IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

IN THE FEDERAL TERRITORY, MALAYSIA

(COMMERCIAL DIVISION)

ORIGINATING SUMMONS NO: WA-24NCC-608-12/2020

In the matter of Top Builders Capital Bhd, Ikhmas Jaya Sdn Bhd and Ikhmas Equipment Sdn Bhd

And

In the matter of a proposed scheme of arrangement and compromise between the Applicants and its Scheme Creditors pursuant to section 366 of the Companies Act 2016

And

In the matter of section 366, 368, and 369 of the Companies Act 2016

And

In the matter of Order 88 of the Rules of Court 2012 and the inherent jurisdiction of this Honourable Court

BETWEEN

1. TOP BUILDERS CAPITAL BERHAD
(Registration No. 201301043050 (1072872-D))

2. IKHMAS JAYA SDN BHD
(Registration No. 199201022513 (254017-H))

3. IKHMAS EQUIPMENT SDN BHD
(Registration No. 199901020860 (495760-W)) …APPLICANTS

GROUNDS OF JUDGMENT

(Notice of Application to intervene and leave to continue Kuala Lumpur High Court Suit No. WA-22C-109-11/2020, Enclosure 12)

Introduction

[1] The Applicants filed an application pursuant to section 366 of the Companies Act 2016 ('**the CA**') for a scheme of arrangement and obtained an order under section 368(1) thereunder on 31.12.2020 restraining legal proceedings taken against the Applicants pending the approval of their proposed scheme ('**the Restraining Order**').

[2] The Proposed Intervener filed the Notice of Application dated 9.2.2021 ('**Enclosure 12**') to intervene in these proceedings and to seek leave of Court to continue with its suit against the 2nd Applicant in the Kuala Lumpur High Court Suit No. WA-22C-109-11/2020 ('**Suit 109**').

[3] Enclosure 12 is premised on Order 15 Rule 6(2), Order 92 Rule 4 of the Rules of Court 2012 ('**the Rules**'), Section 366 and Section 368(1) of the CA, and seeks the following prayers:

(a) That leave be granted to Seng Long Construction & Engineering Sdn Bhd (Registration No.: 200801024162

(825485-P)), the Proposed Intervener to intervene in the proceedings herein;

(b) That if leave as sought for, is granted, the Proposed Intervener be allowed to be heard, file, affirm and serve affidavit(s) to oppose the Originating Summons No.: WA-24NCC-608-12/2020; and

(c) That Seng Long Construction & Engineering Sdn Bhd be granted leave to continue with the Kuala Lumpur High Court Suit No.: WA-22C-109-11/2020 concerning Seng Long Construction & Engineering Sdn Bhd's claim against Ikhmas Jaya Sdn Bhd and in respect of all and/or incidental proceedings thereof.

[4] At the commencement of the hearing of Enclosure 12, learned counsel for the Applicants informed the Court that the Applicants are not objecting to prayers (a) and (b) of the said Enclosure. However, the Applicants are of the view that this is not a suitable case for the Court to grant leave to the Proposed Intervener to continue with its legal action under Suit 109.

[5] Accordingly, this judgment will examine the guiding principles governing the granting of leave under section 368(1) of the CA.

Background Facts

[6] Prior to the filing of this Originating Summons ('**OS**'), Seng Long Construction & Engineering Sdn Bhd ('**Seng Long**' or '**Proposed**

Intervener') had on 9.11.2020 filed a writ action under Suit 109 against Ikhmas Jaya Sdn Bhd ('**IJSB**'), the 2nd Applicant under the OS to recover the sum of RM3,791,328.02, as the alleged debt due and owing to Seng Long by IJSB ('**the Debt**') for services Seng Long had provided.

[7] The brief facts of the claim in Suit 109 are as follows.

(a) At all material times, Seng Long carries on business as a construction and renovation contractor.

(b) IJSB was at all material times known to Seng Long as the main contractor in a construction project known as the OPUS Residence ('**OPUS Project**'), which is now completed.

(c) By way of a "Letter of Award: Supply and Install Hard Landscape Works" dated 12.9.2019, IJSB awarded Seng Long the subcontract work ('**Subcontract Works**') for the sum of RM 3,567,234.22, excluding Good and Services Tax.

(d) Between September 2018 and August 2019, IJSB requested Seng Long to carry out additional work and/or variation work on the OPUS Project ('**Variation Works**').

(e) The total value of work done by Seng Long under the Subcontract Works and Variation Works is alleged to be RM 5,081,328.02.

(f) Seng Long has received RM 1,290,000.00 to date. The total outstanding sum due and owing to Seng Long by IJSB is the amount constituting the Debt.

(g) Seng Long issued numerous demands to IJSB for the payment of the Debt and has met with IJSB for settlement of the Debt where it is alleged IJSB had admitted on 20.9.2019.

(h) On 9.11.2020, Seng Long filed the Suit 109 to recover the Debt.

(i) A month later, IJSB filed its Defence, though appearance had been filed out of time.

(j) On 10.12.2020, Seng Long file its application for summary judgment.

(k) The next day, the Court had by way of an e-review fixed the hearing of Seng Long's application for summary judgment on 11.2.2021, via Skype.

(l) On 24.12.2020, Seng Long filed its affidavit in support of the summary judgment, which was served on IJSB's solicitors on the same day.

(m) IJSB was to file and serve its affidavit in reply on or before 7.1.2021. However, on 5.1.2021, Seng Long's solicitors were informed by IJSB's solicitors, in Suit 109, Messrs Manjit Singh Sachdev, Mohammad Radzi & Partners, that IJSB "*has*

*obtained a Restraining Order dated 31.12.2020 at Kuala Lumpur High Court wherein the said Order, *inter alia*, stayed all current legal proceedings for the period of three (3) months subject to any extension, unless a leave from Court was obtained.*".

[8] It is undisputed and admitted by the Applicants that Seng Long is a creditor of IJSB and is listed in IJSB's List of Unsecured Scheme Creditors. For this reason, the Applicants, as indicated, quite rightly, are not objecting to the Proposed Intervener's *locus* to intervene in the OS.

[9] It is also undisputed that Suit 109 is now restrained by the Restraining Order (obtained *ex parte*) and accordingly Seng Long's attempts in its claim and recovery of the Debt has been restrained thereby.

[10] The "*Proposed Resolution of Unsecured Scheme Creditors*" in the Applicants' proposed scheme sets out that the estimated recovery which an Unsecured Scheme Creditors such as the Proposed Intervener will be able to realise under the proposed scheme is up to 30% of the Listed Debt. However, in the Listed Debt, the Proposed Intervener's debt was stated at only 1/7th of the quantum of the Debt which under the proposed scheme would mean that the Proposed Intervener will receive only up to 30% of the same. This constitutes a substantial haircut from the sums claimed in Suit 109.

[11] The Proposed Intervener contended that it is clearly prejudiced by the Restraining Order since prior to OS, it had already initiated legal

action to pursue its claim for the Debt due, and accordingly it takes issue with the Listed Debt as incorrect and misleading.

[12] In addition the "*Proposed Resolution of Unsecured Scheme Creditors*" sets a condition that:

> "The remaining RM303.0 m of the Unsecured Scheme Creditors' debt as at the Cut-Off Date and any amount incurred thereafter shall be waived" and "… all outstanding amount due *shall be deemed full and final settlement. Thereafter, each and every Unsecured Scheme Creditor shall not have any Claim whatsoever against the Company,* the corporate guarantors (if any) or the Company's Directors."
>
> [Emphasis added]

[13] It is the Proposed Intervener's contention that the inclusion of the waiver in the proposed scheme read together with the Listed Debt unilaterally imposes a scheme which forces the Proposed Intervener to waive its rights to pursue the Debt. According to counsel for the Proposed Intervener, this prejudices the Proposed Intervener's legal and commercial rights. The proposed scheme will in effect throttle and bring Seng Long's Suit 109 and summary judgment application to a definitive end. The subject matter of the OS would have direct, material, legal and final effect on Seng Long's rights and interest.

[14] The Proposed Intervener also highlighted several issues that can be identified from reading the proposed scheme, more specifically from the "*Draft Explanatory Statement"*: These are as follow:

(i) That IJSB's *'Draft Explanatory Statement'* found at pages 784 – 825 of Enclosure 4 is devoid of particulars pertaining to the 'White Knight' and the 'Fund-Raising Exercise'.

(ii) That IJSB's *'Draft Explanatory Statement'* does not provide particulars of the sum which is to be recapitalized by the 'White Knight', and the plan/steps to be taken by the Applicants to raise RM 43.2 million to meet the 10% of the Unsecured Scheme Creditors' debt.

(iii) From a reading of paragraphs 29 and 30 of the affidavit filed in support of the OS, the Applicants have stated that it would take a combination of the proposals under the proposed scheme and a potential investor to fully restructure and manage the Applicant's debts.

(iv) That appears however to be now no more than just a pipedream since by way of an announcement on Bursa Malaysia dated 21.1.2021, it is clearly made out that the said proposals had been abandoned by the Applicants.

(v) It is claimed that the rationale for IJSB's proposed scheme seems to be to avoid the liquidation of IJSB, rather than to arrive at a real means to pay creditors, inclusive of the Proposed Intervener.

(vi) That there appears to be an anomaly in that many of the scheme creditors who are mentioned as being in favour of the appointment of the nominee Mr. Yong Kok Yee, are either the

Applicant companies themselves, their 100% owned subsidiaries or companies in which they hold substantial shareholding or in which are appointed persons who straddle several connected companies as directors or shareholders, essentially the TCBC Group, who in actuality account for 42% of the debt owed.

(vii) That according to IJSB '*Draft Explanatory Statement*' *(page 793 – 794 of Enclosure 4)*, '*The TBCB Scheme, IJSB Scheme and IESB Scheme are inter-conditional on each other*', but to date, no visible steps appear to have been taken with respect to the proposed scheme and the intended court convened creditors' meetings as can be made out of the Top Builders Capital Berhad's (1st Applicant's) Bursa Company Announcements website.

[15] The Proposed Intervener questioned what, if any, is the 'safety net' that the Applicants will fall back on to revitalize the proposed scheme should the potential investor, who is only *'expected'* to *'participate'* in the proposed scheme decides not to participate since there appears to be no commitment spelt out in the proposed scheme or the '*Draft Explanatory Statement*' towards that end by any party.

[16] There are a slew of unknowns and uncertainties with the Applicants' proposed scheme, which must be open to question before the same is tabled to creditors, since by the estimated timeline set out by the Applicants, between the '*Draft Explanatory Statement*' in relation to the proposed scheme being sent to creditors to the Court convened

meeting, there is very little time for any creditor to review with any comprehensiveness the proposed scheme.

Leave to continue with the Suit 109

[17] Prayer 3 of the Restraining Order (Enclosure 11) restrains, not only Suit 109, but all legal actions from proceeding.

[18] Section 368(1) of the Companies Act 2016 ("**CA 2016**") reads:

> "368. (1) If no order has been made or resolution passed for the winding up of a company and a compromise or arrangement has been proposed between the company and its creditors or any class of those creditors, the Court may, in addition to any of its powers on the application in a summary way of the company or any member or creditor of the company, *restrain further proceedings in any action or proceeding against the company except by leave of the Court and subject to any terms as the Court may impose."*
>
> [Emphasis added]

[19] The Debt due to Seng Long (RM3,791,328.02) as claimed in Suit 109 differs substantively from the Listed Debt (RM563,915.00) made out by the Applicants '*Draft Explanatory Statement*'. Learned counsel for the Proposed Intervener submitted that should this Court not grant leave to continue with Suit 109, the Proposed Intervener will suffer a significant loss in the Debt due given that the correct amount has not been included in the proposed scheme for the purposes of voting by IJSB's Scheme Creditors and thereafter for sanction by this Court.

[20] The Proposed Intervener has in Suit 109 filed its affidavit in support of its application for summary judgment, in which the supporting documents that verify and prove the Proposed Intervener's claim against IJSB (2nd Applicant) have been exhibited and served on IJSB (2nd Applicant) on 24.12.2020, this being well prior to the filing of the OS. The Proposed Intervener contended that there is in this instance a seriously arguable case and thus leave ought to be granted by this Court for the Proposed Intervener to continue with its application for summary judgment in Suit 109.

[21] In the course of the submissions, I asked both counsel of the Applicants and the Proposed Intervener for their respective views as to what ought to constitute the guiding principles for the Court when granting leave under section 368(1) of the CA. The hearing was then adjourned for counsel to do further research. Further submissions have since been filed on this point.

Proposed Intervener's position on Leave

[22] As there are no reported local decision setting out the guidelines for the exercise of the Court's discretion to grant leave under section 368(1) of the CA, learned counsel for the Proposed Intervener had referred this Court to decisions pertaining to the granting of leave to commence or continue proceedings in winding up matters as a guide.

[23] More specifically, in **Mosbert Berhad (In Liquidation)** v **Stella D' Cruz** [1985] 2 MLJ 446 the Federal Court laid down the long-

established test for granting of leave to commence proceedings against a company (in liquidation) at p. 447:

> "On perusing the record of appeal we are satisfied that the learned judge was right to re-affirm his decision to grant leave after the views of the Official Receiver had been heard and considered. Notwithstanding that the giving of leave to commence legal proceedings against the appellant on the ex parte application of the respondent constituted an irregularity we are further satisfied that no substantial injustice had been caused to the appellant in any way [see section 355(1) of the Act], and we find that there is no merit in this ground of appeal. *In re Cuthbert Lead Smelting Co Ltd (1886)) WN 84 it was held that if the applicant could obtain all the relief in the winding up leave would be refused. In short, the Court will always give an applicant leave if his claim cannot be dealt with adequately in the winding up or if the remedy he seeks cannot be given to him in a winding up proceedings.* We think the learned judge had applied the correct test laid down in Cuthbert case and we agree with him that leave should be given pursuant to section 226(3) of the Companies Act 1965 to the respondent to commence proceedings against Mosbert Berhad (In Liquidation)…"
>
> (Emphasis added)

[24] More recently, in **Dubon Bhd (in liquidation)** v **Wisma Cosway Management Corp** [2020] 4 MLJ 288, Nallini Pathmanathan FCJ in delivering the judgment of the Federal Court at paragraph 41 had this to say:

> "[41] As such the High Court judge was correct in applying the test he did, premised on the well-known principles cited, inter alia, in Mosbert Berhad (in liquidation) v Stella D' Cruz [1985] 2 MLJ 446 and more recently by the Court of Appeal in Ganda Setia

Cemerlang Sdn Bhd & Anor v Maika Holdings Bhd (in liquidation) [2017] 6 MLJ 661; [2017] 1 LNS 1576. The test is that set out in the old English decision of Re Cuthbert Lead Smelting Co Ltd [1886] WN 84 which held that if the party applying for leave could obtain all the relief in the winding up, leave would be refused. *If that party's claim cannot however be adequately dealt with in the winding up or if the remedy sought cannot be granted in the winding up proceedings then leave would be granted."*

(Emphasis added)

[25] In **Shencourt Sdn Bhd** v **Perumahan NCK Sdn Bhd** [2008] 5 MLJ 191 the Court of Appeal held that:

"(1) Leave to proceed would only be granted when the plaintiff's claim could not be adequately dealt with in winding up of the defendant's company or when the plaintiff was seeking a remedy which could not be given in the winding up of the defendant's company (see para 11).

…

(5) The plaintiff's counterclaim against the defendant was far in excess of the defendant's claim and it was unlikely that the amount, even after deducting the whole amount which the defendant claimed in the S5 suit should the defendant succeed in their action, would be realised. Further, since the defendant's claim and the plaintiff's counterclaim in the S5 suit were based on the same facts, the *balance of convenience was in favour of leave to proceed being granted to the plaintiff* (see paras 18–19)."

(Emphasis added)

[26] The Court of Appeal has in **OCBC Bank Malaysia Bhd v. Metroplex Bhd** [2013] 1 CLJ 669, also held that:

"[13] As said, the circumstances in which leave to proceed may be appropriate are not closed, and *courts have an absolute discretion in deciding whether or not to grant leave. That discretion should not be fettered. Courts must do what is right and fair in all of the circumstances…*"

(Emphasis added)

[27] Learned counsel for the Proposed Intervener further referred this Court to the principles for a grant of leave in **Re Atlantic Computer Systems plc** [1992] 1 All ER 476; [1992] Ch 505 which is a case involving the granting of leave to commence proceedings under judicial management. At pp. 501-503 of the report, the following passages dealt with the leave issue in the following manner:

"(1) It is in every case for the person who seeks leave to make out a case for him to be given leave.

…

(5) *Thus it will normally be a sufficient ground for the grant of leave if significant loss would be caused to the lessor by a refusal. For this purpose loss comprises any kind of financial loss, direct or indirect, including loss by reason of delay, and may extend to loss which is not financial. But if substantially greater loss would be caused to others by the grant of leave, or loss which is out of all proportion to the benefit which leave would confer on the lessor, that may outweigh the loss to the lessor caused by a refusal.*

…

(12) In some cases there will be a dispute over the existence, validity or nature of the security which the applicant is seeking leave to enforce. It is not for the court on the leave application to seek to adjudicate upon that issue, unless (as in the present case, on the fixed or floating charge point) the issue raises a short point of law which it is convenient to determine without further ado.

Otherwise the court needs to be satisfied only that the applicant has a seriously arguable case."

[Emphasis added]

[28] Premised on the above, learned counsel for the Proposed Intervener submitted that the position for granting of leave can be surmised as follows:

(a) That the Court has discretion in deciding whether or not to grant leave for parties to continue the proceedings.

(b) That the discretion has to be exercised rightly and fairly taking into account of all circumstances (balance of justice).

(c) That if the relief and remedy sought for by a party cannot be dealt with adequately in the scheme of arrangement, then leave to continue the restrained proceedings ought to be granted.

(d) That if the balance of convenience is in favour of leave to continue proceedings, then the same ought to be allowed.

[29] Based on the aforesaid proposed guiding principles, learned counsel for the Proposed Intervener submitted that the balance of justice lies in favour of the Proposed Intervener for the Suit 109 to be determined and disposed of expediently and at the earliest opportunity, as the Debt due has been owing to the Proposed Intervener by IJSB for more than a year (since the completion of OPUS Project). With the proposed scheme seemingly in a state of

flux, the balance of convenience must also sit in favour of the Proposed Intervener, since nothing indicates that the proposed scheme is ready to move forward.

[30] It is further contended that the claim for the Debt due cannot be dealt with or determined by the Applicants be it its financial advisor(s), the director approved by this Court and/or the trustee appointed for the proposed scheme, but is to be determined by the Suit 109. This is because IJSB's culpability in Suit 109 is not in dispute, and the Proposed Intervener ought not to be deprived of the opportunity to establish the quantum of the Debt due, more so seeing that IJSB despite knowing and agreeing to the same had chosen to put its own arbitrary figure for the purposes of bulldozing the proposed scheme through.

[31] The Proposed Intervener submitted that there appears to be a lack of full and frank disclosure of the Debt due by the Applicants in the proposed scheme. The justice of the matter must be to allow leave so that the correct and full state of events/facts in relation to the claims in Suit 109 can be made available to this Court.

Applicants' Position on Leave

[32] Learned counsel for the Applicants on the other hand referred this Court to the principles for leave against a moratorium in UK and Australia administration proceedings for guidance. Similar to a scheme of arrangement, the object of administration is also to facilitate the rescue and rehabilitation of a financially distressed company. Administration is similar to Malaysia's judicial

management. Both administration and judicial management have an automatic moratorium against legal proceedings and leave of Court is required to proceed against the moratorium.

[33] In the UK, the administration provision provides that "*[n]o legal process (including legal proceedings, execution, distress and diligence) may be instituted or continued against the company or property of the company except … with the permission of the court*." (See: **Schedule B1 paragraph 43 of the UK Insolvency Act 1986**).

[34] In Australia, the administration provision provides that *"[d]uring the administration of a company, a proceeding in a court against the company or in relation to any of its property cannot be begun or proceeded with, except … with the leave of the Court and in accordance with such terms (if any) as the Court imposes*." (See: **section 440D of the Australia Corporations Act 2001**).

[35] Learned counsel for the Applicants' take on what ought to constitute the guiding principles for leave under section 468(1) of the CA can be summarised as follows.

[36] First, learned counsel made reference to paragraphs [38] and [39] of the Supreme Court of New South Wales decision in **Larkden Pty Ltd** v **Lloyd Energy Systems Pty Ltd** [2011] NSWSC 1305 on the moratorium in administration**:**

> "[38] The stay of proceedings imposed by s 440D may facilitate the achievement of this object, among others, by

(a) affording the administrator time to assess and report on the company without the distraction of the proceedings;
(b) putting a brake on legal and associated costs;
(c) allowing time for the development of proposals which might preserve the value of the company as a going concern;
(d) giving the creditors time to consider their position for the purposes of the creditors' meeting; and
(e) in appropriate circumstances, preventing a creditor from obtaining some advantage over other creditors or potential creditors.

[39] While the discretion under s 440D must be exercised with the objects of the part in mind, it remains one at large. *A stay is the starting point. There must be circumstances which warrant its displacement.*'

[Emphasis added]

[37] It is submitted that the restraining order under our section 368(1) of the CA shares similar objectives and the applicant must demonstrate that there are circumstances that warrant the Court's discretion to grant leave against the moratorium.

[38] The test is whether the applicant's claim is 'exceptional' in some respect and not whether the claims have a real prospect of success and it would be inequitable not to allow them to proceed. (**Unite the Union and another** v **Nortel Networks UK Ltd (in administration)** [2010] EWHC 826 (Ch)**.**

[39] The English High Court in **Ronelp Marine Ltd and other companies** v **STX Offshore & Shipbuilding Co Ltd** [2016] EWHC 2228 (Ch) interpreted 'exceptional' to mean that "*the applicant*

creditor must demonstrate a circumstance or combination of circumstances of sufficient weight to overcome the strong imperative to have all the claims dealt with in the same way", i.e in the present context, under the scheme of arrangement.

[40] Second, leave may be granted for certain proprietary claims. The leading case is the Court of Appeal decision of **Re Atlantic**. The court granted leave to a secured creditor seeking to exercise its proprietary rights to repossess the computers leased to the company. The court proceeded to set out some guiding principles regarding applications for leave to exercise existing proprietary rights against a company in administration.

[41] Learned counsel for the Applicants contended that the **Re Atlantic** principles are equally applicable to an application for leave to proceed against a company that obtained a restraining order pursuant to a scheme of arrangement. Reference was made to the judgment of **Hyflux Ltd** v **SM Investments Pte Ltd** [2019] SGHC 236 where the Singapore High Court cited the **Re Atlantic** principles as guidance:

> "[26*] The principles governing the granting of leave are clear. In re Atlantic Computer Systems Plc [1992] 2 WLR 367 has been the primary case cited in applications thus far. That case concerned the granting of leave in relation to the enforcement of security, but its considerations are applicable generally.* In particular, it was noted that the granting of leave requires a balancing exercise between the secured creditor in that case, and those of the other creditors (at 395A–C). Here, the balancing

exercise would need to consider the interests of the defendant as against those of the plaintiff's other creditors."

[Emphasis added]

[42] Learned counsel for the Applicants then set out below a summary of the relevant principles (as summarised in **Sweet and Maxwell, 'Lightman & Moss on the Law of Administrators and Receivers of Companies**') for leave in the context of administration for this Court's consideration:

(i) The burden is on the applicant to make out his case for leave to be granted;

(ii) The moratorium is intended to assist the company, under the management of the administrator, to achieve the purpose for which the administration order was made. If granting leave is unlikely to impede the achievement of that purpose, leave should normally be given;

(iii) If granting leave is likely to impede the achievement of the purpose of the administration, the private interests of the applicant must be weighed against the collective interests of the general body of creditors, having regard to the parties' interests and all the circumstances of the case;

(iv) Great weight is usually given to proprietary interests and where an administration order is made in lieu of a liquidation, it should not be used to benefit the unsecured creditors at the expense of those with proprietary rights;

(v) If significant loss is likely to be caused to the applicant by the continued suspension of his rights, then permission should be granted unless substantially greater loss would be caused to the general body of creditors by the grant of permission. Loss could comprise any kind of financial loss, direct or indirect, including loss by reason of delay, and may extend to loss which is not financial;

(vi) In carrying out the balancing exercise, the Court must take into account all the circumstances such as: the financial position of the company, the administrator's proposals, the period for which the administration order has already been in force and is expected to remain in force, the effect on the administration if leave were given, the effect on the applicant if leave were refused, the end result sought to be achieved by the administration, the prospects of that result being achieved, and the history of the administration so far;

(vii) Conduct of the parties may also be a material consideration. Therefore, applicants should make their position clear to the administrator at the outset and, if necessary, apply to the Court for leave promptly; and

(viii) The above considerations may be relevant not only to the decision whether leave should be granted or refused, but also to a decision to impose terms if leave is granted or refused.

[43] Based on the above general guiding principles which learned counsel submitted are equally applicable to a scheme of

arrangement, learned counsel for the Applicants set out the three categories of possible outcomes when considering an application for leave under section 368(1) of the CA, namely where (a) leave to proceed is refused, (b) leave is allowed on terms, and (c) leave is allowed in full.

Category 1: Leave to Proceed is Refused

(i) Court Unlikely to Grant Leave for Pure Monetary Claims

[44] Generally, the Court is unlikely to grant leave in relation to a pure monetary claim unless exceptional circumstances arise. This was made clear by the English High Court in **AES Barry Ltd** v **TXU Europe Energy Trading (in administration)** [2004] EWHC 1757 (Ch)**:**

> "[14] ... *where the creditors' claim is simply a monetary one, the court has to carefully scrutinise whether or not it is appropriate to allow that claim to be determined and enforced in advance of the achievement of the statutory purposes and the conclusion of the administration, either by a scheme or, if all else fails, by an order for the liquidation of the Company*."
>
> [24] *It seems to me that it will only be in exceptional cases, and I do not rule out that there may be such cases, but it will be in exceptional cases that the court gives a creditor, whose claim is simply a monetary one, a right by the taking of proceedings to override and pre-empt that statutory machinery*."
>
> [Emphasis added]

[45] In **Nortel Networks**, the company was placed in administration and the administrators terminated some employees of the company as

part of the reorganisation of business. The employees then sought consent from the administrators to bring claims before the Employment Tribunal for, among others, protective awards, unfair dismissal, breach of contract, expenses claim and discrimination claims. The administrators consented to the claims for protective awards but not the other claims, so the employees applied for leave from the High Court. Leave was refused because the other claims were all monetary claims and that there were no exceptional circumstances that warranted the grant of leave.

[46] The Court expressed that the reason why a company needed to undergo administration was because the monetary claims against the company exceeded the assets available for payment. Therefore, granting leave to an applicant with a pure monetary claim, save in exceptional circumstances, would likely hinder and/or defeat the purpose of the administration. At paragraph [8] of the judgment, the Court held:

> 'The claims with which I am concerned are all monetary claims. The Company has gone into administration because the monetary claims it faces far exceed the assets available for their payment. The object of the administration is to exploit and deploy those assets "in the interests of the Company's creditors as a whole" i.e. in the interests of all those who have monetary claims. To enable the Administrators to discharge that function paragraph 43(6) imposes a general rule that those with monetary claims against the Company may not pursue them...
>
> In my judgment the question is whether the claims of Unite and of the Northern Irish employees are "exceptional" in some respect.'

(i) Other Instances Where Leave is Refused

[47] In the English High Court decision of **Re Divine Solutions UK Ltd** [2003] EWHC 1931 (Ch), the applicant applied for leave to continue employment tribunal proceedings against the company in administration to obtain a declaration that she was unfairly dismissed. The applicant claimed that, unless she could obtain the declaration, she would suffer prejudice in the employment market based on the circumstances in which she was dismissed. She was also prejudiced by having to wait for the administration to end before she could continue with her proceedings.

[48] The High Court rejected the applicant's arguments and refused leave on the following grounds:

(i) The moratorium operated only for a limited time period;

(ii) There was insufficient evidence of prejudice to support the applicant's claim; and

(iii) The potential effect of leave would have on the administrators to discharge their duties. In particular, it is not the duties of the administrators to deal with claims of such a nature.

[49] In **AES Barry**, the applicant applied for leave to commence proceedings against the company in administration to resolve issues of construction arising under an agreement between both parties. The applicant claimed that the purpose of the court proceedings was to resolve those issues so parties could finalise

the quantum of early termination payments; hence when the company's scheme was approved and implemented, the applicant would then be able to seek payment as a fully recognised creditor whose claim is not in dispute and to avoid any delay in payment. Further, the applicant would be recognised in terms of its voting rights as a creditor in the full adjudicated sum rather than the provisional sum assessed by the administrator for voting purposes.

[50] The Court considered those arguments and refused leave because there was no real prejudice to the applicant to allow the administration to proceed and to require the applicant to prove its claim through the ordinary machinery of the scheme:

(i) First, the scheme contained a right for any creditor whose claim is disputed either to have the claim adjudicated by some form of expert determination or to submit the dispute to Court. Therefore, there is no real intention or possibility that the applicant would be deprived of access to Court if leave was not granted;

(ii) Second, in relation to the payments of dividends, the scheme provides that the creditors would receive an interim dividend in relation to the undisputed part whereas a sum would be set globally to meet the claims established regarding the disputed parts. If the applicant was able to establish its claim under the scheme machinery, then it will receive a final dividend based on that sum with a proportionate amount of interest;

(iii) Third, in relation to the applicant's issue on its voting rights, the Court accepted that majority of the creditors are likely to vote in favour of the scheme regardless of what voting rights are assigned to the creditors. Hence, the scope of the applicant's voting rights is of little weight.

Category 2: Leave Granted but with Conditions

[51] The Court has granted leave in cases where a defendant was pursuing a counterclaim and associated claims for additional damages and/or reliefs. However, the court ordered that all execution and enforcement proceedings related to the defendant's counterclaim to be stayed so that the defendant would not gain an advantage over the plaintiff's other creditors through its counterclaim.

[52] In **Hyflux**, the plaintiff had previously filed an action against the defendant for repudiatory breach of the agreement between both parties and the defendant counterclaimed for the release of an escrow sum under the agreement. Later, the plaintiff intended to enter into a proposed scheme of arrangement with its creditors and a moratorium was imposed. As a result, the defendant sought leave to continue with its counterclaim and to claim for additional damages and/or remedies.

[53] The Singapore High Court held that the defendant could pursue its counterclaim in respect of the escrow sum without leave from the Court but its associated claim for additional damages and/or remedies required leave. Nonetheless, the Court granted leave for

the defendant to proceed with the associated claim, save that no execution of judgment was allowed.

[54] The Court found it appropriate to grant leave for the following reasons:

(i) The Court could impose conditions on leave as a safeguard to minimise the impact on other creditors. For example, leave was allowed only to the extent of determination of liability in relation to the counterclaim and associated claims, but any enforcement or execution of award or order were stayed;

(ii) In relation to the argument that the company would be distracted from focusing its resources on the restructuring, the court held that the argument would be compelling but for the fact that the associated claim was part of the defendant's counterclaim which could already be pursued without leave of court. There was no substantial burden to the company; and

(iii) Allowing the defendant's counterclaim to proceed altogether would not have any significant adverse impact on the plaintiff but disallowing it would expose the defendant to a claim that it could possibly extinguish.

Category 3: Leave Granted in Full

(i) Claims of a Proprietary Nature: Leave Allowed

[55] The Courts have also granted leave to applicants whose claims are of a proprietary nature. For example:

(i) A landlord seeking to exercise its forfeiture rights under a lease agreement because such rights were proprietary rights (**Lazari GP Ltd** v **Jervis** [2012] EWHC 1466;

(ii) A secured creditor seeking to exercise its proprietary rights to repossess the computers leased to the company (**Re Atlantic**); and

(iii) An applicant seeking to register and enforce an arbitral award against the company where the nature of the award was of a proprietary nature. The arbitral award was for, among others, a declaration that the company held on constructive trust certain patent inventions and company shares on behalf of the applicant (**Larkden**).

[56] In the English High Court decision of **Magic Marking Ltd & Anor** v **Phillips & Ors** [2008] EWHC 1640, the claimants filed an injunction action against the defendants to restrain, among others, the misuse of confidential information and infringement of copyright. One of the defendants, a company, was later placed in administration and the claimants sought leave to continue with the trial against the defendant company.

[57] The Court granted leave for several key reasons:

(i) First, the claimants' claim essentially had a '*proprietary foundation*' because it required the determination of the ownership of properties such as copyright, documentation and confidential information. The injunction and ancillary reliefs

sought could not be determined until the ownership issue was settled;

(ii) Second, the court took into account the commercial reasons as to why the claimant should be allowed to pursue its claim. It was necessary to eliminate the uncertainty and rumours circulating in the business over the ownership of the underlying rights because competitors were beginning to take advantage of the situation to the detriment of the claimants; and

(iii) Third, the postponement of trial against the defendant company would lead to a serious duplication of costs. In particular, the trial against the other defendants would still continue and summary judgment had already been obtained against the first defendant. Therefore, it would be impractical for the claimants to pursue the same claim against the defendant company all over again at a later stage.

(ii) Advanced Stage of the Proceedings: Leave Allowed

[58] Further, a relevant factor in the exercise of the Court's discretion is the state of the proceedings at the time of any application. The Court may be more inclined to grant leave for proceedings that are already at an advanced stage.

[59] In **Ronelp**, the English High Court held that it was a factor of significant weight that the proceedings in that case were already "*reasonably well advanced*" when the application was made. The

fact that proceedings have been commenced is a factor for the Court and that "*the nearer the outcome of the proceedings, the greater the weight is to be attached to that factor*". In particular, paragraph [39] of the judgment states:

> "Second, it is in my judgment a factor of significant weight that there are already proceedings before the Commercial Court which are reasonably well advanced and on which the Buyers and STX have each expended considerable sums in preparation for trial in December 2016. Plainly the mere existence of proceedings is not of itself sufficient, for the automatic stay (modified to accord with paragraph 43) applies to existing proceedings. But the fact that proceedings have been commenced is a factor to be taken into account, and the nearer the outcome of the proceedings the greater the weight to be attached to that factor: note the exceptions made in the Recognition Order itself, and compare American Energy Group Ltd v Hycarbex Asia Ltd [2014] EWHC 1091 (Ch), where permission was granted to continue an existing 2-year old arbitration where the hearing was due to commence the following day."

Court's Decision

[60] The Court would like to express its gratitude to counsel for their extensive research and submissions above.

[61] It is instructive to set out the nature and mechanics of the scheme of arrangement proceedings when considering the principles applicable in an application for leave under section 368(1) of the CA.

[62] Whilst a winding up action leads to the dissolution of the company, a scheme of arrangement application seeks to revive the financially distressed company as a going concern. The application for a scheme of arrangement is time sensitive as the company is in distressed and require decisions pertaining to the proposed scheme to be made as soon as possible. There is an underlying consideration that the greater good of many will outweigh the interests of a few. It is not a coincidence that in both sections 366(1) and 368(1) of the CA, the applications to the Court are expressly described as in the nature of a summary application. Parliament did not intend the proceedings in a scheme of arrangement to be in the form of a protracted trial-based hearing.

[63] Unlike winding up or judicial management, the scheme of arrangement is managed and controlled by the company who essentially devises a proposal or a plan which it hopes will be agreed to by its creditors to assist the company in fulfilling its debt obligations. The company remains in control of its management without any interference from any outside party save that the scheme is subject to the supervision and sanction of the Court. This means that at the first instant, it is left to the company to determine the claims submitted by the creditors and to propose the pay out to be made to meet its debt obligations for approval by the creditors. The Court plays only a supervisory role in the process.

[64] Further, unlike a winding up or a judicial management or a corporate voluntary arrangement, a scheme of arrangement will not in and of itself trigger a moratorium in the sense that there is no automatic stay on creditor enforcement action and legal proceedings against

the company. An application has to be made by the company seeking a scheme of arrangement to the Court for a restraining order under section 368(1) of the CA. It is to be noted that the restraining order is to '*restrain further proceedings in any action or proceeding against the company'*. It does not stop proceedings initiated by the company. Hence, a creditor is not restrained from defending an action commenced by the company against it (See: **Hylux**).

[65] Section 368(2) of the CA sets out the conditions that are to be complied with at the time the application is made for a restraining order under section 368(1) of the CA. These conditions seek to ensure that the restraining order sought is not an abuse. In fact, the initial restraining order is valid for a maximum of 3 months with extension of up to a further 9 months only [See: **Barakah Offshore Petroleum Berhad & Anor** v. **Mersing Construction & Engineering Sdn Bhd & Ors]** [2019] 3 AMR 673].

[66] The restraining order seeks to preserve the assets of the company and to allow for the company to focus its efforts and resources to re-structure and rehabilitate the company. The scheme can come in many forms and may include re-organisation of the company's share structure, rights and liabilities of its members and creditors, the transfer of assets to another company, cancellation of securities of the creditors and or issuing of new securities. Typically, it involves the company engaging its members and creditors on the debt obligations of the company and seeking through a series of meetings and negotiations to persuade them to accept an alternative plan to the impending winding up of the company.

Between the initial formulation of the scheme and the sanction of the Court, the company is vulnerable to legal proceedings by any of its creditors. If the creditor seeks to enforce its debts, it may result in the failure of the scheme, hence, the restraining order.

[67] The restraining order will enable the company and its creditors the necessary time and space to focus and formalize the terms of the proposed scheme for approval by the requisite 75% majority of the creditors in value and in attendance under section 366(2) of the CA and subsequently for the plan approved by the creditors to be sanctioned by the Court. Once this is attained, the scheme will be binding on all the creditors and the members including those who had opposed the scheme when an office copy of the order is lodged with the Registrar as provided in section 366(5) of the CA.

[68] In **AirAsia X Berhad** [2021] MLJU 189, I had referred to 3 stages to a scheme of arrangement as follow:-

i) an application under s. 366(1) of the CA for an order that a meeting of the relevant classes of creditors to be convened ('**Convening Stage**');

ii) the actual convening and holding of the meetings of the relevant classes of creditors ('**Meeting Stage'**); and

iii) if the scheme is approved by the requisite majority at the relevant meeting(s), an application is made to the Court for its sanction of the scheme under s. 366(4) of the Act ('**Sanction Stage'**).

[69] After the Convening Stage when leave is obtained from the Court to convene the creditors' meetings, the company and the creditors would continue their engagement to negotiate on the terms of the proposed scheme with each party hoping to achieve the best terms for themselves and for the company to secure approvals from the requisite number of creditors to meet the threshold for the sanction of the scheme from the Court.

[70] For the purpose of the scheme of arrangement, it is necessary to have a mechanism to establish the status of a person as a creditor and for the value of his claims determined. This has a dual purpose, namely, to entitle the person to attend and vote at the creditors' meetings and subsequently to receive the payments under the proposed scheme if approved and sanctioned by the Court.

[71] In this respect, unlike in Australia and Singapore, there are no statutory provisions in Malaysia regulating the admission or rejection of the claims put forth by persons asserting as creditors for the purposes of voting at the creditors' meetings and or for distribution of payments under the proposed scheme.

[72] In practice, the determination of these claims made in the form of proofs of debt submitted to the company is by the chairman of the creditors' meetings or an appointed scheme manager ('**the decision-maker**'). The decision-maker is not an officer of the Court in the same way that a liquidator of a company under a winding up order is. Nevertheless, it has been held that the decision-maker owes a fiduciary duty to act in good faith and with complete impartiality and assumed a quasi-judicial role when adjudicating the

proofs of debt (See: **The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others** v. **TT International Ltd and another appeal** [2012] SGCA 9).

[73] The powers of the decision-maker is exercised in a summary manner based on information and documents of the company and that which the person claiming to be creditor chooses to put before the decision maker, who is entitled to request for further proof, if he deems fit. The decision is typically undertaken just a few days before the creditors' meetings or just prior to the start of the creditors' meetings without any lengthy and detailed evaluation to meet the date line for the creditors' meetings. In some cases, the decision-maker may have the benefit of legal advice on the claims.

[74] In the process of evaluating the claims, the decision-maker may have to make fair estimates of certain claims and if there is little or insufficient materials to form a conclusion as to a value, to ascribe a nil or minimal amount to the claims. Where there is a dispute, the decision-maker may either reject the claims or permit the claims, whether in whole or in part. In cases where the claims are contingent claims or unliquidated claims or where the company is seeking a set-off or counterclaim, a fair estimate or value will have to be made. In arriving at the determination of the claims in such cases, there will be some exercise of discretion (See: **Re UDL Holdings Ltd** [2000] 4 HKC 778).

[75] Where a particular proof of debt is rejected, this means that the person is excluded from attending the creditors' meetings and to vote on the proposed scheme. Similarly, if only a part of the proof of

debt is admitted, this may have an effect of the weightage of the creditor's vote. In some cases, such decisions may be significant as the exclusion of the affected creditor's vote or the rejection of part of his claims may be determinative of the approval or otherwise of the proposed scheme.

[76] The decision made on the claims, both as to the recognition of a debt (and thereby the status as creditor) and the quantum (and thereby fixing the value to the vote), will be or ought to be made known to the creditors and persons asserting as creditors prior to the creditors' meetings so that the voting at these meetings can be made on an informed basis (See: **The Royal Bank of Scotland NV**).

[77] In practice, this adjudicated List of Scheme Creditors and their respective quanta will later be submitted to the Court at the Sanction Stage for the purpose of distribution of payments pursuant to the terms of the scheme as approved by the requisite 75% of the creditors in value and attending at the creditors' meetings.

[78] As the determination of the creditors' claims from the proofs of debt exercise has been said to be for voting at the creditors' meetings only, there is a suggestion that perhaps a separate proof of debt exercise is to be undertaken for distribution of the payments involving a more detailed evaluation of the merits of the claims. More will be said about this below.

[79] Returning to the decision by the decision-maker on the proofs of debt submitted by the creditors and persons who are asserting as scheme creditors for the voting process at the creditors' meetings,

there is little doubt that the creditor and or the person who is asserting as creditor who is aggrieved by the determination may appeal to the court against the decision.

[80] In **The Royal Bank of Scotland NV**, V K Rajah JA opined that the aggrieved creditor is entitled to appeal against the decision of the scheme manager's decision to reject or admit its own or other creditors' proofs of debt notwithstanding that there was at that time of the decision, no statutory provisions providing for such appeal in Singapore.

[81] However, what is less clear is the nature or characteristics of the appeal before the Court in such a case. This issue was discussed by the Federal Court of Australia in **Bacnet Pty Limited** v. **Lift Capital Partners Pty Ltd** [2010] FCAFC 36, a decision that was referred to by V K Rajah JA in **The Bank of Scotland NV**.

[82] Finkelstein J in **Bacnet Pty Limited** opined that the appeal may bear one or other of the following characteristics: (1) it might be an appeal in the strict sense, requiring the finding of error based only on the material before the decision-maker; (2) it might be an appeal in the nature of a re-hearing, where it is necessary to show error but the appeal tribunal can try the case with new evidence; or (3) it might be a hearing *de novo* where all the issues are looked afresh.

[83] Whilst the majority judgment in **Bacnet Pty Limited** preferred to leave open the question of the nature of the appeal, Finkelstein J took the position that the appeal (which is specifically provided for

by the regulation 5.6.26(3) of the Corporations Regulations) is to be in the nature of a hearing *de novo.*

[84] V K Rajah JA in **The Royal Bank of Scotland NV** seems to adopt the appeal in the strict sense although admittedly this is not entirely clear to me reading from the judgment. This was what the learned judge said at paragraphs [105] and [106]:

> '105. We turned next to the court's approach in hearing an appeal against a chairman's admission or rejection of a claim for the purpose of voting in a s. 210 creditors' meeting. We ought to make clear from the outset that the court should be slow in overriding the professional judgment of the chairman in admitting or rejecting proofs of debt for the purpose of voting. Indeed, we accepted as correct the following principles as stated in Bacnet, viz, that the court will not ordinarily interfere with the chairman's decisions based on his professional judgment unless it was affected by bad faith, a mistake as to the facts, an erroneous approach to the law or an error of principle (Bacnet at [72]); and that *the court's role is not to engage in its own valuation of a claim* (Bacnet at [73]).
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> 106. Nonetheless, we are of the view that the court has to be satisfied that the proposed scheme manager has acted on the correct principles in his quasi-judicial role as chairman of a s.210 creditors' meeting. If a proof of debt is not capable of substantiation without the need for serious investigation or exertion, then the chairman should at least make the necessary enquiries regarding the proof. This is especially so if the proof of debt in question seeks to proof substantial claim, as Ho Lee's proof does on the instant case.'
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> [Emphasis added]

[85] Because of this strict sense approach for the appeal, with the court having no role in the evaluation of the claims, the learned judge proceeded to hold at paragraph [108] that the appeal '*does not bar the creditor from going back to the court subsequently to seek determinative final adjudication of the same claim on its merits'*. This is on the basis that the order made on appeal by the court is in the nature of a '*rough and ready*' determination purely for the purpose of voting which ought not to be delayed unnecessarily.

[86] At paragraph [104] of his judgment, the learned Judge held that the appeals to court against the decision of the scheme manager should only be taken after the votes have been counted and it can be seen whether the vote in question would affect the result. In fact, the learned Judge stated that such appeals should preferably be heard concurrently during the Sanction Stage.

[87] So, if there is still available to the creditors an avenue of going back to the Court for a '*determinative final adjudication of the same claim on its merits*', practically, such application will have to be filed after the Court has sanctioned the scheme. Of course the application can also be made during the Sanction Stage but this would render the appeals against the decision of the scheme manager redundant.

[88] If by the aforesaid, it means that between the approval of the proposed scheme by the creditors and the hearing of the application by the company to the Court for sanction of the scheme, any of the scheme creditors may apply to the Court for the final determination of their claims on its merits notwithstanding the determination by the Court in respect of appeals made against the decision of the scheme

manager in the first instant, then I would respectfully depart from the learned judge. To my mind, such an approach will impede instead of assist the achievement of the scheme of arrangement as this would result in undue delay to the application for sanction and or the distribution of the dividends. It will also mean more legal costs for the parties. In some instant, it may be a means for a disgruntled creditor to frustrate the application for the scheme to be sanctioned by the Court.

[89] On my part, I much prefer the approach by Finkelstein J in **Bacnet Pty Ltd** when the learned judge said at paragraph [168] that *'[t]here must ultimately be a single correct answer to the questions whether a person is a creditor and entitled to vote and for what amount – the fact that those questions are to be summarily determined in the first instance by the chairperson does not alter that.*'

[90] What this means to me is that the decision to admit or reject the proof of debt at the first instant should also be determinative of the quantum of the claims. While acknowledging that the decision of the first instant taken by the decision-maker is made in a summary fashion, the interests of the creditors are protected by the appeal to the Court where such appeal is to be heard in the nature of a re-hearing where the Court may, in exercising its discretion in appropriate cases, admit new evidence. An instant of such a case is where the Court is of the view that the decision-maker ought to have entertained the further documents which the party asserting as creditor wished to admit but was rejected. Once the Court arrives at such a conclusion, it must follow that the Court will entertain these

documents to be admitted for its consideration at the hearing of the appeal.

[91] The task of the Court on an appeal is to examine the evidence placed before the decision-maker in the first instant (together with fresh evidence where appropriate) and to decide on the balance of probability whether the claim against the company is established and if so, in what amount. The hearing of the appeal should be heard on an expedited basis and preferably together with the application to the Court for the sanction of the scheme. This will obviate the need for another separate proof of debt exercise as determinative final adjudication of the creditors' claims in respect of the quantum for the purpose of distribution of the payments under the scheme. Of course it does not at all mean that the company cannot, if it deems fit, make appropriate provisions in the scheme for an adjudication process to determine the quantum of the creditors' claims after the voting has been completed and the necessary approval for the scheme has been attained for the purpose of distribution.

[92] The appeal should not be in the nature of a *de novo* hearing as this will entail the company and the creditor filing voluminous affidavits and adducing more evidence which usually lead to conflicting versions with no documentary support from either side making it difficult or inappropriate for a summary disposal. Indeed, this problem is illustrated in the Singapore case of **Erpima SA** v. **Chee Yoh Chuang & Anor** [1998] 1 SLR 83 which involved a challenge to the decision by the judicial manager in rejecting a proof of debt. In holding that the appeal is to proceed as a hearing *de novo*, the

learned judge was ultimately led to have the disputes determined by the legal suits filed prior to the judicial management. In paragraphs [25] and [26] of his judgment, the learned judge stated thus:

> [25] In the light of the conflicting affidavit evidence, which in some issues certainly were not backed up by documentary evidence, the conclusion was irresistible that the resolution of the issues required the trials in the usual way of both suits instituted by the plaintiffs. Evidence by affidavits were inappropriate to resolve the issues. The first question was whether the goods and services were rendered to the company. The second question was whether the phrase 'the first party' in the agreement referred to the company alone or to TAE alone or to both the company and TAE. This would require an investigation of the 'factual matrix' leading to the agreement. The third question was whether the company could set-off and counterclaim, even if there was liability under the agreement, for the sums mentioned earlier in this judgment.
>
> [26] There were really two options open to the court. The first option was to order cross-examination and discovery. Under this approach, the matters involving TAE, which were linked in many ways to the transactions between the company and the plaintiffs, could not be dealt with. There was no hearing of any appeal relating to any proof of debt filed against TAE. The second alternative was to dismiss the originating summons but order that the outcome of the proof of debt shall abide by the final determination of the two suits in which all issues in controversy among the plaintiffs, TAE and the company could be dealt with comprehensively. In those circumstances, I made the orders I did.'

[93] If there is any concern that a summary determination of the quantum of claims by the Court may prejudice any party, there is a safeguard in section 366(4) of the CA which provides that '[t]he Court may grant its approval to a compromise or arrangement subject to such alterations or conditions as the Court thinks just'. This provision vests upon the Court at the Sanction Stage some flexibility to deal with the cases where justice requires the quantum of the creditor's claims to be determined through the vigorous process of a trial or arbitration proceedings. In such a case provisions may have to be made for a sums to be set aside under the scheme to await the outcome of these proceedings.

[94] Subject to the aforesaid, the scheme will invariably provide that the company will be completely and absolutely released and discharged from all claims, obligations and liabilities (whether actual, contingent or otherwise) and the indebtedness of the scheme creditors whatsoever and howsoever arising out of or in connection with any and all agreements, transactions, dealings and matters effected or entered into or occurring at any time prior to the approval of the scheme. The scheme creditors shall, with the scheme being sanctioned by the Court, forthwith discontinue and terminate, without any order as to costs, any or all legal proceedings commenced against the company.

[95] Based on the aforesaid outline of the scheme of arrangement process, it is clear that Parliament has intended by section 368(1) of the CA for the scheme of arrangement proceedings to serve as the preferred alternative platform tor the determination and resolution of the claims by the creditors against the company which,

if the scheme is to have any chance of succeeding, must take precedence over the normal legal proceedings filed in court or before an arbitral tribunal. The adjudication of the creditors' claims under the scheme of arrangement is in a summary fashion as opposed to the normal legal proceedings where elaborate investigation into the evidence is conducted for establishing the merits of the claims.

[96] With the aforesaid in mind, we can now examine what ought to be considered by the Court when entertaining an application by a scheme creditor for leave to commence or continue with legal proceedings against the company which has obtained a restraining order under section 368(1) of the CA 2016.

[97] To begin, the rationale for the restraining order in a scheme of arrangement has in fact been stated by our Federal Court in **Mansion Properties Sdn Bhd** v. **Sham Chin Yen & Ors** [2021] 1 MLJ 527 in the following passages in the judgment:

> [45] In our view, the purpose of s 368(1) of the CA is to ensure that a company's restructuring efforts are not rendered nugatory pending the approval of a scheme of arrangement. 'The desire of the legislature [is to] protect the assets of the company pending the possible adoption of a scheme in the interests of the creditors generally' (see Playcorp Pty Ltd v Venture Stores (Retailers) Pty Ltd (1992) 7 ACSR 193 (Supreme Court of Victoria) at p 195).
>
> [46] As elaborated by the Singapore High Court recently in Re Im Skaugen Se and other matters [2018] SGHC 259 at para [34], in respect of the Singaporean equivalent of s 368(1) of the CA:

It was evident that s 210(10) existed to ensure that restructuring efforts were not scuttled or rendered nugatory by preserving the status quo pending the filing and disposal of an application for a scheme meeting to be called under s 210(1), and if such a meeting was called, pending the holding of that meeting. Thus, the moratorium under s 210(10) served two important functions. First, it allowed the company the breathing space to develop and refine a compromise or arrangement that had been proposed to its creditors pending an application under s 210(1) for the calling of a scheme meeting. This was important as, at that stage, the court had to be satisfied that it would not be futile to call the scheme meeting (Re Ng Huat Foundations Pte Ltd [2005] SGHC 112 (Re Ng Huat) at [9]; The Royal Bank of Scotland NV v TT International Ltd [2012] 2 SLR 213 at [64]). Second, in the event a meeting of creditors was called pursuant to s 210(1), the moratorium allowed the status quo as between the company and its creditors to be maintained, to enable the creditors to decide whether to approve the proposed compromise or arrangement with or without further modifications and refinements. In either scenario, the moratorium allowed the applicant time and space to refine the compromise or arrangement to a level of maturity to enable the creditors to take a view on its acceptability, and to express their position through a vote at a scheme meeting if one was ordered. It also allowed the applicant the time and space to secure sufficient creditor support for the compromise or arrangement. (Emphases added.)

> [47] We can confidently say that the legislative purpose of s 368(1) of the CA is to preserve status quo and to prevent efforts to develop and approve a scheme of arrangement from being thwarted by the dissipation of the company's assets. In light of the potential necessity for immediate action and speedy procedures, an ex parte application would be suitable and appropriate to achieve the legislative purpose.

[98] As stated, the main thrust for the restraining order being to give the scheme of arrangement precedence over the legal and or arbitral proceedings as the platform to resolve the debt obligations of the company with its creditors.

[99] As such, in line with the aforesaid objective, the starting principle when entertaining an application for leave under section 368(1) of the CA is that such leave will only be granted in 'exceptional circumstances' and the burden will be on the applicant to show so. However, it will be unwise to attempt at defining what would constitute 'special circumstances'. A prescirptive and definitive list of factors would not be attempted because of the infinite variety of circumstances. But it will be safe to adopt the English High Court's guide in **Ronelp Marine Ltd and other companies** v **STX Offshore & Shipbuilding Co Ltd** [2016] EWHC 2228 (Ch) that 'exceptional circumstances' here must be such that the circumstance or combination of circumstances must be of sufficient weight to overcome the strong imperative to have the claims dealt with under the machinery of the scheme of arrangement.

[100] The fact that the applicant's claim in the legal proceedings may have a 'real prospect of success' alone cannot constitute 'special

circumstances'. Similarly, the contention that the legal proceedings if permitted to proceed would finalise the quantum of the applicant's claim and therefore assists the applicant in its claim as a recognised scheme creditor based on a fully adjudicated sum to be paid instead of a provisional sum asserted for voting purpose cannot constitute 'special circumstances'. Such contentions would defeat the very purpose of the scheme of arrangement which depends on a summary determination of the claims to achieve an expedited solution to the company financially distressed situation. It must also follow that a claim that the scheme creditor's claims will only be determined in a summary fashion as oppose to a full evaluation of the evidence commonly afforded by the civil suit cannot be a reason to grant leave.

[101] Leave will likely be granted where the commencement or continuation of the legal proceedings does not impede the achievement of the scheme or where it would in fact facilitate and or assist towards the achievement of the scheme. For instance, where the claim is proprietary in nature and the applicant is not seeking anything other than to reclaim possession or ownership of property said to belong to him, leave will normally be granted. Another instant is where the adjudication of the quantum of the creditor's claims is determinative of the question of approval of the scheme, leave may be granted to proceed with legal proceedings if the circumstances of the disputes are such that a summary decision on the claims is not appropriate.

[102] Ultimately what the Court is asked to do is to balance between the harm or loss to the applicant if leave is not granted with the harm

and loss to the general body of creditors under the scheme of arrangement if leave is granted taking into consideration, *inter alia*, the structure and terms of the scheme and how the company seeks to implement the same, the support of the creditors for the scheme, the company's financial position, the *bona fide* of the company in proceeding with the scheme, the stage of the legal proceedings and whether the outcome of the legal proceedings would have a determinative impact to the approval of the scheme.

[103] At this juncture, I would also add that it will also be unwise to attempt at determining the circumstances where the Court will impose terms when granting leave as in staying the enforcement or execution of the judgment. The Court will have to exercise its discretion appropriately to impose such terms as may be necessary when granting leave that serve the interests of all parties based on the peculiar facts of each case.

Should leave be granted to the Proposed Intervener?

[104] Seng Long's claim is, in essence, a pure monetary claim for an outstanding amount of RM3,791,328.02 against the 2nd Applicant. Further, Seng Long's legal proceedings are not at an advanced stage. On 10.12.2020, Seng Long had filed a summary judgment application. Although affidavits have been filed, the exchange of affidavits have not been exhausted and no submissions have been filed. The application has also not been heard.

[105] Learned counsel for the Proposed Intervener had contended that the summary judgment application has a real prospect of success

citing the fact that the 2nd Applicant had in fact admitted to the claim. However, as I have alluded to above, this is not 'special circumstances' to warrant the grant of leave. In any case, the 2nd Applicant is disputing any such admission.

[106] Learned counsel for the Proposed Intervener also contended that the Proposed Intervener is prejudiced because the Applicants have only recognised a sum of RM 563,915.00 instead of RM 3,791,328.02 as claimed in Suit 109.

[107] This is not a case where the determination of the disputed part of the Proposed Intervener's claims will have a significant impact on the approval of the proposed scheme before the creditors' meetings. The Proposed Intervener is not precluded from submitting its proof of debt to the Applicants under the proposed scheme and if dissatisfied, to appeal against the decision to the Court. There is no reason proffered by the Proposed Intervener as to why they ought not to be treated in similar fashion with the other general body of creditors subject to the scheme. To permit the Proposed Intervener to proceed with its claims under Suit 109 will give them an unfair advantage over the other scheme creditors.

[108] The other ground raised by the Proposed Intervener has to do with the feasibility of the proposed scheme that has been presented to the scheme creditors. With respect, this cannot be a reason to grant leave. The proper forum for the Proposed Intervener to raise its objections or dissatisfaction is at the scheme creditors' meetings and to express their position through the voting process.

[109] It seems to the Court that what the Proposed Intervener is really seeking to avoid is the cram down provision under section 366(3) of the CA. There are policy considerations why such a cram down provision is put in place by Parliament, the paramount reason being to prevent dissenting and disgruntled creditors who are in the minority from frustrating a scheme accepted by 75% or more of the creditors. To require a 100% acceptance of a scheme is impracticable.

[110] In the premises, the Proposed Intervener has failed to demonstrate that the circumstances in this case warrant its claims to be determined and proceeded with differently from the other general scheme creditors under the machinery of the scheme of arrangement.

Conclusion

[111] For the reasons as set out above, the Court dismissed Seng Long's prayers in relation to leave to proceed against the Restraining Order and allowed only prayers (a) and (b) of Enclosure 12 with no order as to costs.

Dated: 30 April 2021

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ONG CHEE KWAN
Judicial Commissioner
High Court of Kuala Lumpur, NCC2

COUNSEL:

1. Mr. Lee Shih with Ms. Pang Huey Lynn for Applicants
   Messrs. Lim Chee Wee Partnership (Kuala Lumpur)
2. Mr. Wong Kah Hui with Mr. Low Jia Juan for Proposed Intervener
   Messrs. KH Wong & Co. (Kuala Lumpur)

CASE REFERENCE:

1. *Mosbert Berhad (In Liquidation) v Stella D' Cruz [1985] 2 MLJ 446*
2. *Dubon Bhd (in liquidation) v Wisma Cosway Management Corp [2020] 4 MLJ 288*
3. *Shencourt Sdn Bhd v Perumahan NCK Sdn Bhd [2008] 5 MLJ 191*
4. *OCBC Bank Malaysia Bhd v. Metroplex Bhd [2013] 1 CLJ 669*
5. *Re Atlantic Computer Systems plc [1992] 1 All ER 476; [1992] Ch 505*
6. *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd [2011] NSWSC 1305*
7. *Unite the Union and another v Nortel Networks UK Ltd (in administration) [2010] EWHC 826 (Ch)*
8. *Ronelp Marine Ltd and other companies v STX Offshore & Shipbuilding Co Ltd [2016] EWHC 2228 (Ch)*
9. *Hyflux Ltd v SM Investments Pte Ltd [2019] SGHC 236*
10. *AES Barry Ltd v TXU Europe Energy Trading (in administration) [2004] EWHC 1757 (Ch)*
11. *Re Divine Solutions UK Ltd [2003] EWHC 1931 (Ch)*
12. *Lazari GP Ltd v Jervis [2012] EWHC 1466*
13. *Magic Marking Ltd & Anor v Phillips & Ors [2008] EWHC 1640*
14. *Barakah Offshore Petroleum Berhad & Anor v. Mersing Construction & Engineering Sdn Bhd & Ors] [2019] 3 AMR 673*

15. *AirAsia X Berhad [2021] MLJU 189*
16. *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v. TT International Ltd and another appeal [2012] SGCA 9*
17. *Re UDL Holdings Ltd [2000] 4 HKC 778*
18. *Bacnet Pty Limited v. Lift Capital Partners Pty Ltd [2010] FCAFC 36*
19. *Erpima SA v. Chee Yoh Chuang & Anor [1998] 1 SLR 83*
20. *Mansion Properties Sdn Bhd v. Sham Chin Yen & Ors [2021] 1 MLJ 527*
21. *Ronelp Marine Ltd and other companies v STX Offshore & Shipbuilding Co Ltd [2016] EWHC 2228 (Ch)*

BOOK / ARTICLE REFERENCE:

1. Sweet and Maxwell, 'Lightman & Moss on the Law of Administrators and Receivers of Companies')

LEGISLATION REFERENCE:

1. Sections 366 and 368 of the Companies Act 2016
2. UK Insolvency Act 1986
3. Section 440D of the Australia Corporations Act 2001