e) putting the company into liquidation.

Section 112 (1) of the Act deals with the power of the Court to exempt the company when there is an application by a shareholder to be bought out. It provides that:-

'A company to which a notice has been given under section 109 may apply to the Court for an order exempting it from the obligation to purchase the shares to which the notice relates, on the grounds that:-

- (a) the purchase would be disproportionately damaging to the company;
  - (b) the company cannot reasonably be required to finance the purchase; or
  - (c) it would not be just and equitable to require the company to purchase the shares.
- (2) On an application under this section, the Court may make an order exempting the company from the obligation to purchase the shares, and may make any other order it thinks fit, including an order :-
- (a) setting aside a resolution of the shareholders;
  - (b) directing the company to take, or refrain from taking any action specified in the order;
  - (c) requiring the company to pay compensation to the shareholders affected; or
  - (d) that the company be put in liquidation.
- (3) The Court shall not make an order under subsection (2) on the grounds set out in subsection (1) (a) or (b) unless it is satisfied that the company has made reasonable efforts to arrange for another person to purchase the shares in accordance with section 109(2)(b).'

### **VARIATION OF RIGHTS**

Section 114 of the Act deals with the variation of rights. It states that:

- '(1) Where the share capital of a company is divided into different classes of shares, a company shall not take any action which varies the rights attached to a class or shares unless that variation is approved by a special resolution, or by consent in writing of the holders of 75% of the shares of that class.
- (2) Where the variation of rights attached to a class of shares is approved under subsection (1) and the company becomes entitled to take the action concerned, the holder of a share of that class, who did not consent to or cast any votes in favour of the resolution for the variation, may apply to the Court for an order under section 178, or may require the company to purchase those shares in accordance with section 108.

(3) In this section-

Class means a class of shares having attached to the shares the same rights, privileges, limitations and conditions;

Variation includes abrogation and the expression 'valued' shall be construed accordingly.

## **TAKEOVER**

I have read with interest the article '*Amalgamations, Schemes of Arrangement and Takeover Regulations: Concerns of the Takeover Panel and the Need for Reform*' by Scott Clune submitted by learned counsel for the respondents as well as the various extracts submitted by both sidesand I note the qualms of the Takeover Panel regarding Schemes of Arrangement which bypass the Takeover Code and which were nevertheless sanctioned by the Court. It stands to reason that when following what obtains in the different jurisdictions, one must ascertain that our law is similar.

What is the definition of Takeover under our law? Section 94 of the Securities Act provides for '*Regulations made under this Act may provide for (a) the making of takeovers; and (b) the rights and obligations of persons when a takeover is made*'. Section 94(2) of the Securities Act defines'takeover' as '*an offer made by or on behalf of a person ("offeror") to acquire such securities of the offeree which will result in the offeror acquiring effective control of the offeree, either at one time or over a period of time*'. Under its subsection (3), it is stated that '*an offeror acquire effective control of a company where a dealing or dealings in securities of the company results in the offeror and its associates together having the right to exercise, or control the exercise of, more than the prescribed percentage of the rights attached to the voting shares of the company*'.That section further defines an 'associate' as '*including a person acting in concert with individuals or companies who, pursuant to an agreement or understanding, whether formal or informal, cooperate, through the acquisition by any of them of shares in a company, to obtain or consolidate effective control of that company*'.

It is useful to note the provisions of section95(1) of the Securities Act which states that '*Notwithstanding the Companies Act, a reporting issuer who intends to acquire securities issued by it, other than debt securities not convertible into shares, shall proceed in accordance with this Act, any regulations made under this Act or any FSC Rules*'. The exemptions are listed under subsection 2. Section 96 of the Securities Act makes it an offence for any person contravening any regulations or any FSC Rules. Under the Securities

(Takeover) Rules (the Rules) made by the FSC '*the effective control is 'more than 30% of the rights attached to the voting shares of the company'*'. The Rules provide for the conduct of the directors of the company when there is a takeover offer and the conditions to be fulfilled when proceeding with the takeover offer which includes amongst others, the offer price and the protection of the dissenting shareholders.

### **MAJOR TRANSACTION**

Approval of any major transaction must be effected by way of special resolution (section 130(1) of the Act). In its subsection 2, major transaction has been defined as:

- (a) The acquisition of, or an agreement to acquire, whether contingent or not, assets the value of which is more than 75 per cent of the value of the company's assets before the acquisition;
- (b) The disposition of, or arrangement to dispose, whether contingent or not, assets of the company the value of which is more than 75 per cent of the value of the company's assets before the disposition; or
- (c) A transaction that has or likely to have the effect of the company acquiring rights or interests or incurring obligations or liabilities the value of which is more than 75 per cent of the value of the company's asset before the transaction.

Under subsection 3, when the transaction is half of the value of the company's asset, the approval shall be by ordinary resolution. Exceptions are to be found under subsections 4 to 7 which are not relevant to the points raised in the two applications.'

### **WHETHER THE PRESENT APPLICATIONS ARE AN ABUSE OF THE PROCESS OF THE COURT**

I have given due consideration to the written submissions put in by both sides which highlight the oral submissions made in Court. In the first place, as was pointed out to learned counsel for the applicants at the start of the hearing, the application before me is for compensation under section 178 of the Act. At no time did the minority shareholders challenge the Scheme of Arrangement and indeed the applicants are not challenging it.

What would be the consequence of such an admission? It must be borne in mind that the Scheme of Arrangement was submitted to the Court under the provisions of Part XVIII of the Act and it was open to the applicants to seize the Court to challenge the proposal as can be distilled from section 263(1)(e) of the Act and bearing in mind the powers given to the Court under section 263 of the Act.

It is common ground that there has been no objection from any shareholders. It is wrong on the part of the shareholders to believe that it was not necessary for them to make known their views as they would be doing so at the time of the shareholders' meeting. This is an erroneous approach as at the shareholders' meeting, the shareholders can only vote for or against the proposal as set out in the memorandum and the explanatory notes submitted to the Court. When challenging the proposal, the Court may well refuse to sanction the Scheme having regard to the various objections put forward and furthermore, since a Scheme under section 262 of the Act does not trigger an automatic buy-out, it was open to the shareholders to apply at the same time a buy-out which the Court has the power to grant under section 263(1)(e) of the Act which provides that '*the provisions to be made for persons who voted against the arrangement or amalgamation or compromise at any meeting called in accordance with any order made under subsection (2) of that section or who appeared before the Court in opposition to the application to approve the arrangement or amalgamation or compromise.*'

It may well be that with the numerous shareholders objecting, the Company may decide not to go ahead with the Scheme or it may come up with a modified proposal to satisfy the dissentient shareholders for approval.

The Court on receiving the proposed Scheme of Arrangement made certain orders in line with section 262 of the Act. Publication was made in the press as ordered by the Court for any objections to be made known within a specified delay. No objection came from any quarters and the Scheme of Arrangement as proposed was sanctioned by the Court subject to the stand of the shareholders to be taken at a meeting of shareholders. Here again, the undisputed facts are that at the special meeting no objection was raised by any shareholders as can be gathered from the minutes of proceedings except regarding the name TML which was not part of any resolutions and the resolutions were passed by a majority of 75.07% of the shareholders of HFL (vide Annex 4 of respondents' affidavit).

As rightly pointed out by learned counsel for the respondent, at no time during the presentation of the Scheme of Arrangement to the Court for approval did the applicants take any objection and/or seek for an order to be bought out. Furthermore, at the special meeting called to approve the Scheme of Arrangement did the applicants voice out any objection except as regards to the change of name which was not a resolution to be taken as per the proposal. Moreover, despite the Court Order that any objection to the Scheme by any interested party must be made known on or before the end of October 2011 and this obviously includes the shareholders and as there were no objections, the Scheme was approved by the Court on the 7<sup>th</sup> November 2011 with conditions attached, one of which is

that the Scheme of Arrangement is sanctioned by the Court subject to the approval of the shareholders at a special meeting. The Court also ordered that the Scheme of Arrangement as put forward to the Court for approval, shall '*be binding on the petitioners and their respective shareholders and creditors and all persons concerned under the Scheme on the Effective Date*'.

As no application or objection was made against the Scheme when it was presented to the Court for approval, the applicants were bound by the resolutions. However, they could have applied to the Court after the resolutions had been passed to ask the Court to prevent the implementation of the Scheme in view of certain breaches by the Company in the procedures adopted and on the grounds raised in the present applications for compensation. Moreover the action must be brought before the date the Scheme of Arrangement comes into force. As they have not done so within the delay and as the approval was made binding upon all the shareholders, and anyway since they are not challenging the Scheme adopted by the majority, they are debarred from raising any such issues.

The complaints raised in the present applications were raised for the first time as rightly pointed out by the respondents and they cannot be made a substratum for a claim for compensation as the Court could have ordered a buy-out on an application by the shareholders when the Court was examining the Scheme. On this score, the applications cannot be entertained and are an abuse of the process of the Court.

Although that would have been sufficient to dispose of the applications, I shall nevertheless consider some of the objections raised to do justice to the submissions made.

#### **WAS IT NECESSARY FOR THE RESOLUTIONS BE PASSED BY SPECIAL RESOLUTION?**

The powers reserved to the shareholders by the constitution of the company or under the Companies Act are to be exercised by the shareholders at a meeting of shareholders pursuant to section 115 or 116 of the Companies Act or by a resolution in lieu of a meeting pursuant to section 117 of the Companies Act or by unanimous resolution in certain specific instances. The need for a special resolution is provided for under section 105 of the Companies Act and this irrespective of the constitution. The shareholders are required to exercise their powers through a special resolution when they want to:-

- (a) adopt a constitution or, if it has one, to alter or revoke the company's constitution;
- (b) reduce the stated capital of the company under section 62;
- (c) approve a major transaction;

- (d) approve an amalgamation of the company under section 246; and
- (e) put the company into liquidation.

Regarding the nature of the resolutions resorted to in the present case, the fact that they were not, according to the applicants made properly, could not be a ground *per se* to entitle them for compensation since, if they are right, the remedy is to ask that the resolutions be of no effect as they did not comply with the constitution of the company or the Companies Act. Anyway, I do not believe that any of the four resolutions to be adopted fall under any of the criteria for a special resolution as mentioned above.

In the cases in hand, there is no amalgamation as shown below. There is no takeover as the same shareholders are swapping shares in another company whether a subsidiary which later becomes a holding company with the same shareholders and less still the creation of different classes of shareholders or a change in the control of the company by a shareholder or capable of having such control. There is no issue of major transaction as the same shareholders control the assets albeit that their management is with subsidiaries which was the case before the proposed Scheme of Arrangement was sanctioned by the Court. At no time was there a change of name of HFL at that stage.

Anyway, it must be borne in mind the powers of the Court under section 351(3) of the Act to cure irregularities in proceedings.

#### **REMEDY UNDER SECTION 178 OF THE COMPANIES ACT.**

Since the Scheme provides for an exchange of shares in the proportion 1:1 to the shareholders of HFL with the same rights in TML, it cannot, by any stretch of imagination, amount to a takeover as there is no change in the effective control of the company by any shareholders or new shareholders or outsiders. Furthermore, it cannot be read in the Scheme of Arrangement, where there was a proposal for HFL to create a company by the name of TML and thereafter, shares of HFL will be exchanged on the ratio of 1:1 with the same voting rights for shares in TML resulting in the same shareholders holding the same number of shares in a new set up, that this amounts to an amalgamation. There is no amalgamation as both HFL and TML still exist after the reorganisation. Not being an amalgamation and far from being a disguised one, the application being a Scheme of Arrangement, does not carry with it any mandatory buy-out as explained earlier.

Can it be argued that the minority shareholders have a remedy under section 178 of the Companies Act in the circumstances as pointed out above? I have already dealt with this issue and run the risk of repeating myself.

Since there is no mandatory buy-out in respect of the Scheme of Arrangement as shown to the Court for approval and there being no objection to the Scheme or any request for a buy-out the Court, the applicants cannot claim to be prejudiced shareholders as when sanctioning the Scheme, it was made clear by the Court that the Scheme was made binding on the shareholders as well. There was never any request for buy-out which was available to the minority shareholders under section 263(1)(e) of the Act. The shareholders were in the presence of the Information Memorandum and the Explanatory Notes and I do not believe them that they did not know what was at stake. In the circumstances, I fail to see how the minority shareholders can argue that the conduct of the business of the Company by the majority has caused them or would cause them prejudice. On this score as well the claims could be dismissed.

In **Re Tower Ltd (2007) 10 NZCLC 264**, I read that when the court is asked to sanction an arrangement under Part XVIII, the court must ensure that:-

1. There has been compliance with statutory provisions;
2. The scheme has been fairly put before the class or classes concerned;
3. The class is fairly represented by those who attended, and the majority are acting bona fide; and
4. The scheme is such that an intelligent and honest business person, a member of the class concerned in acting in respect of that interest, might reasonably approve.

I am of the view that when the proposal was put before the Court for approval, all the statutory provisions have been taken into account and the interested parties notified by way of press publication to make any observation.

In **Suspended Ceilings (Wellington) Ltd v C of IR (1997) 8 NZCLC 261**, the CA favoured a more stringent test: that the proposal must be such that it would be unreasonable not to make the order sought.

In exercising its discretion to approve an arrangement, the Court should weigh the interests of the applicants against the interests of any dissentient minority: **Weatherstone v Waltus Property Investments Ltd (2001) 9 NZCLC 262**. In that case, a scheme was proposed to bring under the ownership of a single holding company, owned by the existing shareholders of the syndicate companies in proportion to the value of their investments. The minority shareholders (i) opposed the approval of the arrangement and (b) in the alternative, sought an order for a buy-out for those who voted against the arrangement. The Court approved the Scheme and further refused to impose a buy-out. The minority

shareholders appealed against that decision and it was dismissed on appeal on the ground that, in the circumstances, it would be unfair to the majority to direct that the dissentient minority be bought out.

The fact of that case is not dissimilar from the ones in hand as all the actors in the restructuring are the same, belonging to a group of companies. It is clear from the order given by the Court before sanctioning the Scheme of Arrangement that the Court did consider the interest of the shareholders and any other interested parties by giving them the opportunity to voice out any observation or objection in view of the powers which the Court has under section 263 of the Companies Act. There was no automatic mandatory buy-out in a Scheme of Arrangement and there was no application for a buy-out as a condition which the Court could have imposed under section 263(1)(e) of the Companies Act.

After the scheme was approved by the majority, the complaints as can be gathered from the two applications were in respect of procedures adopted in the approval of the Scheme which according to them must have been by way of special resolution. Another ground of complaint is that they are prejudiced shareholders in that the shareholders have no control anymore over the assets of HFL. Complaints were made regarding a disguised take-over.

As pointed out earlier all the complaints raised by the applicants could have been the subject matter of an application challenging the Scheme but as they are not challenging the Scheme, it is binding on all shareholders as well and they cannot claim to be prejudiced shareholders when there was opportunity for an application for a buy-out despite the fact that a Scheme of Arrangement does not automatically warrant a buy-out but which the Court could still order as provided for under section 263(1)(e) of the Act. The Court may also, having regard to the interest of the Company and the stand of the other shareholders, refuse to make a buy-out.

The applicants have failed in the circumstances when the proposal of the Scheme of Arrangement was made to establish that the conduct of the affairs of HFL or TML '*is likely to be oppressive, unfairly, discriminatory or unfairly prejudicial*' to them and that they had been unfairly discriminated against and unfairly prejudiced under the Scheme of Arrangement. The shareholdings have not changed in the new scenario and the minority cannot claim that they are prejudiced, oppressed, unfairly treated or discriminated by the decision of the Company approved by the majority. There is no question of a major transaction as well since the assets of the Company are still managed as before through the subsidiaries.

In considering what is just and equitable, the different rights, expectation and obligations of all the shareholders must be looked into. Here the majority shareholders voted for the Scheme of Arrangement, the moreso that no valid objection was put before Court at the time of the application for sanctioning the Scheme by the applicants. Since the vote at the special meeting could only be for or against the Scheme, in the absence of any departure from standards of fair dealing and on the whole that there had been no unfair treatment of the minority, the Court will not intervene.

A shareholder would not be entitled normally to complain of unfairness unless there are breaches of the terms on which he had agreed that the company's affair should be conducted. Here the applicants are a minority of the shareholders who had not approved the Scheme of Arrangement which consists of several stages. The main reasons advanced in their applications as highlighted above do not constitute by any stretch of imagination to 'unfairness' even though the trust and confidence in the Board had broken down according to the minority. The decision to innovate the commercial activities of HFL had been explained and in my mind it is in the best interest of the company and thus to all the shareholders. Since the Court had sanctioned the proposal after giving an opportunity to one and all to voice out any suggestions or objections, the issue of 'unfairness' or 'prejudice' cannot arise the more so that the order was made binding on all and no provision was made under section 263(1)(e) of the Act which was open to the applicants to ask for before the approval of the Scheme and which was not done. No challenge was made regarding the approval of the Scheme by the Court and as admitted by them, the present applications were not to challenge the decision of the Court.

An added reason why the applicants cannot be said to have been prejudiced by the Scheme of Arrangement since the exchange of the shares, the buy-back of the one share held by HFL in TML, the transfer of the pledges had all been sanctioned by the Court and made binding on all shareholders and interested parties as the Court has the power to do so under section 263(1)(a) of the Act.

The contemplated amalgamation in the third stage falls squarely within the definition of a short form amalgamation which does not require the approval of the shareholders under section 247 of the Companies Act. That form of amalgamation applies to companies that are directly or indirectly wholly owned by one of them and the procedures under sections 245 or 246 of the Companies Act find no application. Furthermore, there is no provision for buy-out of dissentient shareholders.

For the reasons given, both applications must fail and they are dismissed with costs.

P. LAM SHANG LEEN

JUDGE

11 FEBRUARY 2014

In the 1<sup>st</sup> Case

For Applicants : Mr T Koenig, SA

For Respondents : Mr Attorney A Robert – Mr A Domingue, SC

In the 2<sup>nd</sup> Case

For Applicants : Mr T Koenig, SA – Sir Hamid Moollan, QC

For Respondents : Mr Attorney A Robert – Mr A Domingue, SC