IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(COMMERCIAL DIVISION)

ORIGINATING SUMMONS NO. WA-24NCC-519-11/2020

In the matter of Sentoria Bina Sdn Bhd. (Company No 199901002914 (477814-V)

And

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

And

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

And

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

SENTORIA BINA SDN BHD.
(Company No: 199901002914 (477814-V) **... APPLICANT**

AND

1. **IMPAK KEJORA SDN BHD**
   (Company No. 779801-V)

2. **YUNG KONG CO BHD**
   (Company No. 103194-T)

3. **SCIB CONCRETE MANUFACTURING SDN BHD**
   (Company No.: 200101019131 (554888-U)

4. **YUNG KONG METAL WORKS CO BHD**
   (Company No. 10181-U) **... INTERVENERS**

JUDGMENT

Introduction

1. This Judgment primarily revolves around an application by a Company pursuant to Section 366 of the Companies Act 2016 ("**CA**") in relation to a proposed scheme of arrangement with its creditors.

2. Of significance, this Judgment will also be dealing with the principles governing the granting of an order restraining further proceedings under Section 368(1) of the CA not only against the Applicant but also additionally to the Applicants holding company ("**SGB**") who had provided some of the Applicants creditors with corporate guarantees.

3. Briefly, the Applicant is a wholly owned subsidiary of Sentoria Group Berhad ("**SGB**"). SGB and its subsidiaries are referred to as the "**Sentoria Group**".

4. The Applicant is the construction arm of Sentoria Group and has been the main contractor for the Sentoria Group's resort development projects as well as the general civil and building work for most of the Sentoria Group's property development projects.

5. The Sentoria Group has undertaken and invested in several significant projects of considerable value and also owns several pieces of land. However, due to mismatch in funding there has been a resultant cash flow difficulty faced by the Group whereby some of its development projects have yet to generate the expected returns. In this regard, the onset of the Covid 19 pandemic has also contributed to the financial challenge to the Group's business.

6. Consequently, due to the financial difficulties faced by the Sentoria Group, the Applicant has received low or no repayment in regard to the amounts owing to it by the Sentoria Group which has resulted in the Applicant experiencing financial difficulties and cash flow constraints to repay its creditors who are essentially its unsecured trade creditors. This predicament has led to the filing of this application by the Applicant pursuant to Section 366 of the CA.

Background Facts and Court Proceedings/ Orders made

7. Pursuant to an *ex-parte* application by the Applicant, the Court had through an Order dated 12th November, 2020 (Enclosure 10) granted the Applicant several orders including leave to summon a creditors meeting pursuant to Section 366 of the CA to consider a scheme of compromise.

8. In its Affidavit in Support of such *ex-parte* application, the same set out the proposed scheme which had identified the various scheme creditors, the amounts due to them whereby the Applicant's proposal under such scheme was to pay all creditors the sums due as set out in the scheme in full over a 6 years period with identified percentages of payment each year. There was only one class of creditors i.e. unsecured trade creditors.

9. I had also on the 12th November, 2020 granted a Restraining Order ("**RO**") pursuant to Section 368(1) of the CA for a period of three months as I was satisfied that the preconditions of Section 368(2) of the CA had been complied with and met. In particular and in relation to the pre-condition contained in Section 368(2)(d) of the CA, Exhibit A-8 evidenced that 71.86% of the value of the Applicant's scheme

creditors were agreeable to the nomination of one Dato' Jimmy Chan Kong San to act as a Director under Section 368(2)(d).

10. Pursuant to the application in Enclosure 1, I had also granted the RO on the following terms where it will be clear that the same extended to the guarantor of some of the Applicant debts, namely SGB. I will later in this judgement explain the reasons for having made this order in respect of the guarantor SGB but for the moment, it will suffice for me to state that in so far as the scheme creditors were concerned, there was only one guarantor in relation to some of the debts and that was SGB which is the holding company of the Applicant. I had amongst others made the following orders on 12th November 2020: -

> *"1. An Order be granted pursuant to Section 366(1) of the Companies Act 2016 to summon meeting(s) ("Creditors' Meeting(s)") of the creditors of the Applicant or any class of them (including their successors) permitted assigns, heirs and/or estate)("Scheme Creditors") for the purpose of considering and if thought fit and appropriate, approving with or without modification (which modification can be made any time prior to and/or at the Creditors' Meeting(s)), a proposed scheme of compromise and arrangement between the Applicant and the Scheme Creditors ("Scheme of Arrangement"), the particulars of which are set out in the draft*

Proposed Restructuring Scheme exhibited in the affidavit of Chan Kong San filed herein.

…

3. *A restraining order be granted pursuant to Section 368(1) Companies Act 2016 to forthwith restrain and stall all and/or further and/or future proceedings in any action or proceedings against the Applicant and/or its assets (wherever located and whether held by the Applicant in whole or in part, directly or indirectly, as principal or agent, beneficially or otherwise) and/or its guarantor(s) (includes a body of persons, corporate or unincorporate) guaranteeing the performance of the Applicant's obligations under any documents or security documents including without derogating from the generality of the foregoing:-*

   a) *Court, winding-up and arbitration proceedings as well as any intended or future proceedings;*

   b) *execution or enforcement process, extra-judicial proceedings or other proceedings;*

   c) *any proceedings in the Industrial Court and/or Labour Court;*

   d) *any proceedings under the Construction Industry Payment and Adjudication Act 2012;*

   e) *any proceedings in any tribunal under any statute;*

f) demands for payment, exercise/enforcement or intended exercise/enforcement of any liens, securities, undertakings and guarantees under any documents or security documents;

g) appointment of receiver(s) and/or manager(s) over the Applicant's assets; and

h) the dealing with such assets in any way or entering upon any premises upon which such assets may be located except with the prior consent of the Applicant or upon further order of the Court;

for a period of three (3) months from the date of this Order, except by leave of the Court and subject to any terms as the Court may impose ("Restraining Order")."

11. Pursuant to such leave granted, the Applicant then proceeds to have its meeting with the scheme creditors on the 29th January, 2021. I am satisfied that all orders in respect of notices/advertisements have been complied with as well as the explanatory statement pursuant to Section 369(1) of the CA had been provided to the scheme creditors prior to the meeting. In addition, in light of the Movement Control Order ("**MCO**") declared by the Government, pursuant to a formal application by the Applicant in Enclosure 40, I had on 22 January 2021 ordered that the Applicant be at liberty to

hold and conduct the said creditors meeting on 29th January, 2021 virtually.

12. In relation to the explanatory statement dated 31st December 2020 which was provided to all scheme creditors prior to the meeting, I have noted that it is indeed quite extensive and sets out the background financial situation as well as the details of the proposed scheme. It has not escaped me that in such explanatory statement, when setting out the procedure of the scheme, the Applicant has been transparent and has disclosed in para 4.6 therein that it had obtained an RO from Court on the 12th November 2020 to restrain proceedings against the Applicant and its guarantors.

13. Prior to the meeting on 29th January, 2021, several scheme creditors had approached the Applicant to amend the amount due to them, and upon verification, the Applicant had agreed to make certain amendments to the amounts due to some of the creditors under the scheme.

14. It is not disputed that the Applicant proceeded to conduct the Creditors Meeting ("**CM**") virtually on the 29th January, 2021 using RPV platform hosted by an independent service provider called V-CUBE who had prior to the meeting sent emails to the creditors (see: Exhibit A-7 of Enclosure 47).

15. One Rimbun Capital Sdn Bhd was appointed to be the poll administrator and scrutineers to conduct the poll by electronic voting.

16. The said Dato' Jimmy Chan Kong San chaired the creditors meeting on 29th January, 2021. The Chairman's report as well as the minutes of the meeting have been annexed at A-10 of Enclosure 47. It appears from the said minutes that the Applicant's Financial Advisor for the scheme i.e. BDO Consulting had explained the amendments and also the amendments to the debt amount being increased by about RM1.517 million to become approximately RM110 million. The minutes further reflect that the scheme creditors had asked questions and that the representatives of BDO had answered most of them.

17. The total amount of creditors who attended the said CM had a debt total of RM97,062,253.88 with 35 proxies attending. Of this, a total of 93.04% (debt of RM90,303,571.69) voted in favour of the scheme whilst 6.96% (representing RM6,758,682.19) voted against. The full report and minutes have been exhibited to Enclosure 47 as Exhibit A-10.

18. At the said meeting, some other creditors had also for the first time raised queries on the actual amount of the debt due to them and contended that it ought to be higher. The Applicant was not able to verify them on the day itself but has since undertaken a verification exercise and are now agreeable to make further amendments and has exhibited at Exhibit A-13 a further addendum reflecting an additional increased debt of RM888,585.10 bringing the grand total of the debts affected by the scheme to RM111,079,893.79. The Applicant however contends that this increase in amount of the debt does not affect the outcome of the voting with any significance as the percentage of those against the scheme would still only be 7.45%.

19. As such, vide Enclosure 46 the Applicant seeks an order that the proposed scheme of arrangement be sanctioned and approved by Court pursuant to Section 366(4) of the CA. The Applicant contends that the proposed scheme is fair and equitable, beneficial to the creditors as well as being beneficial to the purchasers of units being developed by the Applicant as opposed to liquidation especially bearing in mind that a majority being in excess of more than 90% of its creditors have voted in favour of the same. The Applicant also submits that they have complied with all the requirements of Section 366 of the CA.

20. In the meantime, pending the disposal of Enclosure 46, I had on the 9th February, 2021 granted an order on an *ex-parte* basis to the Applicant further extending the RO from the 12th February, 2021 until 12th May, 2021 on terms similar to the RO I had granted on the 12th of November 2020.

21. Apart from the Enclosure 46 application by the Applicant seeking the Courts sanction for the proposed scheme, there are 4 applications by four different interveners. All 4 interveners are scheme creditors and leave was granted for them to intervene. As there is some overlap in the orders/relief sought by them, I will set

out briefly the details of the 4 applications but deal with the issues raised by them simultaneously where appropriate thereafter. These applications by the interveners are in Enclosures 17, 18, 23 and 58.

Enclosure 17

22. This was an application filed on 3rd December 2020 by one of the scheme creditors namely Impak Kejora Sdn Bhd who were seeking *inter-alia* an order setting aside the RO of 12th November 2020 or alternatively giving the said creditor leave to proceed with its suit in the Shah Alam Sessions Court which was merely pending decision on its Order 14 application. The main grounds for its application was that it was merely a very small creditor in terms of its debt and should not have to wait 6 years to collect its debt. It also contended that the proposed scheme was speculative. Finally, it was contended that Section 386(2)(d) of the CA was not complied with as the said director's nomination didn't have the support of the majority of the creditors.

Enclosure 18

23. This was an application by one Yung Kong Co Bhd on 11th December 2020 seeking to set aside the RO or alternatively to vary the extent of the RO to delete its applicability to guarantors as well as to get leave of Court to proceed with its claim against the Applicant pending in the Kuching Sessions Court.

24. Further, this creditor contends that the amount due to it under the scheme ought to be increased to include late penalty interest on its debt which is being claimed in the Sessions Court suit as well as the costs of that suit.

25. In so far as the RO granted by Court on 12th November, 2020, it is contended that the same is ultra vires Section 368(6)(b) of the CA as it can have no effect of restraining proceedings against the guarantor of the Applicant's debts.

Enclosure 23

26. This was an application by one SCIB Concrete Manufacturing Sdn Bhd who were similarly praying for the RO to be amended to delete any reference to guarantors and that the holding Company Sentoria Group Bhd be deleted from the order so that the said creditor could pursue its claim against the guarantor in accordance with a Judgment in Default it had obtained against the Applicant and Sentoria Group Bhd on 4th June, 2020. This scheme creditor also contends that the proposed scheme is speculative.

Enclosure 58

27. This was an Application by Yung Kong Metal Works Company Berhad, another creditor who is related to the intervener in Enclosure 18.

28. This scheme creditor does not oppose the proposed scheme but seeks to increase the debt amount due to it to RM187,509,20 from RM158,578.65 to account for late payment interest and costs (creditor no. 272 of Exhibit A-13, Enclosure 47).

29. Bearing in mind all the above, in my view, it is perhaps apt for me to deal with the substantive application in Enclosure 46 first to consider whether the Court should grant approval/sanction to the proposed scheme. The fate of Enclosure 46 i.e. whether to sanction or not will in my view necessarily deal with the fate of the respective intervener's applications. I will however, where necessary deal with the issues raised by the interveners and reveal my agreement or otherwise with their respective contentions.

30. At the outset, it is imperative to have regard to the statutory scheme of arrangement process under Section 366 of the CA and what principles guide the Court when faced with such applications.

31. The scheme of arrangement mechanism under the CA 2016 is found under Section 366 CA 2016. It provides as follows:-

> *"(1) The Court may, on an application under this Subdivision, order a meeting in a summary way to be summoned in such manner as the Court directs, by either-*
>
> *(a) the company;*
>
> *(b) any creditor or member of the company;*
>
> *(c) the liquidator, if the company is being wound up; or*

(d) the judicial manager, if the company is under judicial management.

(2) A meeting held pursuant to an order of the Court made under subsection (1) may be adjourned if the resolution for adjournment is approved by seventy-five per centum of the total value of creditors or class of creditors or the members or class of members present and voting either in person or by proxy at the meeting.

(3) The compromise or arrangement shall be binding on-

(a) all the creditors or class of creditors;

(b) the members or class of members;

(c) the company; or

(d) the liquidator and contributories, if the company is being wound up, if the compromise or arrangement is agreed by a majority of seventy-five per centum of the total value of the creditors or class of creditors or members or class of members present and voting either in person or by proxy at the meeting or the adjourned meeting and has been approved by order of the Court.

(4) The Court may grant its approval to a compromise or arrangement subject to such alterations or conditions as the Court thinks just.…".

32. The scheme of arrangement under Section 366 envisages a compromise of debt between a company and its creditors. It is designed to save companies in difficulty and provides better recovery of monies by the creditors as opposed to in a liquidation scenario. This is borne out in the following cases.

33. In the High Court case of ***Intrakota Komposit Sdn Bhd v Sogelease Advance (M) Sdn Bhd*** **[2004] 8 CLJ 276**, Abdul Malik Ishak J (as he then was) in dealing with the application under Section 176 Companies Act 1965 (repealed) (predecessor of Section 366 CA 2016) held as follows:-

> *"This type of arrangement would float a flagging company heavily burdened with debt to survive provided that there is a possibility that the business may be viable and the company may persuade its creditors that it is in their best interest to accept a compromise of their debts. So, instead of enforcing their debts or winding up the company, the creditors will accept less than the full amount in final satisfaction of their debts. Section 176 of the Companies Act 1965 is designed to save a company in difficulty and it is the best alternative to liquidation. As far as the company is concerned, section 176 of the Companies Act 1965 is a life saving device designed by the legislators and it will be resorted to, from time to time."*

34. In the case of ***Sea Assets Limited v Perusahaan Perseroan (Persero) Pt Perusahaan Penerbangan Garuda Indonesia*** **[2001] EWCA Civ 1696**, the English Court of Appeal has recognised that a company is encouraged to enter into compromises and arrangements with its creditors to restructure its debts rather than having the relevant creditors to exercise their rights to put the company into liquidation. Peter Gibson LJ in this regard held as follows: -

"It has been the legislative policy for well over a century to encourage compromises and arrangements between a company and its creditors or members. That has been achieved by the enactment of a statutory mechanism to enable the absence of consent of minority creditors or members to be overcome, … That of course in the case of a creditor is an encroachment on his right to be paid what he is owed in accordance with the contractual terms. But the utility of the statutory mechanism is particularly obvious in a case where a company is in financial difficulties but can persuade most, but not all, of the relevant creditors that the company's debts should be restructured rather than that those creditors should exercise their rights, including the right to put the company into liquidation."

35. In order for the Scheme of Arrangement to be implemented, the company is required to undertake the following processes pursuant to Section 366 of the CA: -

"(a) Convening Stage

The company shall obtain leave of Court to convene creditors' meeting (Section 366(1) CA 2016) ["Convening Stage"].

(b) Creditors' Meeting

Upon leave being obtained, the company shall call for a Creditors' Meeting to obtain agreement of the creditors in regard to the proposed Scheme of Arrangement (Section 366(3) CA 2016).

(c) Sanctioning Stage

> *The company shall obtain the Order of Court to approve the proposed Scheme of Arrangement, if the same is approved by the requisite majority of the Scheme Creditors (Sections 366(3) and 366(4) CA 2016) ["Sanctioning Stage"]."*

36. The above three (3) stage process under Section 366 CA 2016 has been recognised in the case of ***Transmile Group Bhd & Anor v. Malaysian Trustee Bhd & Ors*** **[2012] 9 CLJ 1071**. Nallini Pathmanathan J (as she then was) followed the principles enunciated in the case of ***Re Hawk Insurance Co Ltd*** **[2002] BCC 300** and held as follows: -

> *"In Re Hawk Insurance Co Ltd [2002] BCC 300 Chadwick LJ had occasion to consider this issue when construing s. 425 of the then English Companies Act 1985 which is similar to s. 176 of the Companies Act 1965:*
>
> > *... First, there must be an application to the court under s. 425(1) of the Act for an order that a meeting or meetings be summoned. It is at that stage that a decision needs to be taken as to whether or not to summon more than one meeting; and if so, who should be summoned to which meeting.*
> >
> > *Secondly the scheme proposals are put to the meeting or meetings held in accordance with the order that has been made; and are approved (or not) by the requisite majority in number and value of those present and voting in person or by proxy.*

Thirdly, if approved at the meeting or meetings, there must be a further application to the court under s. 425(2) of the Act to obtain the court's sanction to the compromise or arrangement."

37. In the more recent decision of the Federal Court case of ***Mansion Properties Sdn Bhd v Sham Chin Yen & Ors*** **[2020] MLJU 1969**, Mohd Zawawi Salleh FCJ has again recognised the 3-stage process for a Scheme of Arrangement to become binding on a company and its creditors under Section 366 CA 2016. His Lordship held as follows: -

"The process by which a scheme of compromise or arrangement becomes binding on the company and its creditors generally comprises three stages –

(i) Firstly, either the company, creditors, members of the company, liquidator or judicial manager may apply to the Court to convene a creditors' meeting;

(ii) Secondly, the proposed scheme is presented at the meeting to be agreed upon by a majority of 75% of total value of creditors present and voting, either in person or by proxy or at the adjourned meeting; and

(iii) Thirdly, upon obtaining the requisite approval, a further order by the Court is to be obtained to sanction the scheme of arrangement."

38. Each of the processes/stages to implement a proposed Scheme of Arrangement involves different considerations.

39. In the case of ***UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin*** **[2002] 1 HKC 172**, after having reviewed the relevant case law on the sanctioning of a Scheme of Arrangement, Lord Millett, speaking for the Hong Kong Court of Final Appeal held as follows: -

> *"The following principles can be derived from this consistent line of authority:*
>
> *It is the responsibility of the company putting forward the Scheme to decide whether to summon a single meeting or more than a meeting. If the meeting or meetings are improperly constituted, objection should be taken on the application for sanction and the company bears the risk that the application will be dismissed.*
>
> *(1) Persons whose rights are so dissimilar that they cannot sensibly consult together with a view to their common interest must be given separate meetings. Persons whose rights are sufficiently similar that they can consult together with a view to their common interest should be summoned to a single meeting.*
>
> *(2) The test is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights.*

(3) The question is whether the rights which are to be released or varied under the Scheme or the new rights which the Scheme gives in their place are so different that the scheme must be treated as a compromise or arrangement with more than one class.

(4) The Court has no jurisdiction to sanction a Scheme which does not have the approval of the requisite majority of creditors voting at meetings properly constituted in accordance with these principles. Even if it has jurisdiction to sanction a Scheme, however, the Court is not bound to do so.

(5) The Court will decline to sanction a Scheme unless it is satisfied, not only that the meetings were properly constituted and that the proposals were approved by the requisite majorities, but that the result of each meeting fairly reflected the views of the creditors concerned. To this end it may discount or disregard altogether the votes of those who, though entitled to vote at a meeting as a member of the class concerned, have such personal or special interests in supporting the proposals that their views cannot be regarded as fairly representative of the class in question."

40. In the High Court case of ***Re Sateras Resources (Malaysia) Bhd*** **[2005] 6 CLJ 194**, Ramly Ali J (as he then was) referred to ***UDL Argos Engineering*** (supra) and adopted the principles set out in Buckley on the Companies Act, 14th edn., 1981, pp. 473-474 and held as follows:-

"... In exercising the power of sanction the Court will see, first, that the provisions of the statute have been complied with, second that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest might reasonably approve.

The Federal Court of Australia in the case of Hiberman Friendly Society (NSW) Limited [2002] FCA 913 stated that:

> *Nevertheless, the Court is not a mere rubber stamp and it will look at the arrangement to ensure that it is a reasonable one. If the Court concludes that there is an objection to the arrangement, such that a reasonable person might not approve it, then the Court may refuse to approve the arrangement. The Court must be satisfied that the proposal is at least so fair and reasonable that an intelligent and honest person who is a member of the class of the security holders bound by the arrangement acting alone in respect of his or the interest, as such security holder might approve it..."*

41. In the case of ***Re Axa Asia Pacific Holdings Ltd*** **[2011] VSC 4**, Croft J held that in exercising the discretion of the Court to sanction a Scheme of Arrangement, there is no exhaustive criteria as to which the Court must be satisfied before granting approval. It was held as follows: -

"... At this present stage of the proceedings, it is useful to make some reference to the nature of the discretion of the court to approve a scheme. In Re Permanent Trustee Co Ltd, Barrett J reviewed some of the authorities of the nature of this discretion:

> *Proceed to the central question whether the court should exercise its discretion in favour of approving the scheme. There is no exhaustive statement of the matters as to which the court must be satisfied before granting approval. Indeed courts have been reluctant to attempt any comprehensive or compendious statement of relevant criteria. I refer to the judgment of MacFarlan in RE A W Allen Ltd [1930] VR 251:*
>
> > *In my opinion nothing can be more dangerous than to attempt to determine the conferring or withholding of the Court's sanction by the application of any formula... The authorities relied on are all useful as directing the considerations which have occurred to, or have been brought to the minds of, other judges and which they have properly held to be of importance. Considerations which are of the greatest weight in one class of case may be... outweighed by circumstances not present in the former. If the Legislature had desired to say that the Court should sanction an arrangement if the necessary majorities were obtained and the conditions of reasonableness and absence of oppression (or any others definable in advance) existed, it would have been easy to say so. It has chosen not to do so.*
>
> > *It is nevertheless clear that the court must form a favourable view as to the reasonableness of the compromise or arrangement..."*

42. Having regard to the above, it now behoves the Court to consider whether the Applicant has complied with the requirements of Section 366 and thereafter demonstrated sufficient basis for the Court to sanction the said proposed scheme.

Has there been compliance with the requirements of Section 366?

43. I am satisfied that the Applicant has duly complied with the previous orders of Court wherein they have complied with all advertisement and service requirements pursuant to Sections 366 and 369 of the CA.

44. In this regard, the Applicant had duly caused: -

(a) the Notice of the Creditors' Meeting, the Explanatory Statement and the proxy form ("Scheme Documents") to be sent to the Scheme Creditors by way of prepaid A.R. registered post addressed to the last known address of the Scheme Creditors;

(b) the Notice of the Creditors' Meeting to be published once in New Straits Times and Utusan Borneo in the

English language and once in Berita Harian and Utusan Borneo in the national language;

(c) the Scheme Documents to be made available to the Scheme Creditors at the registered office of the Applicant;

(d) the Addendum to the Notice of the Creditors' Meeting to be sent to the Scheme Creditors by way of prepaid A.R. registered post addressed to the last known address of the Scheme Creditors on or about 21st January 2021;

(e) the Addendum to the Notice of the Creditors' Meeting to be advertised once in New Straits Times and The Borneo Post in the English language and once in Berita Harian and Utusan Borneo in the national language on 22nd January 2021; and

(f) the fully virtual Creditors' Meeting to be convened on 29th January 2021 at 11.00 a.m. pursuant to the 2nd Court Order;

(g) as highlighted earlier, the Applicant had sent to the creditors a statement explaining the scheme in detail as well as its effect. This is a requirement pursuant to section 369 CA.

45. Further, it is also an undisputed fact, that the class of creditors in regard to the Proposed Scheme of Arrangement are properly classified. All the Scheme Creditors (in one single class) are the Applicant's unsecured trade creditors that share the similar legal rights in regard to the Applicant. It should be noted that none of the interveners have challenged or raised any issues in regard to the classification of the scheme creditors.

Is this a scheme that an intelligent and reasonable man would approve?

46. The next issue to consider is whether the scheme as proposed is a scheme that an intelligent and reasonable man would approve or is the scheme speculative as contended by some of the interveners.

47. It is perhaps apt at this juncture to briefly set out the objective/rationale and the mechanics of the proposed scheme of arrangement.

The Proposed Scheme

48. The key objective of the proposed scheme is to settle all creditors of the Applicant in full while at the same time maintaining the Company as a going concern. In this regard, the Company's management is confident of the viability and future prospects of the company and the Sentoria Group.

49. In addition to the cash flow generated from its ongoing projects, the Sentoria Group has implemented a divestment plan to sell its major assets in order to settle its liabilities including the creditors of the Applicant.

50. The Applicant is not proposing any haircuts from its creditors but merely seeks indulgence from the creditors to give it more time to pay the total scheme debts which is proposed to be in six instalments over a period of six years with various percentages being paid on the 31st December 2021 and thereafter on the 31st

December of each year with the final payment on 31st December 2026.

51. The Applicant has clearly identified the scheme creditors in Appendix C with a total debt of RM108,674,002.44. Of these creditors, 24 of them have been identified in Appendix B as having corporate guarantees with the Applicant's holding company, SGB. These creditors with such guarantees have debts totalling RM5,166,396.17.

52. A cash flow projection of the Sentoria Group is then provided in Appendix D whereby the sources of funds is to be derived from the property development and other activities of the Applicant company as well as activities of the group and its divestment plan. It is also expressly provided that should the Sentoria Group be successful in selling any significant assets, it will allocate more surplus to pay the scheme creditors within a shorter a time.

53. It is of significance to state and point out that paragraph 5.6 of the proposed scheme expressly provides and proposes a moratorium as follows: -

"Moratorium during the Scheme Period

Provided the Company does not breach the key terms of the Proposed Scheme in paying the relevant instalments to the Scheme Creditors as set out in paragraph 5.2, no Scheme Creditor shall, during the Scheme Period, take any steps or concur in the taking of any steps, whether directly or indirectly:

i) to wind up Sentoria Bina;

ii) to place Sentoria Bina under judicial management under subdivision 2 of Division 8 Part III of the Act;

iii) ***to commence or continue any proceedings against Sentoria Bina and/or its guarantors, including without limitation proceedings for the recovery of debt or damages by civil action or arbitration or any other dispute resolution procedure, except to the extent and for the purpose provided in this Proposed Scheme (including enforcement proceedings pertaining to any rights, benefits and interests arising under this Proposed Scheme****); (Emphasis mine)*

iv) to enforce any injunction, judgment to order, arbitral award or any other compulsory direction arising from or referable to any Claim against Sentoria Bina by commencing or continuing any proceedings by way of legal or equitable execution including without limitation proceedings which have as their purpose the sequestration, attachment, garnishment, repossession or seizure and sale of assets of Sentoria Bina and/or its guarantors whether tangible or intangible;

v) to levy distress against Sentoria Bina or its respective assets, where such entitlement to levy distress from or is alleged to

arise from the failure, refusal, neglect or inability to satisfy a Claim;

vi) to amend the terms of any other agreement relating to a Claim;

vii) to require and/or take any new corporate guarantee, security interest (or another agreement or arrangement having the effect of conferring security), cash collateral or cash cover of whatever nature in respect of and/or any other agreement relating to a Claim;

viii) to exercise any right of set-off or counterclaim in respect of outstanding amounts under any other agreement relating to any Claim;

The Scheme Creditors shall also agree to waive (a) all interest, premium, additional amounts, fees, commissions and penalties chargeable accruing on, or payable in respect of or in relation to any Claims under or in connection with any agreement relating to a Claim; and (b) the right to claim for any legal fees incurred; and

Where any terms of any other agreement relating to a Claim conflict with any terms of the Proposed Scheme, the relevant terms of the Proposes Scheme shall prevail."

54. Having reviewed the scheme, the explanatory notes as well as reviewing the evidence produced through the various affidavits, the question I pose myself is this- can it be concluded that when viewed as a whole, the proposed scheme is a scheme that an intelligent

and honest man might reasonable approve? I would answer this question in the affirmative for the following reasons: -

a) Some interveners are not opposing the scheme but merely requesting that their debt be varied/ increased;

b) The proposed scheme does not entail any reduction in the debt due but rather an extension of time to pay the debt in full in a period 6 years;

c) There was available evidence by way of an opinion from BDO that creditors are only expected to recover 11.5% of the sums due in the event of liquidation;

d) There is also the impact on and to the many house buyers who have bought affordable homes being constructed by the Applicant and SGB should the projects be abandoned.

55. As such, in my considered view, the proposed scheme certainly seems more viable than any liquidation.

56. I also thus cannot conclude that the proposed scheme is speculative as contended by some interveners. Firstly, apart from making bare averments that 6 years is too long or that it is speculative that the Applicant and its holding company SGB will be able to make profits, there is nothing else to support such contention. To the contrary, the evidence will show that the entire scheme and the evaluation of all financial aspects have been proposed with the guidance and advice of BDO as well as Ernst & Young. Furthermore, the proposed scheme has been formulated on their advice and they too have taken the view that the scheme is more viable to the Applicant and the creditors as opposed to liquidation. I am as such unable to conclude that the statutory majority were not acting bona fide or were coercing the minority.

57. Significantly, 93% of the scheme creditors have overwhelmingly supported the scheme which is indicative that the majority are of the view that the scheme is more beneficial as opposed to liquidation. This majority support is further fortification that the scheme is one that an intelligent and reasonable man would approve.

58. Having noted that 93% of the scheme creditors want the Applicant to continue operations and they are prepared to await repayment within the 6 years period, should the Court take a differing position and usurp the views of the creditors? I think not.

59. In my considered view, the commercial aspect of the proposed scheme of arrangement should be left to the scheme creditors. The Scheme Creditors are in a much better position to evaluate their own commercial interest and make the necessary business judgments whether to accept or reject the Proposed Scheme of Arrangement.

60. In this regard, the test enunciated by Croft J in the case of ***Re Axa Asia Pacific Holdings Ltd* (supra)** is of relevance and is directly applicable. Croft J was of the considered view that even though the role of the Court in the Sanctioning Stage is supervisory in nature, the Court should not usurp the views of the security holders and "second guess" their commercial decision. It was held as follows: -

> *"... It is clear that the role of the court is supervisory, but that this does not involve the "second guessing" of the commercial judgment of the shareholders or to substitute its own commercial judgment. The nature of the jurisdiction was described by Emmett J in Re Central Pacific Minerals NL as follows:*

The jurisdiction of the Court in relation to an arrangement is supervisory, in the sense that the Court is concerned to be satisfied that there has been an absence of oppression and that the arrangement is one that is capable of being accepted. For example, the Court will withhold its approval where a majority is shown to be acting in bad faith or where a majority's acceptance is in the nature of a fraud on the minority. The Court will, of course, generally take the view that the shareholders are the best judges of whether an arrangement is to their commercial advantage and will be reluctant to make decisions contrary to the views of security holders expressed at the meetings. The function of the Court does not extend to usurping the views of the relevant security holders."

61. In the South Australian Supreme Court case of ***Re BRL Hardy Ltd* (2003) 45 ACSR 397**, Perry J in approving the Scheme of Arrangement also held that the Court should not second-guess the commercial judgment. Perry J held as follows: -

"the authorities make it plain that it is not for this court to second-guess the view of the statutory majority of the members in the exercise of their commercial judgment, if, as is clearly the case, they have reached the view that they wish to participate in the schemes of arrangement. It is not for the court to substitute its commercial judgment for theirs.

62. In the Supreme Court of Victoria case of ***Re Sonodyne International Ltd*** **[1994] 15 ACSR 494**, Hayne J was of the view that the Court should approve the Scheme of Arrangement if it could reasonably be supposed by sensible business people to be for the benefit of the class concerned. The Court should not embark into detailed analysis and substitute its judgment on affairs of business for the judgment of the business people concerned. The relevant except of Hayne J's observation is reproduced below: -

> *"... in the end the question that is presented at this stage of the process of a company propounding and implementing a scheme of arrangement is whether the scheme is such that it could reasonably be supposed by sensible business people to be for the benefit of the class concerned. That is, the test in the present case is whether it is reasonable to suppose that sensible business people might consider that the arrangement proposed by the company is of benefit to its members.*
>
> *I do not consider that that question requires, or in the circumstances of this case permits the court to embark upon a nice analysis of whether the chance that is now offered to members to derive some benefit from their shareholding is likely or unlikely to occur. Of course, there may be cases in which the appearance of benefit to members or creditors is properly classified as illusory but I do not consider that that is this case. It has often been said both in the context of schemes of arrangement and elsewhere that the court is not to substitute its judgment on affairs of business for the judgment of the business people concerned. If the members of this company consider that the chance is worth pursuing then they may choose to*

vote for it. If they do not, or for some other reason they consider that the scheme should not be approved, then they will vote against it..."

63. Hayne J's reasoning in the case above was adopted by Nallini Pathmanathan J (as she then was) in the case of ***Transmile Group Bhd & Anor*** (supra) where her Ladyship concluded that the Court should not be required to decide on question of commercial viability and held as follows :-

"This then leaves the sole issue whether the scheme creditors would benefit more from a winding up of TAS rather than the implementation of the TAS scheme, which MTB maintains is sufficient reason for this court to withhold sanction. This amounts to an assessment of the relative merits of the implementation of the TAS scheme versus the benefits accruing in a winding up. Ultimately it is a question of commercial viability/feasibility. What is being sought is the court's assessment of the feasibility of one option over the other. The court here ought not to embark on a careful analysis and dissection of the relative merits of one scheme as opposed to another (see also Re Reliance National Asia Re Pte Ltd [2007] SGHC 206

64. In light of the above and applying the same, in my considered view, the Scheme Creditors are the best judges of whether the Proposed Scheme of Arrangement is speculative or is to their commercial advantage. I should not discount or disregard the votes of these

scheme creditors nor make any decision contrary to the majority views and substitute it for my own commercial judgment or view.

65. As such, I am of the opinion and firm view that this Court should approve and sanction the proposed scheme of arrangement in accordance with the will and wishes of the requisite majority of the scheme creditors.

Issue in relation to guarantors

66. As highlighted earlier, some of the interveners take issue with the fact that the RO granted on 12th November 2020 also restrains them from proceeding against any guarantors for a period of 90 days. However, as I have set out earlier, there is only one guarantor that is involved and that is the Applicant's holding company namely SGB.

67. In addition, there is no doubt that the majority of the scheme creditors have also as part of the proposed scheme agreed to a moratorium during the scheme period whereby they have undertaken that they will not during the scheme period take any steps whether directly or indirectly to commence or continue any

proceedings against Sentoria Bina (the Applicant) and/or its guarantor namely SGB.

68. I will first deal with the issue raised by the interveners namely the legality or otherwise of the order I made on 12th November 2020 granting the restraining order (RO) in relation to proceedings against the Applicant and/or its guarantors.

69. At the outset, I will state that as at the date of making the RO I was cognisant that such order would also restrain proceedings against guarantors and in this regard, I was also aware that the guarantor referred to was SGB being the holding company. At that point, having perused the background facts and the relationship between the Applicant and SGB, it was beyond peradventure that the Applicant's and SGB's current financial position were indeed very closely intertwined. In fact, as seen earlier, it was the financial difficulties faced by SGB which caused them to make little payment of the amounts they owed the Applicant. Furthermore, there was no dispute that through the proposed scheme, it was the Sentoria Group that would settle the total scheme debt within the scheme period by utilising:

(a) the revenue generated from the construction activities and property development undertaken by the group; and

(b) the proceeds of the divestment plan to sell properties by the Companies in the group which had an indicative market value in excess of RM800 million.

70. With the aforesaid in mind, one must then consider the rationale for granting restraining orders in a scheme of arrangement. This has been succinctly set out in the case of ***Mansion Properties*** (supra) where His Lordship Mohd Zawawi Salleh FCJ speaking for the Federal Court held as follows:

> *"[45] In our view, the purpose of section 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 195).*
>
> *[46] As elaborated by the Singapore High Court recently in Re Im Skaugen Se and other matters [2018] SGHC 259 at [34], in respect of the Singaporean equivalent of section 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 section 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."

71. I fully and gratefully adopt the above as being the purpose and intended effect of a restraining order. Therefore, it can be discerned that the main thrust for granting an RO is to give the proposed scheme of arrangement and the possible approval thereof by its creditors precedence over legal proceedings. In a recent decision by Ong Chee Kwan JC, in the case of ***Top Builders Capital Berhad & 2 Ors v Seng Long Construction & Engineering Sdn Bhd & Another*** in Kuala Lumpur High Court OS No. WA-24NCC-608-12/2020, his Lordship also made the following observations in relation to a restraining order under Section 368 of the CA where he held as follows: -

"[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 restructure 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.

[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."

72. In my considered view, the RO that was sought in relation to the guarantors in this case was not in relation to guarantors who were independent of the Applicant or guarantors who were not involved in the proposed scheme. Quite to the contrary. It was clear to me that SGB were in fact an integral component to the scheme to the extent that I was of the view that the proposed scheme would not be workable without SGB. As a result of this, in my considered view, if the RO was not granted in relation to SGB as a guarantor as prayed for, then, continued proceedings or actions by any of the creditors of the Applicant against SGB as guarantor would have been detrimental or even fatal to the proposed scheme of arrangement as a whole. I had also taken into account at that point that scheme

creditors representing 71.86% of the total scheme debt value who had appointed Dato' Jimmy Chan Kong San as a director vide letters had also therein stated their support for the granting of the RO.

73. The interveners contend that the granting of the RO in relation to the guarantors is ultra-virus Section 368(6)(b) of the CA which provides that a restraining order made under subsection (1) shall not have the effect of restraining further proceedings against a guarantor. Section 368(6)(b) of the CA reads as follows:

> *"(6) An order made by the Court under subsection (1) shall not have the effect of restraining: -*
>
> *…*
>
> *(b) further proceedings in any action or proceeding against any person including the guarantor of the company but does not include the company that had applied for the restraining order."*

74. In my view, the above cannot be read as the Court not being able to grant an order expressly or specifically restraining proceedings against guarantors. The operative words are that such an order "*shall not have the effect of restraining*". In cases cited by the interveners, the ROs there were not granted to guarantors but only the Applicant companies. The guarantors then attempted to rely on

such RO's granted to the applicants to contend that proceedings against them as guarantors ought to also be restrained.

75. In those circumstances, in my view, it is certainly the correct position that in light of Section 368(6)(b) of the CA, such RO in favour of the Applicant did not have the effect of restraining proceedings against guarantors.

76. However, as highlighted, the facts herein are different. Firstly, I find nothing prohibiting the Court from making an order restraining proceedings specifically against guarantors pending the creditors meeting. I will emphasise here that the RO was granted in relation to the guarantors on the particular facts of this case as such guarantor was in fact intrinsic and had an integral role in the scheme. If such guarantors were not so intertwined or integral with the scheme, I would in all likelihood not have granted the same.

77. As such, in my considered view, if an Applicant seeks expressly and specifically for the RO to be applicable to a guarantor/s, and if the Applicant can justify the issuance of the same on the particular facts of their case, I do not see Section 368(6)(b) of the CA as prohibiting the issuing of such RO specifically to extend to guarantors. If the

RO does not specifically extend to guarantors, then Section 386(6)(b) of the CA applies in that the RO in favour of the Applicant cannot have the effect of restraining proceedings against guarantors.

78. As highlighted earlier, in this case, the Applicant had specifically sought for an order that the RO be applicable to guarantors. In light of the peculiar facts herein and the details of the proposed scheme to wit, the fact that SGB was intrinsically intertwined and integral to the scheme, I had granted the RO as prayed so as to also be applicable to SGB as guarantors.

79. The interveners rely on the decision of Wong Kian Kheong JC (as his Lordship then was) in the case of ***Ambank (M) Bhd vs Metal Reclamation (Industries) Sdn Bhd & Ors*** **[2016] 10 CLJ 205**. In that case, there was a pending suit against 5 defendants wherein the 1st defendant was the one who was provided the credit facilities with the remaining 4 defendants being the guarantors. The first and second defendants had applied and obtained a restraining order under the old Section 176(10) pursuant to a restructuring scheme to compromise D1's debts with the Plaintiff. Quite clearly the Court there could not proceed with the suit against D1 and D2 in light of

such RO. However, D3 to D5 decided to jump on the bandwagon and filed an application to stay the suit even against them pending the expiry of the said RO. In those circumstances, in light of Section 176(10) F & G, the Court held that the order obtained in favour of D1 and D2 could not apply to D3 to D5 who were guarantors as that would amount to an indirect application of the RO to D3 to D5. However, of significance is that in that case, the restructuring exercise of D1 and D2 had nothing to do with D3 to D5.

80. In the case at hand, it is clear as daylight that the claims by the scheme creditors against the Applicant are clearly intertwined with their claims against SGB. Of greater significance is of course the fact that the Scheme creditors have now approved the proposed scheme which expressly provides for a moratorium against the guarantors. In my considered view, if the scheme itself provides for a moratorium against guarantors, then surely by extension, the Court should also be able to grant a RO in relation to the same guarantor so as to preserve status quo pending the creditors meeting.

81. Further, in my opinion, this issue is no longer a live issue as firstly, the said RO dated 12th November 2020 has since lapsed. Secondly, any subsequent RO granted will similarly lapse upon my determination of Enclosure 46. In essence therefore, if I dismiss Enclosure 46, the whole issue is academic in that the parties are then free to continue with all proceedings against the Applicant and the guarantor. However, in light of the subsequent approval of the proposed scheme by the creditors, it is clear that the majority are prepared to be restrained from acting against the guarantors as well. The issue then is, can the scheme as approved and if sanctioned apply to SGB as guarantor as well. If this question is answered in the affirmative, then, in my view, it is the scheme that provides such moratorium and no longer any RO by Court.

82. Learned counsel for the Applicant contends and submits that the Applicant may in its proposed scheme enter into a compromise with its creditors in regard to security that had been procured by the Applicant in favour of the scheme creditors, including but not limited to varying the existing security arrangement.

83. In support of the above proposition, reliance is placed on the Singapore Court of Appeal decision in ***Daewoo Singapore Pte Ltd v. CEL Tractors Pte Ltd*** **[2001] 4 SLR 35**, where Yong Pung How CJ delivered the following judgment: -

> *"[8] The first objection raises the question of fairness of the scheme to Daewoo, which, however, was not canvassed before the court below. It was not suggested that the scheme was unfair to Daewoo in any way. True it is that cl 4.3.1 of the scheme requires Daewoo to release the guarantor, Mr Lim, from his liability under the guarantee in respect of CEL Tractors' debts owed to them....*
>
> *[9] The second objection is this. The scheme expressly incorporates provisions requiring the creditors to discharge and release their securities and further to release the guarantors from their liabilities under the guarantees for the debts and liabilities of CEL Tractors. It was argued that a scheme of arrangement under s 210 of the Companies Act could not encompass such provisions on the ground that a scheme under that section bound only the company and the creditors and therefore could only discharge or affect the debts and liabilities of the company and not the liability of a third party, such as a guarantor, for the same debts and liabilities of the company.*
>
> *...*
>
> *[23] On the first question, we can see no reason in principle why a scheme of arrangement or compromise under s. 210 of the Companies Act cannot incorporate such a term. No cases have been cited to us to say that such a term cannot be*

embodied in a scheme. After all, a scheme of arrangement or compromise proposed by a company to be made with its creditors or a class of creditors under s. 210 of the Companies Act is no more than a proposal to vary or modify its obligations in relation to its debts and liabilities owed to its creditors or a class of creditors on certain terms and conditions. In seeking so to vary or modify its obligations, there is nothing to prevent the company from proposing, as part of a wider scheme, inter alia, a term to the effect that, in consideration of what the company has provided under the scheme, the creditors will, upon implementation of the scheme, discharge not only the debts and liabilities of the company but also the liabilities of the guarantors for the same debts and liabilities of the company. Whether such a term is agreeable to its creditors is a different matter; it all depends on the circumstances of the case and what the company has to offer under the scheme as a quid pro quo for the discharge of these liabilities.

[24] It is trite law that, where a scheme of arrangement or compromise (containing such a term) is approved by all the creditors of the company, it is binding on the company as well as its creditors. In such a case, there is no need on the part of the company to invoke s. 210 of the Companies Act. The scheme is wholly a contractual scheme. Where, as is usually the case, it is not practical or practicable to secure the unanimous agreement of all the creditors, s. 210 is invoked. And when s. 210 is invoked, and the scheme is approved by the requisite majority of the creditors and the court, the scheme becomes binding on all the creditors or the class of creditors (as the case may be). That is provided in s. 210(3) of the Act. The binding effect of the scheme is given by the court order approving the scheme. As Street J said in Re Norfolk Island and Byron Bay Whaling Co (1969) 90 WN (Pt

1) (NSW) 351 at 354 with reference to s. 181 of the Companies Act 1961 of the State of New South Wales (which is the equivalent of our s. 210), the section is intended to provide a machinery (1) for overcoming the impossibility or impracticability of obtaining the individual consent of every member of the class intended to be bound thereby, and (2) for preventing, in appropriate circumstances, a minority of class members frustrating a beneficial scheme.

[25] We now turn to another aspect of a scheme of arrangement or compromise under s. 210 of the Companies Act. It is permissible in law to incorporate in a scheme an involvement or participation by an outsider, that is, a party not a party to the scheme. Indeed, quite often, a scheme does provide for such involvement or participation by an outsider. Quite often, a scheme as devised provides for a 'buy out' or an injection of cash by an outsider and it has been held that such a scheme falls within the purview of that section. In Re A and C Constructions [1970] SASR 565, the Supreme Court of South Australia held that the court would not refuse to approve a scheme under s. 181 of the Companies Act 1962-1968 (which was the equivalent of our s. 210) merely because (1) the scheme provided for an outsider to purchase the company structure in order to obtain a tax benefit, and (2) that a person other than the company, its members and creditors was a party to the scheme. Bray CJ said at p 568:

An order of the court under s. 181(2) is necessary so that a dissentient, non-voting or absentee minority of creditors or members may be bound by the scheme. Otherwise everything could be done contractually. The order of the court in the terms of the sub-section is made binding only on the creditors or members, or particular class of creditors or members, and on the company, or, if the company is being wound up, also

on its liquidator and contributories. It is, however, in my view, a fallacy to assume that therefore no other person can be a party to the scheme. In my view, so long as the scheme can properly be described as a compromise or arrangement between a company and its members or creditors or any class of them within the meaning of s. 181(1), it is immaterial that other persons are parties to it, but its binding force on such other parties will derive from the scheme as a contract, or from some other contract, and not from the order of the court.

A similar pronouncement was made by another member of the court, Wells J who said at p. 574:

A scheme that includes provisions that may without doubt be said to constitute a compromise or arrangement of the kind described by s. 181 does not cease to fall within the jurisdiction conferred upon the court by that section by reason only of the inclusion within the scheme of an outsider - a person not the company, a member or a creditor - but the extent to which the stranger will be bound by the scheme will depend on the inherent contractual validity of the scheme with respect to the stranger, and not upon any order of the court under s. 181 signifying its approval of the scheme.

[27] The scheme before us involves also third parties but in a passive way. Under cl 4.3 of the scheme, the creditors of CEL Tractors are required, upon CEL Tractors performing their obligations under the scheme, to release the guarantors from the obligations to pay the debts and liabilities of the company under the respective guarantees. In our judgment, there is no reason why the scheme may not contain such a provision."

84. The principles enunciated above in ***Daewoo Singapore Pte Ltd*** (supra) have been adopted and succinctly summarised by Wong Kian Kheong JC (as he then was) in the High Court case of ***Re Khondker Yarad Ahmed; Ex P Midf Amanah Ventures Sdn Bhd*** **[2016] 3 CLJ 637** where His Lordship similarly echoed that it is permissible for a Scheme of Arrangement to provide for a third-party arrangement involving the company's guarantor who is not a party to the Scheme of Arrangement. The summary of His Lordship's judgment in regards the principles in ***Daewoo Singapore Pte Ltd*** (supra) is as follows :-

> *"My understanding of Daewoo Singapore Pte Ltd is as follows:*
>
> *(a) if a scheme of compromise or arrangement is proposed between a company and its shareholders and/or specified creditors (scheme), the scheme may include extinguishment or settlement of debts owed by third parties to the company's creditors (third party arrangement);*
>
> *…*
>
> *(c) if a third party arrangement is expressly provided in the scheme:*
>
> *(i) the third party arrangement may be enforced as a "statutory contract" between the company and the relevant creditor if the following conditions are fulfilled:*
>
> *(1) the scheme is approved by the company's creditors and HC (approved scheme); and*

(2) the company fulfils all the terms and conditions of the approved scheme; and

(ii) the third party arrangement may be enforced as a binding statutory contract between the company and creditor in question. It is immaterial that the creditor in question has voted unsuccessfully against the scheme which has express provided for the third party arrangement."

85. Another case which had opportunity to consider the above issue was ***Ipmuda Berhad v Bujang Buyong @ Jislen Bagong & Ors*** **[2010] 18 MLRH 273**. In that case, D1 to D3 as directors had agreed to be guarantors to a supply of goods contract between the Plaintiff and one Cygal Sdn Bhd. The creditors of Cygal and three of Cygal's companies deliberated on a proposed scheme of arrangement where Cygal proposed to repay scheme liabilities/ creditors through issuance of ICULS. The plaintiff as one of Cygal's creditors voted against the scheme but such scheme was approved by the majority of creditors with the same being subsequently sanctioned by Court. The scheme expressly provided that all claims by the scheme creditors shall be deemed to have been fully and irrevocably satisfied and discharged and the scheme creditors shall fully discharge and free Cygal and all relevant parties from all claims etc. The scheme was then carried out and the plaintiff received a

payment in the form of ICULS in Cygal but the plaintiff then claimed the shortfall of its debt and such payment. The issue that arose was whether the plaintiff was entitled to enforce its guarantee despite the scheme as sanctioned.

86. Mary Lim J (as her Ladyship then was) in placing reliance on the decision of ***Daewoo Singapore Pte Ltd*** (supra) and in dismissing the Plaintiff's claim against the guarantors held as follows:

> *"13. However, in no way does this mean that any action or proceeding that has been brought cannot be disputed or challenged. In my view, clause 7 of the guarantee does not imply that there can never be discharge of the guarantors from liability. Neither does section 176(10F) mean that the parties cannot agree to discharge the guarantors with the drawing up of a scheme management, particularly one which is endorsed by the Court. There is nothing in law which prohibits a creditor from agreeing with the principal debtor discharge a guarantee provided such an agreement to discharge expressed with some measure of certainty - Daewoo Singapore Pte Ltd v. CEL Tractors Pte Ltd [2001] 4 SLR 35 In my judgment, the operation of clause 7 can be displaced with words which clearly express the intention of the parties to over-ride this operation.*
>
> *14. Having examined these relevant provisions and having regard to the circumstances, once the two conditions in paragraph (c) are fulfilled, "all claims by the Scheme Creditors shall be deemed to be have been fully and irrevocably satisfied and*

discharged" and the Scheme Creditors will fully discharge and free Cygal and all relevant parties from all actions, proceedings, claims, demands guarantees whatsoever which the Scheme Creditors have or may have for or in respect of the Scheme Liabilities ."

15. *It is not in dispute that the scheme of arrangement has been sanctioned and completed. To my mind, it cannot be disputed that the Defendants who are guarantors are within the understanding of the term "relevant parties " mentioned paragraph 2(c) as that paragraph further describes the type of matters such "relevant parties " may be discharged from, and these matter include "guarantees ". With the fulfilment of the two pre-conditions, the language in paragraph 2(c) is clear in its intention that the guarantors such as the Defendants will be discharged since the claims of the Plaintiff as one of the Scheme Creditors "shall be deemed to have been fully and irrevocably satisfied ". In my view, the language in paragraph (c) is clear and unambiguous in its. Effect must therefore be given to that clear intention of the parties to in this case, over-ride clause 7 of the guarantee. After all, it is the parties themselves who exercised commercial judgment when deciding and voting on the scheme. This court cannot substitute its judgment on that. The reading, interpretation and application of the guarantee and the scheme must be appreciated in its right chronological evolution as has been done here.*

16. *A further fact that weighs in my mind is the presence of the merchant bankers and lawyers who provided the necessary advice all the way through on the operation and impact of the scheme of arrangement. Further, the directors who were the guarantors and the Plaintiff were also present at the material time of the proposal and the creditors' meeting. This indicates*

> *the awareness of the parties as to status of persons other than Cygal, and their respective peculiar rights and obligations, whether under the principal contracts or the guarantee. It would have been quite reasonable to expressly reserve the right to sue upon the guarantee even with sanction and completion of the scheme, if that contrary was the intended position. Instead, the use of the term "guarantee" was expressly incorporated in paragraph (c). This clearly indicates the intention of the parties to include the discharge of the guarantors from any guarantee."*

87. Another decision that I can place reliance on is the decision of Abdul Malik Ishak J in the often-quoted case of ***Intrakota Komposit*** (supra). In that case, one of the complaints of the intervener was that the proposal to discharge existing guarantees was ultra vires Section 176. In holding that such complaint had no basis, his Lordship relied on the decision of ***Daewoo*** and concluded that there is nothing wrong with the creditor and the principal debtor agreeing to release a guarantor. His Lordship further held that a scheme once sanctioned is binding on the parties as if a contract had been entered between the company and all scheme creditors. It was further concluded that the terms of a sanctioned scheme is binding on the dissenting creditors and that furthermore, the release of any third-party guarantee is well within the scope and ambit of Section 176.

88. Applying the above, in my view, it follows therefore that the Proposed Scheme of Arrangement can incorporate a term that changes the security arrangement with SGB as guarantor.

89. After all, the Proposed Scheme of Arrangement is no more than a proposal of the Applicant to vary or modify its obligations in regard to its debts and liabilities owed to its Scheme Creditors on certain terms and conditions.

90. In seeking to vary its obligations, the Applicant is not prevented from proposing a term to the effect that, in consideration of what the Applicant has provided under the Proposed Scheme of Arrangement, the Scheme Creditors shall, upon implementation of the Proposed Scheme of Arrangement, discharge/vary not only the debts and liabilities of the Applicant but also the liabilities of its guarantors for the same debts and liabilities of the Applicant.

91. As such, I see no impediment to / or issue of the scheme varying the security arrangement. I have also considered that the said guarantor is the holding company Sentoria Group Bhd which is intrinsically linked in the scheme itself as it will be one of the sources of funds to settle the debts in due course. It would thus make no

sense to the proposed scheme if parties were not prevented from commencing proceedings against them as guarantors.

92. It has not escaped my attention that some of the interveners have highlighted the fact that only approximately 4-5% of the debt value scheme creditors have got guarantees from SGB. They therefore contend that a majority of the creditors do not have any interest at all *vis a vis* the guarantors and that their vote should thus not bind them. In this regard, quite apart from this not being raised in the affidavits, looking at the support obtained at the meeting, it cannot be discounted that some creditors with a corporate guarantee may have supported the scheme. In any event, I find no merit in such contention as in my view, for the scheme to succeed, it is quite critical for SGB's operations to continue viably and without hindrance of legal proceedings and as such, the majority also have an interest to vote in favour of such moratorium against the guarantors.

93. Additionally, with every intent of pursuing their claims against the Applicant and or SGB, some of the interveners have in the alternative prayed for an order that they be allowed to continue with the current proceedings against the Applicant and /or SGB and its

enforcement thereafter save by way of winding up. The crux of the submission by such creditors is that their debt is very minimal when compared to the scheme as a whole and they shouldn't have to wait 6 years to recover the debt especially when they themselves need the funds for their own operations. However, as much as I may sympathise with their situation, I must always have at the forefront of my mind the bigger picture and that is the ultimate purpose and intent of a scheme of arrangement which is to seek to revive a financially distressed company as a going concern.

94. I would also echo the sentiments of his Lordship Ong Chee Kwan JC in the case of ***Top Builders*** (supra) where his Lordship was of the view that there is certainly an underlying feature of a scheme that the greater good and the will of many will outweigh the interest of a few.

95. In my considered view, the claims by the interveners are purely monetary and I cannot ascertain any exceptional circumstances that would warrant me granting leave to them to continue with their ongoing proceedings. In my opinion, to allow them to do so i.e. to allow some of the creditors to be carved out of the scheme and to proceed with legal proceedings would cut right across the very intent

of the proposed scheme which is for the Company engaging its creditors seeking to persuade them to accept a proposed scheme of arrangement whereby it is normally imperative that it is not vulnerable to legal proceedings so as to enable the scheme to be truly effective and beneficial to all. In those circumstances, either an RO or the terms of the scheme itself will seek to preserve assets so as to allow the Company to focus its efforts and resources to rehabilitate.

96. Similarly, granting any application to allow claims to proceed against SGB would not only be going against the will of the majority but would also in my view, effectively be creating two classes of creditors with the ultimate effect of those creditors having a corporate guarantee having an unfair advantage or preference over those creditors who do not.

97. On the issues of improper conduct of the meeting, the first intervener has raised some allegations. No other creditors have raised any issue on the conduct of the meeting. These issues are in my view quite trivial such as creditors could only type 800 characters per question and that questions and answers were done individually and not displayed for all creditors to see or that there was insufficient

time. However, bearing in mind that this was uniquely a meeting held virtually, and with some lawyers attending as proxies for the creditors (as submitted by counsel for the interveners) and after perusing the minutes of such meeting as well as the affidavits on this issue, I see no merit in the complaints. In my view, all creditors were fully aware of the details and effect of the proposed scheme and the consequences if the same were approved.

98. Finally, with regards the 2nd and 4th interveners request that their debt amounts be increased to reflect late payment interest as well as costs of their litigation, the Applicant has conceded and agreed to amending the amounts due to them to include the interest payments but not their claim for legal costs as the claims had not been dealt with finality by the Sessions Court. I find this to be a fair alteration to be made which the Court is fully entitled to do under Section 366(4) and as such, I would increase the amount due to Yung Kong Company Berhad from RM301,008.00 to RM310,740.59. In relation to the debt due to Yung Kong Metalworks Company Sdn Bhd, I would order the debt amount to be increased from the sum of RM158,578.65 to RM185,509.20. These increased sums are to reflect such late payment interest.

99. As such, the total debt to the scheme creditors under the scheme shall be amended to the sum of RM111,116,556.93.

Conclusion

100. Having considered the facts and circumstances of this case as set out, discussed and analysed hereinabove, I would make the following conclusions: -

i. That the majority of the scheme creditors have come to a commercial decision that adopting the proposed scheme is a more viable option then winding up;

ii. That the proposed scheme is such that an intelligent and honest man might reasonably approve; and

iii. That the majority have acted bona fide and that the proposed scheme is a fair one which is for the benefit of the creditors as a whole.

101. In the upshot, I make the following orders: -

1. that the scheme of arrangement as set out in the Explanatory Statement (as modified and altered) as per Annexure A be sanctioned and approved by this Court so as to be binding upon the Applicant and all of the Scheme Creditors as therein defined;

2. that an office copy of this Order be lodged with the Companies Commission of Malaysia within 7 days from the date of this Order and that this Order shall take effect on and from the date of such lodgement;

3. that the Applicant shall annex to its Constitution a copy of this Order for a period of two (2) years;

4. that the Applicant be granted liberty to apply to the Court;

102. All the prayers sought by the interveners save for those allowed previously are hereby dismissed with no order as to costs.

103. As for costs, in my view, the fair order to be made is that each party is to bear its own costs on all the various applications.

Date: 9th July 2021

Anand Ponnudurai
Judicial Commissioner
High Court NCC1
Kuala Lumpur

Counsel:

Dato DP Naban together with Gopi Seshadari, Chong Hau Yean and Alya Izzati (*Messrs Gopi Seshadari*) for the Applicant.

Chris YH Tan together with Lee Shih En (*Messrs J M Chong Vincent Chee & Co*) for the 1st intervener.

Cecilia Tan Shee Shia together with Soon Zhen Hui (*Messrs Soh Hayati & Co*) for 2nd and 4th intervener.

Helmi Bin Hamzah together with Alif Ridhwan Bin Mohd Yusof (*Messrs Hisham, Sobri & Kadir*) for 3rd intervener.

Legislation:

Section 366 Companies Act 2016

Section 366(4) Companies Act 2016

Section 368(1) Companies Act 2016

Section 368(2)(d) Companies Act 2016

Section 368(6)(b) Companies Act 2016

Section 369(1) Companies Act 2016

Cases:

Intrakota Komposit Sdn Bhd v Sogelease Advance (M) Sdn Bhd [2004] 8 CLJ 276

Sea Assets v. Perusahaan Perseroan (Pereso) [2001] EWCA Civ 1696

Transmile Group Bhd & Anor v. Malaysian Trustee Bhd & Ors [2012] 9 CLJ 1071

Re Hawk Insurance Co Ltd [2002] BCC 300

Mansion Properties Sdn Bhd v Sham Chin Yen & Ors [2020] MLJU 1969

UDL Argos Engineering & Heavy Industries Co Ltd v. Li Oi Lin [2002] 1 HKC 172

Re Sateras Resources (Malaysia) Bhd [2005] 6 CLJ 194

Re Axa Asia Pacific Holdings Ltd [2011] VSC 4

Re BRL Hardy Ltd (2003) 45 ACSR 397

Re Sonodyne International Ltd [1994] 15 ACSR 494

Ambank (M) Bhd vs Metal Reclamation (Industries) Sdn Bhd & Ors [2016] 10 CLJ 205

Daewoo Singapore Pte Ltd v. CEL Tractors Pte Ltd [2001] 4 SLR 35

Re Khondker Yarad Ahmed; Ex P Midf Amanah Ventures Sdn Bhd [2016] 3 CLJ 637

Ipmuda Berhad v Bujang Buyong @ Jislen Bagong & Ors [2010] 18 MLRH 273