Re: Attilan Group Ltd

[2017] SGHC 283

High Court — Originating Summons No 783 of 2017
Aedit Abdullah J
17 July 2017, 14 August 2017; 11 September 2017

Companies — Schemes of arrangement — Related creditors

Insolvency Law — Rescue financing — Super priority

8 November 2017 Judgment reserved.

Aedit Abdullah J:

Introduction

1 This case concerns an application by a company for, among other things, the court's leave to convene a meeting of creditors to consider a proposed scheme of arrangement under s 210(1) of the Companies Act (Cap 50, 2006 Rev Ed) ("CA") ("s 210(1)"), as well as super priority to be granted in respect of rescue financing sought to be obtained by the company under the recently introduced s 211E of the CA ("s 211E").

Background

2 The company, Attilan Group Limited ("the Applicant"), is a locally incorporated company that is listed on the main board of the Singapore

Exchange.[1] It is the holding company of a group of companies active in the media and education business ("the Group").[2]

3 At the end of 2016, the Applicant issued two circulars to its shareholders. The first circular sought approval for a proposed diversification of the Group business to include early childhood education.[3] The second circular concerned the proposed issue of 1.0% unsecured equity-linked redeemable structured convertible notes due in 2018 for a total of up to S$50,000,000 to an intended subscriber, Advance Opportunities Fund 1 ("the Subscriber"), under a subscription agreement ("the Subscription Agreement").[4] The Subscription Agreement provides that the Subscriber subscribes for convertible loan notes which may be converted into the Applicant's shares and that the subscription is over several tranches and sub-tranches. On 5 January 2017, the Applicant's shareholders approved the resolutions under both these circulars.[5]

4 Phillip Asia Pacific Opportunity Fund Ltd ("Phillip Asia"), a locally incorporated company, is a creditor of the Applicant. Phillip Asia is a creditor because the Applicant, through its subsidiary, provided a guarantee dated 24 April 2014 to Phillip Asia for the benefit of Turf Group Holdings Limited, a company which was previously part of the Group.[6] On the basis of this

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1 Lim Chih Li @ Lin ZhiLi's 1st Affidavit filed on 7 July 2017 at para 4.

2 Lim Chih Li @ Lin ZhiLi's 1st Affidavit filed on 7 July 2017 at para 7.

3 Lim Chih Li @ Lin ZhiLi's 1st Affidavit filed on 7 July 2017 at Exhibit LCL-3.

4 Lim Chih Li @ Lin ZhiLi's 1st Affidavit filed on 7 July 2017 at Exhibit LCL-4; Shu Kwan Chyuan's 1st Affidavit filed on 10 July 2017 at Exhibit SCK-1.

5 Lim Chih Li @ Lin ZhiLi's 1st Affidavit filed on 7 July 2017 at para 11.

6 Lim Chih Li @ Lin ZhiLi's 1st Affidavit filed on 7 July 2017 at Exhibit LCL-14; Lim Chih Li @ Lin ZhiLi's 3rd Affidavit filed on 4 August 2017 at paras 7–8.

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guarantee, Phillip Asia issued a letter of demand against the Applicant on 16 January 2017, and thereafter instituted a suit in the High Court, *vide*, Suit No 223 of 2017 ("the Suit"), against the Applicant on 13 March 2017.[7]

5 Since the issuance of the letter of demand by Phillip Asia, the Applicant has incurred various liabilities. These include contingent debts arising from put options given by the Applicant to investors ("the Put Option Holders"), who had in turn invested in 2013 to 2014 into a fund ("the Fund") that was managed by the Applicant's subsidiary, Tap Private Equity Pte Ltd. According to the Applicant, the put options were effectively guarantees by the Applicant to the Put Option Holders that they would be repaid their principal amounts invested.[8] Further, a guarantee was given by the Applicant to Tremendous Asia Management Inc ("TAMI") in respect of several advances disbursed by TAMI to various members of the Group, in consideration of TAMI deferring legal proceedings on these outstanding advances.[9] The nature and extent of these liabilities are disputed by Phillip Asia.

6 In the meantime, as a result of the Suit by Phillip Asia, the Subscriber has refused to subscribe further under the Subscription Agreement.[10]

7 In light of its financial difficulties, the Applicant sought a scheme of arrangement ("the Scheme") to restructure, turnaround its financial affairs and to remain as a going concern. The salient features of the Scheme involve the

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7 Lim Chih Li @ Lin ZhiLi's 1st Affidavit filed on 7 July 2017 at para 12.

8 Lim Chih Li @ Lin ZhiLi's 1st Affidavit filed on 7 July 2017 at para 13.

9 Lim Chih Li @ Lin ZhiLi's 1st Affidavit filed on 7 July 2017 at Exhibit LCL-5.

10 Lim Chih Li @ Lin ZhiLi's 1st Affidavit filed on 7 July 2017 at para 17.

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issuance of new shares of the Applicant, an expansion and diversification of the Group's business funded by a subscription of further convertible equity-linked notes under the Subscription Agreement, and a moratorium on court proceedings against the Applicant.[11] In connection with the Scheme, the Applicant sought leave to convene a meeting of its creditors under s 210(1). The Applicant also sought for subsequent sums disbursed by the Subscriber under a subscription agreement to be treated as "rescue financing" and be given super priority in the event of the Applicant's winding up.[12]

8 At the hearing before me on 14 August 2017, Phillip Asia was represented by Rajah and Tann Singapore LLP ("R&T") and objected to the Applicant's application for both the calling of the creditors' meeting as well as super priority. Six individual unsecured creditors of the Applicant, who were all Put Option Holders, also appeared, similarly represented by R&T. While these individual creditors belatedly indicated that they did not consent to the proposed Scheme, they did not expressly oppose the Scheme.[13]

9 While the matter was adjourned for deliberation, the Court of Appeal issued its judgment in *SK Engineering & Construction Co Ltd v Conchubar Aromatic Ltd and another appeal* [2017] SGCA 51 ("*Conchubar*"). Accordingly, I invited all interested parties to make brief submissions on the impact, if any, of that decision on the present proceedings. By agreement, the Applicant and Phillip Asia filed and exchanged further submissions on 11 September 2017.[14]

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11 Lim Chih Li @ Lin ZhiLi's 1st Affidavit filed on 7 July 2017 at para 19.

12 Lim Chih Li @ Lin ZhiLi's 1st Affidavit filed on 7 July 2017 at para 18.

13 NE 14/08/17 at p 1.

14 See Letter from R&T to Court dated 4 September 2017.

The Applicant's case

10 In its application, the Applicant primarily seeks: (a) leave of court under s 210(1) to call a meeting of creditors to consider the proposed Scheme, and (b) for further financing provided by the Subscriber to be considered "rescue financing" and be given super priority under s 211E in the event of the Applicant's winding up. In its written and oral submissions, the Applicant relies primarily on the matters deposed in the various affidavits filed on its behalf.

11 In relation to the amounts owed to TAMI by the Applicant, the Applicant maintains that TAMI is owed S$2,355,394 from the Applicant.[15] TAMI is a contingent creditor of the Applicant as the Applicant had given TAMI a guarantee in respect of advances disbursed by TAMI to various members of the Group (see [5] above). Even though TAMI is also concurrently a debtor to the Applicant because TAMI had provided a counter indemnity dated 1 January 2015,[16] no equitable set-off is possible between the two debts since the transactions are not related or connected with each other: *Pacific Rim Investments Pte Ltd v Lam Seng Tiong and another* [1995] 2 SLR(R) 643.[17]

12 As for whether the Put Option Holders and TAMI should be placed in the same class of creditors as Phillip Asia, the Applicant cites *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd and another appeal* [2012] 2 SLR 213 ("*TT International*") for the proposition that the court should apply the dissimilarity principle to determine the proper classification of its creditors. Applying that principle, the

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15 Applicant's Skeletal Submissions at para 14.

16 Lim Chih Li @ Lin ZhiLi's 1st Affidavit filed on 7 July 2017 at Exhibit LCL-15.

17 Applicant's Skeletal Submissions at paras 15–17.

court considers the most likely scenario aside from the approval of the scheme. If the positions of two groups of creditors under the proposed scheme as compared to under the most likely scenario differ to dissimilar extents, these two groups of creditors would have to be placed in different voting classes. Here, the most likely scenario in the event that the Scheme is not approved would be liquidation. Comparing the situation under the proposed Scheme to the situation in which the Applicant is liquidated, the Put Option Holders, TAMI and Phillip Asia are all favoured or prejudiced to similar extents as each other given that they are all beneficiaries of some form of guarantee given by the Applicant. Thus, they should not be classed separately.[18]

13 In terms of creditor support, the Applicant contends that the Scheme has garnered support from 20 creditors holding total debts with the value of S$28,878,358, representing 76% of the total debts owed to the Scheme creditors.[19]

14 In respect of the relevance of *Conchubar*, the Applicant notes that the Court of Appeal did not find that there was a lack of clarity or uncertainty in the schemes proposed in that case, but only that there was no "meaningful compromise" because of intervening events. In the present case, there is similarly no uncertainty in the proposed Scheme.[20] As for the discounting of related creditors' votes, following *Conchubar*, what mattered is whether there exists any relationship between the creditors and the scheme company. There is no such relationship alleged in the present case. Phillip Asia should be in the

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18 Applicant's Skeletal Submissions at paras 18–22.

19 Applicant's Skeletal Submissions at para 29.

20 Applicant's Further Submissions at paras 1–3.

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same class as the contingent creditors (*ie*, the Put Option Holders and TAMI) because their positions are analogous.[21] In any event, the issue of proper classification of creditors should only be considered at a later stage of the s 210 process.[22]

15 As for super priority, the Applicant submits that the statutory requirements have been met. All creditors have been notified of the application. It has also been shown that the Applicant is in dire need of funds and the loan from the Subscriber is necessary for the Applicant's survival: the definition of "rescue financing" under s 211E(9) of the CA ("s 211E(9)") is thus met. The Applicant further avers that its management team approached several parties, including high net worth individuals and financial institutions, to discuss the possibility of any of them providing loans to the Applicant as working capital and to fund the Applicant's exploration of new investments.[23] However, there was no success. Further, being loss-making, the Applicant finds it difficult to raise funds through bank borrowings and/or the issue of equity. In the circumstances, the terms imposed by the Subscriber are the best possible that could be obtained by the Applicant. The Applicant further cites general weakness and volatility in the stock market, insufficient cash flow, currency fluctuation, soft consumer demand, and competitive environment, to demonstrate its financial difficulties. Notably, the Applicant has also offered Phillip Asia the same terms of super priority in return for future financing, as that offered to the Subscriber.[24]

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21 Applicant's Further Submissions at paras 4–9.

22 Applicant's Further Submissions at paras 10–11.

23 Lim Chih Li @ Lin ZhiLi's 3rd Affidavit filed on 4 August 2017 at paras 16–21.

24 Applicant's Skeletal Submissions at paras 23–27.

Phillip Asia's case

16 Phillip Asia argues against both aspects of the Applicant's application: (a) for leave to convene a creditors' meeting to consider the proposed Scheme, and (b) for subsequent loans disbursed by the Subscriber to be given super priority status in the event of the Applicant's winding up.

17 In respect of the Scheme application, Phillip Asia argues that the Applicant has acted in bad faith by failing to disclose material information concerning the Put Option Holders and TAMI: *Re Punj Lloyd Pte Ltd and another matter* [2015] SGHC 321 ("*Re Punj Lloyd*").[25] The contingent debts owed to the Put Option Holders and TAMI were not included in the Applicant's unaudited financial statement, which was issued recently in May 2017. The inference to be drawn must be that the Applicant included these contingent liabilities in the proposed Scheme in order to inflate the quantum of liabilities and to reduce Phillip Asia's portion to below the 25% threshold and preclude any chances of its successful opposition to the proposed Scheme. The Applicant has also failed to respond to Phillip Asia's request for categories of information and documents in order to clarify the basis for its contingent debts.[26]

18 In relation to the Put Option Holders, the following additional issues arise:[27]

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25 Creditor's Skeletal Submissions at paras 22–23.

26 Creditor's Skeletal Submissions at paras 25–26.

27 Creditor's Skeletal Submissions at paras 28–29.

(a) No written confirmation has been given that the Put Option Holders support the Scheme. All that has been provided is a letter from the Fund manager that the Put Option Holders support the Scheme.

(b) The figure of S$24.5m given as the amount of contingent liabilities is suspect as no grounds have been given for the full amount to be taken to be what is owed; it is only when the net asset value of the Fund is zero that the contingent debt could be ascribed to be S$24.5m. Yet, according to the Applicant, the net asset value of the Fund as at 31 December 2016 amounts to S$32,956,213.

(c) If the rights under the put options are extinguished, there are properly no contingent debts, *ie*, if the rights are not exercised by the Put Option Holders, there is no basis for the alleged contingent debts.

(d) No information has been provided for the agreement between the Fund manager and the Put Option Holders relating to the determination of the contingent debts.

(e) Each put option is conditional on payments being made by the Put Option Holders; no evidence has been given that these contingent creditors have made or intend to make these payments.

19 In relation to TAMI, a guarantee for the value of S$2,355,394 had supposedly been given to it by the Applicant for various advances that TAMI made to the Applicant's subsidiary companies. However, TAMI also owes the Applicant US$6,040,770 under an indemnity agreement. If a set-off is applied, there is no basis for TAMI's contingent debt. To this end, no explanation has been given as to why TAMI is still classified as a contingent creditor on a *gross*

basis without setting off the debt owing from TAMI to the Applicant.[28] No explanation has also been given as to why TAMI is classified in the same class as unsecured creditors with accrued debts.[29] From the evidence adduced, TAMI is also a related creditor because Mr Ng Teck Wah ("Mr Ng"), who is deemed to be a substantial shareholder of the Applicant, appears to be also a director of TAMI.[30]

20 Even if the contingent liabilities are accounted for in good faith, there is no reasonable prospect that the Scheme would be approved by the creditors. If the Put Option Holders do not agree to pay the required sums, there is no contingent liability to speak of. Accordingly, these contingent debts should be disregarded, and the total outstanding liability of the Applicant would be reduced. Moreover, there would be a further reduction if the Applicant's liability to TAMI had been set off against TAMI's debt to the Applicant. Other scenarios would reduce the support level as well, reducing the quantum of support to lesser than 75% in value of the Scheme creditors.[31]

21 With respect to the relevance of *Conchubar*, Phillip Asia argues that the proposed Scheme lacks details. Fundamental information, such as profit and loss projections, and how the new businesses would contribute to the growth of the Group were not disclosed in the business plan. The Scheme was also an unabashed attempt to write down certain claims, and did not explain how the

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28 Creditor's Skeletal Submissions at paras 30–34.

29 Creditor's Skeletal Submissions at para 35.

30 Creditor's Skeletal Submissions at para 35; Creditor's Supplementary Skeletal Submissions (No. 1) at para 9.

31 Creditor's Skeletal Submissions at para 37.

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forecast liquidation scenario was made out and how the proposed Scheme would lead to an outcome better than that under the liquidation scenario.[32]

22 As for the contingent liability, the debts supposedly owed to some of the Put Option Holders should be disregarded because they are not consenting to the Scheme. Quantum of support for the Scheme is thus low once the Put Option Holders are excluded. Even if they are considered, there should be a reasonable discount of 25% in value because the contingent debt would only be triggered when the net asset value of the Fund is zero; there is nothing to show why this is expected to be the case.[33] Further, based on the Court of Appeal's suggestion in *Conchubar* in relation to related creditors, which is to disregard their votes entirely, since TAMI is a related creditor to the Applicant, its vote should therefore be disregarded.[34]

23 In any event, the court is given a wide discretion to consider the appropriate discount on any creditors' votes and how the creditors should be classified.[35] Phillip Asia submits that these issues relating to classification of creditors should be considered at the leave application stage rather than at the sanction stage because costs would otherwise be incurred unnecessarily.[36]

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32 Creditor's Supplementary Skeletal Submissions (No. 1) at para 3.

33 Creditor's Supplementary Skeletal Submissions (No. 1) at paras 4–7 and 10–11.

34 Creditor's Supplementary Skeletal Submissions (No. 1) at paras 8–9.

35 Creditor's Supplementary Skeletal Submissions (No. 1) at para 11.

36 Creditor's Supplementary Skeletal Submissions (No. 1) at paras 12–13.

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24 As for the application for super priority, Phillip Asia argues against it. The Subscriber's offer of finance[37] is said to be dependent on various pre-conditions, and the proposal itself is vague.[38] The Applicant and the Subscriber, having failed to specify which sub-section of s 211E(1) of the CA ("s 211E(1)") is invoked, also fail to identify the nature of the super priority sought.[39]

25 On the assumption that s 211E(1)(*a*) of the CA ("s 211E(1)(*a*)") is relied upon, Phillip Asia argues that it should be shown that there have been reasonable efforts expended by the Applicant to obtain unsecured financing, relying on *In re Johnson Rubber Company, Inc et al* Case No 07-19391 (Bankr, ND Ohio, 2008) ("*In re Johnson*")[40] interpreting § 364(b) of the Bankruptcy Code 11 USC (US) ("Chapter 11"). The Applicant has failed to do so and relies only on bare assertions without any substantiation.[41]

26 Even if the Applicant relies on s 211E(1)(*b*) of the CA ("s 211E(1)(*b*)"), it has to be established, applying *In re Western Pacific Airlines, Inc* 223 BR 567 (Bankr, D Colo, 1997) ("*In re Western Pacific*")[42] interpreting § 364(c) of Chapter 11, that the proposed financing is an exercise of sound and reasonable business judgment, that no alternative financing is otherwise available, that such financing is in the best interest of the estate and its creditors, and that no better offers, bids, or timely proposals are before the court. These, according to Phillip

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37 Lim Chih Li @ Lin ZhiLi's 1st Affidavit filed on 7 July 2017 at LCL-7.

38 Creditor's Skeletal Submissions at paras 4–6.

39 Creditor's Skeletal Submissions at paras 7–8; Minute Sheet dated 14 August 2017 at p 2.

40 Creditor's Bundle of Authorities at Tab C.

41 Creditor's Skeletal Submissions at paras 12–14.

42 Creditor's Bundle of Authorities at Tab D.

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Asia, have not been met on the facts of the present case. There was insufficient evidence of solicitations and follow-ups made by the Applicant to explore financing for the Applicant or any discussions relating to seeking financing on the basis of super priority status being accorded as a carrot. A token letter was issued by the Applicant to Phillip Asia on 3 August 2017, just some 11 days before the hearing of the Applicant's application, in an attempt to show that efforts were made to offer Phillip Asia the same terms for future financing as the Subscriber, but that was not a serious attempt at securing financing.[43]

The decision

27 On the evidence, I conclude that the meeting of the Applicant's creditors should be permitted to be called to consider the proposed Scheme. However, I am of the view that the proposed financing from the Subscriber should not be given super priority.

The analysis

28 In respect of the issue of whether leave to call the Scheme meeting should be granted, I have to determine whether the requirements for the calling of a creditors' meeting under s 210(1) are met. As I indicated in *Re Punj Lloyd*, generally, the court's concern here would be to ensure that the classes of creditors at the proposed meeting are fairly constituted, that there is sufficient disclosure, that the proposed scheme is not doomed to fail, and that there is no abuse of process (at [26]).

29 As for the application for super priority, I have to consider the operation of the recently enacted statutory provisions under s 211E, as well as other

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[43] Creditor's Skeletal Submissions at paras 17–21.

factors that are material to the exercise of the court's discretion in granting super priority status for rescue financing.

Application to convene the creditors' meeting

30 I am satisfied that leave to convene a meeting of the Applicant's creditors for the consideration of the Scheme should be granted.

The law

(1) Four stages under s 210 CA

31 The process under s 210 of the CA for the promulgation of schemes of arrangements may be broken down into four discrete stages. The first stage below was not considered in *TT International* (at [55]) but given the increased number of applications under s 210(10) of the CA, it is useful to note it as a separate stage:

> (a) The first stage, which may or may not be invoked by the applicant, is an application for a moratorium, to protect the company while preparations are being made for a scheme to be proposed. This is governed by s 210(10) of the CA. The requirements for the granting of a moratorium have been considered in a number of decisions such as *Pacific Andes Resources Development Ltd and other matters* [2016] SGHC 210.
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> (b) The second stage is the application for the court's leave to convene a creditors' meeting to consider the scheme, under s 210(1) (hereinafter, "the calling of meeting stage").

(c) The third stage relates to the sending of notices and explanatory statements to the creditors as required under s 211 of the CA and the actual holding of the creditors' meeting.

(d) The fourth stage involves the application for court sanction of the scheme of arrangement under s 210(3AA) of the CA, after approval is obtained from the creditors or members, as the case may be (hereinafter, "the sanction stage").

(2) The calling of meeting stage

32 At the calling of meeting stage, the criteria for the granting of leave have been laid down in various cases, with the main guidance given in *TT International*:

(a) There should be unreserved disclosure of "all material information" (*TT International* at [62]), such that the court can arrive at a properly considered determination of how the scheme creditors' meeting is to be conducted.

(b) The material information will include issues in relation to the fairness of the classification of creditors for voting (see also *Re Punj Lloyd* at [29a] and [31]). The guidance from *TT International* is that proper classification of creditors should be considered at the calling of meeting stage (at [59] and [61]–[62]).

(c) The court will consider if there is "no realistic prospect" of the scheme receiving the requisite approval: *TT International* at [64], citing with approval *Re Ng Huat Foundations Pte Ltd* [2005] SGHC 112 at [9]. Where the opposition is such that the required supermajorities cannot be met, there is no realistic prospect of the scheme receiving the requisite

> approval. Thus, if there is strong opposition expressed, it would be prudent for the applicant to indicate sufficient support to show that the scheme is at least within striking distance of the supermajorities required.

33 However, as emphasised in *TT International*, the court does not consider "the merits and fairness" of the scheme at the calling of meeting stage (at [63]). The court's consideration is limited to matters going to its jurisdiction or power to subsequently sanction the scheme if it proceeds to the sanction stage.

34 The court will also be mindful of anything indicating abuse of process (*Re Punj Lloyd* at [26] and [29(c)]). In particular, the application should not be a sham, or an attempt to game the system to avoid winding up proceedings, or to obtain the benefit of a moratorium under s 210(10) of the CA without any serious *bona fide* attempt at restructuring. In weighing this issue, the court will look to the details of the proposed scheme, the agenda of the proposed scheme meeting, as well as the past conduct of the parties.

35 I pause to note the recent decision of Justice Snowden in the English decision of *Indah Kiat International Finance Company B.V.* [2016] EWHC 246 (Ch). That case was not addressed in the submissions before me; it could be read as stipulating that there be some examination of the scheme's explanatory statement even at the calling of meeting stage. That issue is taken up directly in another case before me, so it may be more suitably addressed on another occasion.

36 As for the scheme proposed, the Court of Appeal in *Conchubar* (at [25(c)] and [101]) reiterated the guidance in *TT International* that the scheme should be one which "a man of business or an intelligent and honest man, being

a member of the class concerned and acting in respect of his interest, would reasonably approve" (at [70(c)]). Any compromise, for instance, should be meaningful rather than something meaningless (see *Conchubar* at [95] and [100]–[101]). These considerations, however, would to my mind only come into play at the sanction stage, and I would not see it as being an issue before the court at the calling of meeting stage.

37 As evident from the above pointers, the standard required for the court's leave to convene a scheme meeting is not a particularly stringent one. So long as a scheme is proposed *bona fide* with sufficient disclosure, in compliance with the CA provisions, there is nothing to indicate the futility of the exercise and the voting classes are fair, the court would generally be inclined to let the matter be determined by a vote of the creditors.

Application on the facts

(1) Disclosure of material information

38 The requirements imposed by the courts for all material information to be given by the applicant at the calling of meeting stage is intended to ensure that there is sufficient material before the courts for an informed decision to be made as to how the creditors' meeting is to be conducted: see *TT International* at [62]. An applicant who fails to do so runs the risk of having the application dismissed. The material information to be disclosed at this stage would be matters that affect the issues of proper classification of creditors and the scheme's realistic prospects of approval or anything indicating an abuse of process (see *Re Punj Lloyd* at [31]). This, however, is not to be confused with the sufficiency of information that must be disclosed under s 211 of the CA, after the leave to convene the creditors' meeting is granted. At this latter stage, more detailed information is required to ensure that the creditors will be able to

"exercise their voting rights meaningfully" (*Conchubar* at [88]). Likewise, the proposed scheme does not need to be wholly clear and certain at the calling of meeting stage as opposed to the sanction stage, though a prudent applicant would presumably aim to win over those voting by being as clear as possible in the details of the scheme from the outset.

39 In the present case, Phillip Asia takes issue with the absence of details and supporting information regarding the Scheme.[44] Whilst the information provided by the Applicant is indeed lacking definitiveness, it could not be said that the Scheme lacks material information insofar as is required at the calling of meeting stage. What the Applicant has outlined is essentially the issuance of further shares to its creditors, the attractiveness of which would presumably be the hope of the improved performance of the Applicant, as well as the classification of its various creditors. This is sufficient information for the court to make a decision as to how the meeting should be called. Some further information may be desirable and helpful, but such lack in itself does not cripple a scheme application at the calling of meeting stage. Phillip Asia's argument might have gained traction at the sanction stage, where there will be additional considerations of whether the Scheme was clear and certain but these are not relevant to the calling of meeting stage.

40 Phillip Asia additionally alleges that there is non-disclosure to the court of information relating to the Put Option Holders and TAMI.[45] The first of these allegations related to the non-disclosure of how these debts were previously reported by the Applicant. These debts were only treated as contingent amounts

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44 Creditor's Supplementary Skeletal Submissions (No. 1) at para 3.

45 Creditor's Skeletal Submissions at para 23.

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when the present application was made and it was not reflected in the Applicant's previous financial statement. The suspicion, Phillip Asia argues, is that such a change in treatment is conjured to give the Applicant the 75% support it needs to have the Scheme passed.[46] This difference in treatment is explained by the Applicant as flowing from the different purposes of the report from the present application.

41 I cannot appreciate that there is such a difference in purpose as the Applicant argues. The different treatment is a matter of concern, and would no doubt be a relevant consideration for the court at the sanction stage. At this point though, the consideration is one that is left to the chairman of the meeting, to determine whether these creditors are indeed creditors, and what value should be accorded to the debts purportedly owed to them (see [46]–[47] below).

42 Nonetheless, the effect of any non-disclosure or late disclosure will need to be considered in the context of the overall circumstances, and more importantly whether these are material information to be considered first before the meeting of creditors is summoned. Where material information is not withheld and there is no clear evidence of an abuse of process, the court would not dismiss the application immediately, but rather, bear in mind these considerations to be given effect to at the sanction stage. There will be, as I indicated in *Re Punj Lloyd* at [26], some situations where an abuse of process is made out at the calling of meeting stage, and the court should dismiss the application in those cases. I do not find that this is the case here, at least at this stage.

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[46] Creditor's Skeletal Submissions at para 25.

43 The treatment of TAMI as well as the value of the debt owed to it by the Applicant, as well as the connection between Mr Ng, the substantial shareholder of the Applicant, and TAMI are also matters for consideration by the chairman of the meeting. These may also incidentally be matters that are material at the sanction stage. What would be significant non-disclosure at this point would be non-disclosure of material information that affects the court's consideration as to whether a meeting should be called under s 210(1), which is absent in the present case.

(2) Assessment of Scheme's realistic prospects of approval

44 Whilst the court would not act in vain in calling for a meeting concerning a scheme which has "no realistic prospect", despite the arguments made by Phillip Asia that the requisite threshold of 75% is not met, I find that the present case is not one where the Scheme is doomed to fail for want of approval. Even though there were additional creditors who indicated that they were not consenting to the Scheme at the hearing before me, they did not *expressly object* to it like Phillip Asia did. Hence, there is still a realistic chance that the requisite 75% threshold may be met. The question of whether any risk is worth taking can still be made by the creditors at the meeting to be called in the exercise of their own interest and judgment. In the absence of any clear opposition, the court cannot do more than that without interfering with a matter that is a commercial judgment.

(3) Fairness of classification

45 With regard to the classification of creditors and whether Phillip Asia should be placed in the same class as TAMI and the Put Option Holders, the inquiry at the calling of meeting stage is only "a preliminary determination" (see *TT International* at [61]):

> … Indeed, without a preliminary determination of the correct classification of creditors, how can it be known whether a scheme is likely to attract sufficient support and subsequently pass muster? Further, if it were certain from the outset that certain opposing creditors would be classified separately so that the scheme would never pass, then it would be a futile exercise to even conduct scheme creditors' meetings…

Based on a preliminary determination, I am not convinced, on an application of the dissimilarity principle, that Phillip Asia should be in a separate class from TAMI and the Put Option Holders because all of their interests are similarly unsecured: see *TT International* at [140]–[143].

46 As regards whether TAMI and the Put Option Holders are creditors of the Applicant, this would have to be decided by the chairman of the meeting, who as noted in *TT International* has to carry out the "quasi-judicial task" of adjudicating disputes to decide whether to admit or reject proofs of debt lodged (at [67]). The concerns raised by the creditors would need to be considered by the chairman. If any dissatisfaction remains, the chairman's decision can be appealed against and may become relevant to the court's granting of approval of the Scheme at the sanction stage, even if the proposal passes muster at the creditors' (or members') meeting: see *TT International* at [103]–[104] and [109].

47 As for the discounting of TAMI's votes to account for related party interests, it would behove those running scheme meetings to be mindful of the guidance given by the Court of Appeal in *TT International* and further commented on more recently in *Conchubar*. But it would be premature for this to operate as a reason to refuse to call the meeting. The court cannot substitute its determination with that of the scheme manager at this time, unless the issue is one which would so clearly result in the scheme's failure that it will be futile to call the meeting (see [45] above). There is nothing to suggest that here. It is

for the Applicant and those running the meeting to consider the guidance laid down in past cases, and how it should apply to the facts before them. Until the meeting is held, the question of a discount does not strictly arise. Further, however obstinate an applicant and its scheme managers may seem, they should be given the opportunity to reconsider the details of the scheme right up to the voting by the creditors. Anything else would, to my mind, interfere too much with the process under s 210 of the CA. Separately, the votes of the Put Option Holders may also need to be discounted in view of the contingent nature of their interests. The degree to which there should be discounting of contingent creditors was considered in *TT International* (at [172]–[174]). Any discounting should properly be done by the chairman at the meeting stage or by the court at the sanction stage rather than presently at the calling of meeting stage. I do not consider it appropriate in general for leave for the calling of a creditors' meeting to be denied simply because of the *possibility* that some of the supporting interests may need to have the proportions discounted unless there is incontrovertible evidence that there will be a significant discount of a supporting contingent creditor such that the requisite threshold of 75% will not be met.

48 For the above reasons, leave is granted under s 210(1) for the calling of a meeting for the creditors to consider the Scheme. Detailed directions, including a long-stop date for any application for sanction of the Scheme by the court, will be given separately.

Super priority application

49 The other application before me is for super priority to be accorded to future financing from the Subscriber to the Applicant. There is no local judicial guidance on this issue given that this is the first case where an application of such nature has been made, following the recent amendments made to the CA.

50 The concept of super priority status for rescue financing is alien to English Companies law-based regimes. As for the US, the super priority provisions introduced in Singapore are not wholly similar to the provisions of Chapter 11. Nonetheless, it was clear that the Singapore amendments were at least inspired by those US provisions (see *Singapore Parliamentary Debates, Official Report* (10 March 2017) vol 94 (Ms Indranee Rajah, Senior Minister of State for Finance)):

> … *The next feature of* ***Chapter 11*** *that is* ***being adapted*** *are* ***rescue financing provisions***. Rescue financing consists of new loans which provides working capital during the restructuring. Without rescue financing, a viable company may be unable to restructure, but lenders may be reluctant to provide additional financing to troubled companies.
>
> To facilitate rescue financing, the Court will be empowered to order that rescue financing be given super-priority. That means priority over all other debts or to be secured by a security interest that has priority over pre-existing security interests, provided the pre-existing interests are adequately protected. *This is* ***consistent with the approach in Chapter 11***.
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> [emphasis added in italics and bold italics]

51 For that reason, despite the differences in statutory language, I was of the view that the US authorities could be helpful in illuminating the appropriate construction of the newly enacted provisions in the CA concerning rescue financing. Ahead of the oral arguments, I thus invited parties to consider whether US authorities were relevant. I must emphasise that the US authorities and doctrine are referred to only as a useful guide as we develop our own law in this area. We may stick close to the US position, or we may depart from it: much will depend on the arguments put before us.

52 The statutory requirements for the grant of super priority are specified in s 211E. That provision permits the court to make any of several orders,

essentially giving priority to rescue financing in the event of the company's winding up, as follows:

(a) as if it were part of the costs and expenses of winding up (sub-section (1)(*a*));

(b) priority over all preferential debts and unsecured debts, if the company could not have obtained the rescue financing unless this priority is given (sub-section 1(*b*));

(c) security on property that is not otherwise subject to any security, or subordinate security on property subject of existing security, if without such security the rescue financing could not be obtained (sub-section 1(*c*)); and

(d) to have the same or higher priority security than an existing security if without such security the rescue financing could not be obtained and there is adequate protection for the interests of the holder of the existing security (sub-section 1(*d*)).

53 For super priority to be granted, (1) the proposed financing must constitute "rescue financing" under s 211E(9); (2) the applicant must meet the condition(s) under one of the limbs specified above in s 211E(1) (note however that there are no conditions stipulated for super priority under s 211E(1)(*a*)); and (3) the court exercises its discretion to grant super priority.

54 On the first issue as to whether the proposed financing from the Subscriber constitutes "rescue financing", Phillip Asia argues that the

Subscriber's offer of finance is subject to pre-conditions and is also vague,[47] presumably implying that these disqualify it from being considered "rescue financing". I find that there is little merit in this argument. There is nothing in the language of s 211E(9) that prohibits a rescue financier from stipulating conditions in the grant of its rescue finance. This is also sound given that the decision as to whether to extend financing and on what terms is ultimately a matter for commercial consideration. Further, from a perusal of the Subscriber's letter to the Applicant dated 6 July 2017,[48] I do not find the Subscriber's proposal to be vague. The Subscriber unequivocally stated that it "shall forbear from terminating the Subscription Agreement and continue in supporting [the Applicant] via continued subscription to the Convertible Notes on the following terms and conditions".[49] In my view, this is clear enough an expression of intent to extend rescue financing to the Applicant.

55 The remaining issues in dispute are accordingly whether the conditions for granting super priority are met and whether the court should exercise its discretion to grant super priority.

56 Without intending to lay down anything that may constrict the flexibility that is often required in restructurings, I am compelled to point out that some thought should be given by applicants to the appropriate type or level of super priority sought, and they should also be prepared to provide the rationale for what they seek. Indeed, as Phillip Asia points out, the Applicant should have specified from the outset which limb of s 211E(1) is being invoked. Without such specification, proceedings will be hampered. Any opposing creditor would

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47 Creditor's Skeletal Submissions at paras 4–6.

48 Lim Chih Li @ Lin ZhiLi's 1st Affidavit filed on 7 July 2017 at LCL-7.

49 Lim Chih Li @ Lin ZhiLi's 1st Affidavit filed on 7 July 2017 at LCL-7.

need to know which specific limb is being relied upon and prepare its arguments accordingly. Be that as it may, in the present proceedings, the Applicant eventually clarified in oral arguments that it is relying on sub-sections (*a*) or (*b*) of s 211E(1), that is priority as part of the expenses of winding up, or priority over all of the preferential and unsecured debts.

57 Turning to the preliminary issue of standard of proof to be met by the Applicant to make out its case for super priority, the CA is silent on the required threshold. In my judgment, the court must be sufficiently satisfied on a balance of probabilities that there is a basis for the matters raised in the affidavit to satisfy the requirements stipulated under the relevant provision in s 211E. It is not necessary to set a high threshold for the evidence. All that is required is that there is a minimum level of satisfaction. For that reason, it should be sufficient that there is credible evidence before the court. Any heavier burden would be too onerous at this stage of the proceedings. There must be something in the affidavit supporting the application which, on the face of it, supports what is being sought. Any contradiction or refutation contained in any response affidavit must be addressed in the reply affidavit or sufficiently neutralised in arguments. If the court retains a doubt on a balance of probabilities as to the applicant's evidence, it is likely that the application for super priority status will fail.

*Section 211E(1)(*a*)*

58 Section 211E(1)(*a*) empowers the court to order, on the winding up of the company, that any rescue financing earlier obtained is to be treated as part of the costs and expenses of the winding up. Philip Asia argues that this is similar to § 364(b) of Chapter 11, and relies on the case of *In re Johnson* for the proposition that "reasonable efforts" must be shown to have been expended in

obtaining "financing on an unsecured basis". According to Phillip Asia, the Applicant here has not shown such reasonable efforts.[50] In response, the Applicant argues that this requirement of reasonable efforts to obtain unsecured financing is not present in s 211E(1)(*a*) and is exclusively the product of the language used in the US legislation.[51] The Applicant however fails to provide any other criteria to guide the exercise of the court's discretion.

59 § 364(b) of Chapter 11 reads as follows:[52]

> The court, after notice and a hearing, may authorize the trustee to obtain unsecured credit or to incur unsecured debt other than under subsection (a) of this section, allowable under section 503(b)(1) of this title as an administrative expense.

This provision governs the conferring of administrative expense status on unsecured credit obtained that is outside the ordinary course of business. The provision does not lay down any express requirements that must be satisfied before the court's power to grant such status can be invoked, giving considerable latitude to judicial discretion. It is in this context that the rule in *In re Johnson* evolved (at pp 4–5).[53] In a similar vein, the local provision is also discretionary: see the words "the Court may" in s 211E(1). Ultimately, the decision to grant super priority status is accordingly in the full discretion of the courts: see also *In re Ames Department Stores, Inc* 115 BR 34 (Bankr, SD New York, 1990) ("*In re Ames*") at 37.[54]

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50 Creditor's Skeletal Submissions at paras 11–13.

51 Minute Sheet dated 14 August 2017 at p 4.

52 Creditor's Bundle of Authorities at Tab B.

53 Creditor's Bundle of Authorities at Tab C.

54 Creditor's Supplementary Bundle of Authorities at Tab 1.

60 As the Applicant points out, I recognise however that there are differences in the language of s 211E(1)(*a*) in Singapore and the corresponding provision § 364(b) of Chapter 11 in the US. For this reason, the rule in *In re Johnson* cannot be directly applied. Instead, the broader point that the applicant should expend reasonable efforts to secure other types of financing (even though this is not a statutory requirement) is a useful yardstick to guide the court's discretion to grant the application for super priority.

61 Unlike s 211E(1)(*b*) (see [68] below), it is not a *condition* for super priority to be granted under s 211E(1)(*a*) that financing would not have been available but for the grant of super priority. Thus, the court does not have to be *satisfied* when adjudicating an application under s 211E(1)(*a*) that the rescue financing would not be obtained but for the grant of super priority. However, to my mind, in most cases, this does not mean that the applicant need not show evidence of reasonable attempts at trying to do so. This view is justified in policy. Giving super priority disrupts the expected order of priority of the various creditors of the company. The grant of super priority should thus not ordinarily be resorted to and the courts would be slow to do so unless it is strictly necessary. Generally, it is only where there is some evidence that the company cannot otherwise get financing that it would be fair and reasonable to reorder the priorities on winding up, giving the rescue financier the ability to get ahead in the queue for assets. For this reason, even for an application under s 211E(1)(*a*), the applicant should adduce some evidence of reasonable attempts at trying to secure financing on a normal basis, *ie*, without any super priority, to move the court to exercise its discretion. To reiterate, this is not, however, a condition for the grant of super priority under s 211E(1)(*a*) but one of the factors to be considered when the court exercises its discretion on whether to grant the super priority. I should also note that this approach is consistent with the aforementioned position in the US.

62 In the present case, I decline to exercise my discretion to grant super priority under s 211E(1)(*a*). From the evidence disclosed, there is insufficient evidence of any efforts, let alone reasonable efforts, being expended by the Applicant to secure financing without any super priority. I substantiate below my reasons for finding as such at [72]–[73]. In the circumstances and in the absence of any other reasons cited by the Applicant that it would be fair and reasonable to grant super priority for the Subscriber's financing, I am not at all convinced that the grant of super priority under s 211E(1)(*a*) is appropriate.

63 For completeness, I should highlight the qualification in *In re Johnson* that there is no need to demonstrate availability of unsecured financing under § 364(b) of Chapter 11 where the "circumstances reasonably dictate that such efforts would be to no avail" (at 5).[55] By analogy, the Applicant could have argued that this is such a case where the circumstances reasonably dictate that alternative sources of financing would be unavailable since the Applicant was facing financial difficulties. Even if this argument was made, the Applicant has not shown that it was in objectively such abysmal financial health that no financial aid could have been reasonably received without any offer of super priority, saving the Applicant from endeavours to reach out to others. In the event, the qualification in *In re Johnson* would not have salvaged the Applicant's case under s 211E(1)(*a*).

64 For these reasons, I find that the Applicant has failed to meet its case for super priority status under s 211E(1)(*a*).

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[55] Creditor's Bundle of Authorities at Tab C.

*Section 211E(1)(*b*)*

65 Turning now to the other limb, s 211E(1)(*b*) provides that the court may order in the winding up of the company that the debt arising from any rescue financing obtained will have priority over all preferential debts specified in the CA and all other unsecured debts, provided that the company would not have been able to secure the rescue financing unless such priority is given. Phillip Asia argues that this power is similar to § 364(c) of Chapter 11, which reads as follows:[56]

> If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt–
>
> (1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title;
>
> (2) secured by a lien on property of the estate that is not otherwise subject to a lien; or
>
> (3) secured by a junior lien on property of the estate that is subject to a lien.

Phillip Asia cites *In re Western Pacific*,[57] a US case interpreting § 364(c) of Chapter 11, in which it was specified that (1) the proposed financing has to be in the exercise of sound and reasonable business judgment; (2) no alternative financing is available on any other basis; (3) such financing is in the best interest of the creditors; and (4) no better offers, bids, or timely proposals are before the court.[58]

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56 Creditor's Bundle of Authorities at Tab B.

57 Creditor's Bundle of Authorities at Tab D.

58 Creditor's Skeletal Submissions at paras 16–17.

66 There have been several other US cases interpreting the same provision. In addition to the factors highlighted above, the following additional factors have been considered as relevant in US case law (see *eg*, *In re Mid-State Raceway, Inc and others* 323 BR 40 (Bankr, ND New York, 2005) ("*In re Mid-State Raceway*") at 60):

> (a) the proposed credit transaction is necessary to preserve the assets of the estate, and is necessary, essential, and appropriate for the continued operation of the debtors' businesses;
>
> (b) the terms of the financing agreement are fair, reasonable, and adequate in light of the circumstances of the debtor and the proposed lender; and
>
> (c) the financing agreement was negotiated in good faith and at arm's length between the debtor, on the one hand, and the agents and the proposed lender, on the other hand.

67 These factors from the US cases are not expressly laid down in § 364(c) of Chapter 11 or for that matter under s 211E(1)(*b*). Nonetheless, to my mind, they are relevant considerations for the court in the exercise of its discretion in adjudicating an application for super priority. Some of these factors will already be considered in Singapore under the statutory definition of "rescue financing": see s 211E(9). In any event, in the present case, most of these factors are not directly relevant because the present application fails for non-satisfaction of the material condition of unavailability of financing without such super priority under s 211E(1)(*b*) (see [69] below). It is therefore prudent for me to leave a closer consideration of these factors to a future case in Singapore where the issue specifically arises.

68 Turning to the present case, the Applicant fails to satisfy the material condition stated in s 211E(1)(*b*). Super priority can only be granted under s 211E(1)(*b*) where the applicant "*would **not** have been able to obtain the rescue financing from any person **unless*** the debt arising from the rescue financing is ***given the priority** mentioned in this paragraph*" [emphasis added in italics and bold italics]. This is a condition for the grant of super priority. The local position is thus similar to the US where super priority can be granted under § 364(c) only where the debtor is "unable to obtain unsecured credit per [§ 364(b) of Chapter 11]": see [65] above and *In re The Crouse Group, Inc* 71 BR 544 (Bankr, ED Pennsylvania, 1987) ("*The Crouse Group*") at 549.[59] As to what it means by being "unable to obtain", the US case law shows that the debtor must demonstrate that he "has *reasonably* attempted, but failed" to seek credit from other available sources [emphasis added] (*In re Ames* at 37).[60] Due to the difference in statutory language, what the reasonable efforts must be in respect of, should logically differ in Singapore but the broader idea remains that the applicant must expend reasonable efforts to source for less disruptive sources of financing, *ie*, financing without the type of super priority sought.

69 In my judgment, in the context of s 211E(1)(*b*), an applicant must demonstrate that *reasonable efforts* have been undertaken to explore other types of financing that did not entail such a priority, *ie*, financing that did not entail priority over all preferential debts specified in the CA and all other unsecured debts. In my judgment, this requirement of reasonable efforts gives sufficient effect to the words "*would not have been able to obtain the rescue financing **from any person unless*** the debt arising from the rescue financing is *given the*

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59 Creditor's Supplementary Bundle of Authorities at Tab 2.

60 Creditor's Supplementary Bundle of Authorities at Tab 1.

priority mentioned in this paragraph" in s 211E(1)(*b*) [emphasis added in italics and bold italics]. It would be next to impossible for the court to determine whether other sources of funds were unavailable to the applicant unless the applicant adduces sufficient evidence that this was the case through evidence, for instance, of failed negotiations and attempts with other potential lenders. In view of the above, an applicant under s 211E(1)(*b*) needs to demonstrate that reasonable efforts were undertaken to secure financing without the type of super priority sought in order to demonstrate that it would not have been able to obtain the rescue financing "from any person" but for the super priority sought.

70 The undertaking of reasonable efforts does not however mean that the debtor must show that he had sought credit from "every possible source": *In re Ames* at p 40.[61] The idea remains that of reasonableness and this is a matter for the court's assessment. The threshold of what constitutes reasonable efforts to demonstrate unavailability of funds can be discerned from several US cases. For instance, *In re Ames*, the court found that the burden was met where the debtors had approached four lending institutions with the capacity to loan the "large sums" needed by the debtors (at 40). In *In re Mid-State Raceway*, the court found that the debtor's efforts, including conducting negotiations and discussions with various financial entities, constituted reasonable efforts (at 59). In stark contrast, in *The Crouse Group*, the court concluded that the burden was not met where the debtor had approached only one lending institution and never attempted to obtain financing from its existing creditors (at 550).[62] Ultimately, the court must make a determination as to how "extensive the debtor's efforts to obtain credit must be" on a case-by-case basis (*In re Reading Tube Industries*

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61 Creditor's Supplementary Bundle of Authorities at Tab 1.

62 Creditor's Supplementary Bundle of Authorities at Tab 2.

72 BR 329 (Bankr, ED Pennsylvania, 1978 at 332). The inquiry is a fact-sensitive one and no bright-line rule can be drawn.

71 On the facts, Phillip Asia argues that the Applicant has adduced insufficient evidence as to the exploration of other opportunities for financing. There was only a purported offer to Phillip Asia itself, which took place 11 days before the hearing of this application. There is accordingly no evidence that the Applicant had made any "serious attempts" at sourcing for other financing.[63] The Applicant contends that what it did was reasonable in the circumstances given the financial difficulties faced by the company.[64]

72 In my judgment, the Applicant has not made out the case for super priority status under s 211E(1)(*b*). I am not convinced that the Applicant undertook reasonable efforts to source for financing without the type of super priority sought. While the Applicant did state on affidavit that the Applicant's management team had approached and discussed with several parties to source for financing,[65] it is not clear whether these discussions were in respect of financing without the super priority terms envisioned under s 211E(1)(*b*). Further, the Applicant avers the terms imposed by the Subscriber were "the best possible that could be obtained by the Applicant".[66] However, this belief is not backed up by any credible evidence. Some evidence should have been deposed to put on record that alternative sources of financing were sought but rejected. The Applicant could have, for instance, produced correspondences relating to

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63 Creditor's Skeletal Submissions at paras 18–21.

64 Minute Sheet dated 14 August 2017 at p 5.

65 Lim Chih Li @ Lin ZhiLi's 3rd Affidavit filed on 4 August 2017 at para 16.

66 Lim Chih Li @ Lin ZhiLi's 3rd Affidavit filed on 4 August 2017 at para 17.

(*cont'd on next page*)

rejection or negotiation with other financial institutions or possible rescuers. This it did not do in the proper form. Mere unsubstantiated assertions cut no ice.

73 The only attempt that was adduced was its offer of super priority to Phillip Asia on 3 August 2017.[67] In my view, this attempt is irrelevant for two reasons. First, this was not an effort by the Applicant to source for financing on a normal basis, *ie*, without the type of super priority sought under s 211E(1)(*b*), since the Applicant extended the same terms of super priority to Phillip Asia as it did to the Subscriber. Even if it was an effort to obtain financing from Phillip Asia without any offer of super priority, there is a graver difficulty with its timing. Whilst the Applicant applied for super priority on 7 July 2017, the offer to Phillip Asia was only made on 3 August 2017. Before the application for super priority was taken out, the Applicant must have already attempted to search for other sources of financing and then come to the conclusion that it is left with little choice but to obtain rescue financing from the Subscriber on a super priority basis. It will make a mockery of the application process if the Applicant is allowed to adduce evidence of subsequent attempts to source for alternative financing after an application for super priority has already been made.

74 The Applicant cannot avoid the obligation to search for other sources of financing by merely asserting that such attempts would be futile due to its weak financial position and have the court believe that it was unable to obtain financing on other bases – even if such a belief is genuinely held, to satisfy the condition for the grant of super priority under s 211E(1)(*b*), the least the Applicant must do to convince the court that this condition is met is to adduce

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67 Lim Chih Li @ Lin ZhiLi's 3rd Affidavit filed on 4 August 2017 at LCL-24.

evidence that the Applicant expended reasonable efforts to source for less disruptive sources of financing. This is necessary because otherwise the court would have to play the role of a lender or investor and determine whether a reasonable lender or investor would have extended funds to the Applicant without such super priority.

75 The burden falls on the Applicant to make out the basis for the super priority status that it sought. For the above reasons, it has failed to do so and I accordingly dismiss its application in this regard.

Funds extended pursuant to a prior agreement

76 A tangential issue in the present case is whether "rescue financing" can be in the form of a proposed financing by an existing creditor with a present obligation to provide such financing. Such a creditor may take the position that its obligation to extend funds to the company no longer persists and is discharged because of a default of the company. It is, however, prepared to extend a further loan, or perhaps more accurately, ignore the default if it is given super priority in respect of the subsequent disbursed loans. It is not argued by Phillip Asia that the proposed financing from the Subscriber did not qualify as "rescue financing" because it arose from a prior obligation or agreement. However, as I had concerns about the propriety of such arrangements, I consider it briefly in this judgment.

77 In principle, in order to come within the scope of "rescue financing" under s 211E(9), it is not necessary for the proposed financing to be entirely new; it can be additional financing from an existing creditor or it can even be premised on a prior obligation. What matters is whether that obligation persists: if the existing creditor is already bound to inject funds, then the provision of funds pursuant to that pre-existing obligation is not financing that should be

accorded the protection and priority under s 211E. If, however, the injection of funds is at the option of the creditor, and its exercise of that option can be made contingent on its obtaining super priority status for these injected funds, then there is to my mind no reason why these funds could not, in appropriate cases, be conferred super priority under s 211E. This is consistent with the rationale expressed in Parliament that the laws on super priority are aimed at encouraging creditors to provide "additional financing" for troubled companies (see *Singapore Parliamentary Debates, Official Report* (10 March 2017) vol 94 (Ms Indranee Rajah, Senior Minister of State for Finance)):

> Rescue financing consists of *new loans* which provides working capital during the restructuring. Without rescue financing, a viable company may be unable to restructure, but lenders may be reluctant to provide *additional financing* to troubled companies.
>
> [emphasis added]

78 On the facts, the Applicant argues that the Subscriber is entitled to regard its obligations under the Subscription Agreement as terminated because of the Applicant's failure to meet the condition precedent in the Subscription Agreement that there are no legal actions or proceedings against the Applicant. This failure excuses the Subscriber from dispensing further tranches of funds. This is also the position taken by the Subscriber in its letter dated 6 July 2017, addressed to the Applicant, where it notes that "an event of default has arisen", thereby "giving us the right to terminate the Subscription Agreement forthwith by giving notice in writing to [the Applicant]".[68] I accept that it appears, from a perusal of the Subscription Agreement, that the Subscriber is not obliged to make further payments into the Applicant as a result of either the Applicant's initiation of a scheme of arrangement (see cl 9.1(h) of the Subscription

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[68] Lim Chih Li @ Lin ZhiLi's 1st Affidavit filed on 7 July 2017 at LCL-7.

Agreement read with condition 12(k) of the Terms and Conditions of the Notes annexed to the Subscription Agreement) or the Suit brought by Phillip Asia against the Applicant (see cl 9.1(a) of the Subscription Agreement read with cl 8 of Schedule 2 to the Subscription Agreement).[69]

79 In the circumstances, any future extension of funds to the Applicant arising from the Subscriber's continuation of the Subscription Agreement would be additional funding for the Applicant. Accordingly, notwithstanding the fact that the Subscriber is extending funds to the Applicant based on a prior agreement, this funding from the Subscriber constitutes "rescue financing" within the meaning of s 211E(9).

Indulgence to file supplementary affidavits

80 I close with an observation. On occasion, the courts have in restructuring applications allowed parties to file supplementary affidavits to make out their respective case. For instance, in the present case, the Applicant filed in total *six affidavits* from its Managing Director over a period of slightly more than two months. This is a matter of indulgence and should not be interpreted as a *right* that the parties have, which enable them to constantly supplement and add to their initial applications incrementally. Whether the court does so depends on all the circumstances, including the seriousness with which the initial application has been pursued, the gaps that remain to be filled, and the reasons why such gaps have arisen in the first place. Some pointers may be given in pre-trial conferences, but the onus always and ultimately lies on the applicant to make out its case, not on the courts to remedy any shortfall.

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69 Shu Kwan Chyuan's 1st Affidavit filed on 10 July 2017 at Exhibit SCK-1.

Conclusion

81 For the foregoing reasons, I grant leave under s 210(1) for the Applicant to convene the creditors' meeting to consider the Scheme as proposed. However, I decline to grant super priority status to the proposed financing from the Subscriber under s 211E.

82 Directions on costs and any other specific orders will be given separately.

Aedit Abdullah
Judge

Lawrence Lee Mun Kong (Aptus Law Corporation) for the Applicant;
Leong Kah Wah and Lim Ruo Lin (Lin Ruolin) (Rajah & Tann Singapore LLP) for Phillip Asia Pacific Opportunity Fund Ltd;
Tee Su Mien (Rajah & Tann Singapore LLP) for six individual creditors.