IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 35

Originating Summons No 1261 of 2021

In the matter of Section 71 of the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018)

Brightoil Petroleum (S'pore) Pte Ltd

… *Applicant*

GROUNDS OF DECISION

[Companies — Schemes of arrangement — Section 71 of the Insolvency, Restructuring and Dissolution Act 2018]
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Introduction

1 These are my written grounds issued to provide guidance regarding the court's reasoning in approving an uncontested scheme of arrangement where no meeting of creditors was held pursuant to s 71 of the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) ("IRDA") in respect of Brightoil Petroleum (S'pore) Pte Ltd ("BPS"). I granted the application and now set out my reasons in full.

2 The present case is one of the first written considerations of a lock-up agreement. Under such agreements, a scheme company undergoing restructuring invites creditors to provide an undertaking to vote in favour of the proposed scheme of arrangement in exchange for certain benefits. The benefits usually come in the form of consent fees which are often fixed by reference to a percentage of the face value of the debt held by the creditor. These benefits

act as an incentive for scheme creditors to commit to the proposal at an early stage, thereby ensuring that the scheme will not fail subsequently.

3 It has not been considered in a published decision in Singapore whether creditors who enter into such lock-up agreements should be placed in a separate class from the other creditors for the purpose of voting on a scheme of arrangement, *ie*, whether these lock-up agreements would "fracture" a class of creditors.

Brief background

4 BPS is a Singapore-incorporated private company that is limited by shares. The company's principal activities lie in international trading and bunkering.[1] BPS is one of the indirect wholly-owned subsidiaries of Brightoil Petroleum (Holdings) Limited ("BOHL"), which in turn, is a company listed on the stock exchange of Hong Kong.[2]

5 BOHL encountered financial difficulties arising from the voluntary suspension in the trading of its shares on the stock exchange due to delays in the publication of its consolidated financial results.[3] This led to finance institutions tightening the credit terms, which in turn, caused BPS to be unable to secure financing to support its trading activities.[4] BPS has been unable to continue its operations since 2019.

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1 Ng Chin Hock's 1st Affidavit filed on 10 December 2021, in HC/OS 1261/2021 ("Ng's 1st Affidavit"), at para 6.

2 Ng's 1st Affidavit at para 7.

3 Ng's 1st Affidavit at para 8.

4 Ng's 1st Affidavit at para 9.

6 BOHL together with its other 90-plus direct and indirect subsidiaries (collectively, the "Brightoil Group") had embarked on a complex debt restructuring exercise in November 2018.[5] To support the Brightoil Group's debt restructuring, BPS applied for and obtained moratorium protection under s 211B of the Companies Act (Cap 50, 2006 Rev Ed) ("CA") to restrain legal proceedings against it. BOHL also applied for and obtained moratorium protection under s 211C of the CA. These moratoria had been extended multiple times by court orders until 31 January 2022.[6] At the hearing on 25 January 2022, I heard the applications and granted a further extension of these moratoria for BPS and BOHL, respectively, in HC/OS 1539/2018 (HC/SUM 5726/2021) and HC/OS 134/2019 (HC/SUM 5727/2021). These extensions were sought to cover the period from the expiry of the moratoria to the date on which the court order sanctioning the scheme is lodged with the Accounting and Corporate Regulatory Authority of Singapore.

7 BPS was able to successfully resolve a significant portion of its liabilities totalling more than US$390 million.[7] The scheme of arrangement proposed (the "BPS Scheme"), which is the subject of HC/OS 1261/2021, is the penultimate step in restructuring the remaining debts due by BPS to its unsecured creditors. The key terms of the BPS Scheme are as follows:[8]

(a) The BPS Scheme is intended to bind all creditors of BPS as of 31 July 2021, save for certain categories of excluded creditors as defined in the BPS Scheme (the "Scheme Creditors").

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5 Ng's 1st Affidavit at para 10.

6 Ng's 1st Affidavit at paras 11–12.

7 Ng's 1st Affidavit at para 15.

8 Ng's 1st Affidavit at para 17.

(b) The BPS Scheme is intended to restructure the unsecured debts and liabilities owing by BPS to the Scheme Creditors and there is a single class of unsecured creditors.

(c) The Scheme Creditors will receive payments fixed at US$6 million, to be distributed on a *pari passu* basis.

(d) Upon the BPS Scheme becoming effective pursuant to s 210(5) of the CA, BPS shall be completely and absolutely released and discharged from any and all claims, other than obligations arising under the BPS Scheme.

8 The potential recovery for Scheme Creditors under the BPS Scheme is estimated to be about 12.0% of the debt value, as compared to recovery in a liquidation scenario of 0.2%.[9] Liquidation is the most likely alternative outcome should the BPS Scheme not be sanctioned by the court,[10] and is thus the appropriate comparator.

9 Subsequently, a voting form for the BPS Scheme was circulated amongst the 12 Scheme Creditors which were eligible to vote, for the purposes of tabulating what the notional votes in favour of the BPS Scheme would have been had a creditors' meeting been held (since an application to sanction the scheme was to be made under s 71 of the IRDA). 11 of the 12 Scheme Creditors casted their votes (representing US$50,143,082.20 in value).[11] There was only

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9 Ng's 1st Affidavit at para 44.

10 Ng's 1st Affidavit at para 19.

11 Ng's 1st Affidavit at para 37.

a single class of creditors constituted for the voting process. The results of the votes casts are as follows:[12]

(a) Ten of the Scheme Creditors (out of 11) representing US$47,269,535.04 in value (94.26%) voted in favour of the BPS Scheme.

(b) One Scheme Creditor (out of 11) representing US$2,873,547.16 in value (5.74%) voted against the BPS Scheme.

10 Hence, it seems clear that there is sufficiently strong support for the BPS Scheme. BPS then sought the court's sanction of the scheme under s 71 of the IRDA.

11 Crucially though, three of the Scheme Creditors, namely: SK Trading International Co Ltd, Global Energy Trading Pte Ltd and TransAsia Private Capital Limited (collectively, the "Locked-in Creditors"), had provided undertakings to vote in favour of the BPS Scheme in exchange for certain benefits ("BOHL Lock-up Agreements").[13] The benefit consisted of a fee of 1.0% of the Scheme Creditor's admitted debt against BPS ("BOHL Consent Fee").[14] BOHL had, prior to the distribution of the explanatory statement and the BPS Scheme, offered to all Scheme Creditors an opportunity to enter into the BOHL Lock-up Agreements.[15] This was done to introduce some certainty in the restructuring process, given that the BPS Scheme was intended to be pursued under s 71 of the IRDA without a meeting of creditors. The issue which arises

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12 Ng's 1st Affidavit at para 36.

13 Ng's 1st Affidavit at para 40.

14 Ng's 1st Affidavit at para 41(d).

15 Ng's 1st Affidavit at para 41.

is whether these Locked-in Creditors should have been placed in a separate class when voting instead of being allowed to vote in a single class with the other voting Scheme Creditors. If the Locked-in Creditors should have been classed separately, then the reliability of the vote conducted is in question.

12 Additionally, one of the Locked-in Creditors, TransAsia Private Capital Limited ("TPCL"), had entered into a modified lock-up agreement with BPS. In addition to the BOHL Consent Fee offered, TPCL's support for the BPS Scheme was also conditional upon BOHL making a separate payment to TPCL in part satisfaction of BOHL's guarantee obligations (the guarantee was linked to loan facilities extended by TPCL to BPS).[16] In total, BOHL agreed to pay an additional US$1.25 million to TPCL under the modified lock-up agreement.

13 Further, six of the Scheme Creditors, consisting of: BO 688 Oil Tanker Pte Ltd, Brightoil 666 Oil Tanker Pte Ltd, Brightoil 639 Oil Tanker Pte Ltd, Brightoil 319 Oil Tanker Pte Ltd, BO 329 Oil Tanker Pte Ltd and BO 326 Oil Tanker Pte Ltd (collectively, the "Related Creditors"), are indirect wholly-owned subsidiaries of BOHL.[17] This raises the issue of whether the votes of these Related Creditors should be appropriately discounted.

Summary of the Applicant's arguments

14 The Applicant submitted that the notional voting outcome satisfied the statutory majority requirements under s 210(3AB)(*a*)–(*b*) of the CA.[18] Since the BPS Scheme seeks only to restructure the unsecured debts and liabilities of the

16 Ng's 1st Affidavit at para 45.

17 Ng's 1st Affidavit at para 33.

18 Applicant's Skeletal Submissions dated 20 January 2022 ("Applicant's Submissions") at para 21.

Scheme Creditors, then there would only be one class of Scheme Creditors for the purposes of voting. All the Scheme Creditors are unsecured creditors with similar rights and these existing rights of the Scheme Creditors *vis-à-vis* BPS will be compromised to the same extent.[19] There is no distinction between the new rights conferred onto each Scheme Creditor under the terms of the BPS Scheme as all will receive payments fixed at US$6 million on a *pari passu* basis.[20]

15 The Applicant argued, following foreign cases, that the presence of the BOHL Lock-up Agreements did not mean that the Locked-in Creditors had to be classed separately for voting purposes. Firstly, the BOHL Lock-up Agreements were offered to all Scheme Creditors in July 2021 prior to the despatch of the BPS Scheme. Secondly, the BOHL Consent Fee of 1.0% of the Scheme Creditor's admitted debt was not so substantial that it would induce the Locked-in Creditors to vote in favour of the scheme (which they might otherwise reject). In particular, there was sufficient commercial justification for Scheme Creditors to vote in favour of the BPS Scheme.[21]

16 Regarding the additional US$1.25 million paid by BOHL to TPCL in partial satisfaction of BOHL's guarantee obligations, the Applicant submitted that this additional payment to TPCL did not require TPCL to be placed in a separate class for voting. In particular, TPCL's rights against BOHL in respect of the guarantee were distinct and independent from TPCL's rights against BPS.[22]

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19 Applicant's Submissions at para 28.

20 Applicant's Submissions at para 28.

21 Applicant's Submissions at para 43.

22 Applicant's Submissions at para 45.

17 On the issue concerning the Related Creditors, the Applicant submitted that those creditors' votes should be given their full value without any discounting as the Related Creditors ceased to be within the control of BOHL when they were placed in a creditors' voluntary liquidation, and the decision to vote in favour of the scheme was made independently by the appointed liquidators.[23]

Approval of schemes of arrangements under s 71 of the IRDA

18 It was held in *Re DSG Asia Holdings Pte Ltd* [2021] SGHC 209 ("*Re DSG Asia"*) at [28] that there are two essential elements to obtaining the court's approval under s 71 of the IRDA:

(a) disclosure of information; and

(b) satisfaction of the statutory majority requirements in the notional counting of votes.

19 It is implicit in the second latter requirement that the creditors be properly classified for the notional counting of votes: *Re DSG Asia* at [29]. The onus is on the applicant to show on a clear case standard that there has been proper disclosure of information and the fulfilment of the notional voting requirements: *Re DSG Asia* at [31].

20 I accepted that the first requirement has been satisfied by BPS relating to the disclosure of information under s 71(3)(*a*) of the IRDA, as a detailed explanatory statement was issued.[24] The other statutory requirements pertaining

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23 Applicant's Submissions at para 53.

24 Ng's 1st Affidavit, Exhibit NCH-1, at pp 32–69.

to notices have also been complied with in accordance with s 71(3)(*b*) and s 71(3)(*c*) of the IRDA.[25]

21 The key issue remaining is whether the statutory majority requirements in the notional counting of votes have been satisfied under s 71(3)(*d*) of the IRDA, which I now turn to.

Statutory majority requirements

22 The first substantive question was whether the notional statutory majority requirements specified under s 210 were met.

23 Under s 210(3AB)(*a*)–(*b*) of the CA, a scheme of arrangement must be approved by a majority in number of the scheme company's creditors or shareholders (as the case may be) representing three-fourths in value of the creditors or shareholders. This requirement need only be satisfied notionally in the context of s 71 of the IRDA for pre-packaged schemes since there is no actual voting conducted in a creditor's meeting: *Re DSG Asia* at [29]. In classifying the creditors to determine whether the notional voting outcomes would have satisfied the statutory majority requirements, the court considers the creditors' rights: *Re DSG Asia* at [53(a)]. Further, even if the statutory majority requirements would have been satisfied, the court in deciding whether to approve the scheme must be satisfied that the creditors whose votes were solicited for purpose of the notional voting outcomes were fairly representative of the class of creditors to which they belong, and the creditors' private interests are relevant to this inquiry: *Re DSG Asia* at [53(b)].

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[25] Ng Chin Hock's 2nd Affidavit filed on 17 January 2022, in HC/OS 1261/2021 ("Ng's 2nd Affidavit"), at paras 6 and 9.

24 The notional statutory majority requirements would appear to have been satisfied as the BPS Scheme had received strong support from the Scheme Creditors. A majority in number of the voting Scheme Creditors (ten out of 11), representing 94.26% of the total value (US$47,269,535.04 of US$50,143,082.20) had casted their votes in favour of the proposed scheme.[26] All of the voting Scheme Creditors were placed in a single class for this notional voting exercise.

25 The issue then was whether the Lock-in Creditors were properly part of the single class or whether they should have been placed in a separate class from the other creditors who did not enter into the lock-up agreements with BOHL ("Non-Locked-in Creditors"). The three Locked-in Creditors constituted 57.32% of total debt value amongst the votes that were cast (US$28,742,356.92 of US$50,143,082.20).[27] This meant that without the buy-in from these Locked-in Creditors, the question would possibly have arisen as to whether the statutory majority requirements would have been met.

Classification of creditors

26 I was satisfied that the Lock-in Creditors were properly part of the same class as the other creditors.

27 As observed in *Re DSG Asia* (at [44]) the requirements on the proper classification of creditors can be carried over from the case law touching upon s 210 of the CA. The test for classification (the "dissimilarity principle") has been laid down in the seminal case of *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd and another*

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[26] Ng's 1st Affidavit at para 38.

[27] Ng's 1st Affidavit at para 31.

appeal [2012] 2 SLR 213 ("*TT International (No 1)*") at [131]: those creditors whose rights are so dissimilar to each other's that they cannot sensibly consult together with a view to their common interest must vote in different classes. Other pertinent principles were also elaborated upon by the Court of Appeal (at [140]–[141]) in *TT International (No 1)*:

> 140 … the dissimilarity principle means that if a creditor's (or a group of creditors') position will improve or decline to such a different extent *vis-à-vis* other creditors simply because of the terms of the scheme (and not because of its own unique circumstances, *ie*, its "private interests") assessed against the most likely scenario in the absence of scheme approval ("the appropriate comparator"), then it should be placed in a different voting class from the other creditors. We should highlight here that the appropriate comparator depends on the facts of each case and is not necessarily an insolvent liquidation. …
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> 141 … The application of the dissimilarity principle to complex transactions and situations where there are different levels of secured and unsecured creditors, as well as intra-creditor relationships, is not without its difficulties. Defining a "legal right" in these contexts can be thorny. *The courts have therefore to take a broad, practical and objective approach in analysing creditor relationships and ensure that the application of this principle does not lead to an impractical mushrooming of classes that could potentially result in the creation of unjustified minority vetoes.* An overly legalistic approach might inhibit the usage of schemes as a practical alternative to other insolvency measures with more extreme consequences for creditors as a whole.
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> [emphasis in original; internal citations omitted]

28 The proposed BPS Scheme is intended to restructure the unsecured debts and liabilities owed by BPS to the Scheme Creditors,[28] and the appropriate comparator here is a liquidation scenario. Unsecured creditors are entitled to a *pari passu* distribution of the remaining pool of assets in liquidation (see *United Securities Sdn Bhd (in receivership and liquidation) and another v United Overseas Bank Ltd* [2021] 2 SLR 950 at [47]). The position of the Scheme

[28] Ng's 1st Affidavit at para 17(c).

Creditors would all be improved by a similar extent *vis-à-vis* each other under the terms of the BPS Scheme, as they will all receive payments totalling US$6 million on a *pari passu* basis.[29] Hence, it is axiomatic that in applying the dissimilarity principle, there would only be one class of unsecured creditors for voting purposes as the Scheme Creditors' positions were improved to a similar extent under the scheme.

29 The question which remains is whether the Locked-in Creditors should be classed separately from the Non-Locked-in Creditors since they had acquired additional benefits under the BOHL Lock-up Agreements in the form of the 1.0% BOHL Consent Fee.

The foreign jurisprudence concerning lock-up agreements

30 The authorities from other jurisdictions, such as England and Hong Kong, point to the usefulness and propriety of such lock-in agreements, provided that certain requirements are met.

(1) English authorities

31 In England, this issue has only been dealt with in first instance decisions. As observed by Snowden J in *Re ColourOz Investment 2 LLC and others* [2021] 1 BCLC 55 ("*Re ColourOz"*), in the context of seeking a court order to convene a meeting of creditors under s 896 of the Companies Act 2006 (c 46) (UK) (the "UK Companies Act 2006"), at [98]: "The full implications of the practice of paying consent fees … have never been considered at an appellate level. However, a number of authorities at first instance indicate that in principle a consent fee … will not fracture a class …".

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[29] Ng's 1st Affidavit at para 17(d).

32 Amongst those first instance decisions include the earlier case of *Re DX Holdings Ltd and other companies* [2010] EWHC 1513 (Ch) ("*Re DX Holdings*"). In *Re DX Holdings*, Floyd J considered the question of whether creditors who signed lock-up agreements should be classed separately from the other creditors in an application to convene a meeting of creditors under s 896 of the UK Companies Act 2006. Floyd J held that no separate classification was required having regard to the following factors in *Re DX Holdings* at [7]:

(a) all the scheme creditors were offered an opportunity to enter into the lock-up agreement;

(b) it was unlikely that a creditor who considered the scheme to be against its interests would be persuaded to vote in favour of the scheme by the existence of the consent fee; and

(c) the amount of consent fee payable (ranging from 0.5% to 2.5%) is small in relation to the common interests of the creditors in the restructuring.

33 Subsequent decisions such as *Re Noble Group Ltd (No 1)* [2019] 2 BCLC 505 ("*Re Noble*") further elaborate upon the requirements set out in the earlier cases, and in particular, how the court should assess whether the consent fee payable to creditors under a lock-up agreement is so material that the rights of the creditors who will not be paid the fees are sufficiently dissimilar such that they cannot consult together with a view to their common interest. In *Re Noble* (at [150]), Snowden J observed that in evaluating the materiality of consent fees, it is inappropriate to simply look at the percentage which the fee bears to the face value of the debt held. Rather, what is more relevant is the size of the fee when compared to the predicted returns offered to all creditors under the scheme and the returns that creditors are predicted to

make in a liquidation scenario (or the appropriate comparator): *Re Noble* at [151].

34 For instance, in *Re Codere Finance 2 (UK) Ltd (No 1)* [2021] 2 BCLC 396 ("*Re Codere*") (at [105]), in evaluating whether the size of the consent fee was material, Falk J did not merely consider the absolute value of the consent fee in the abstract, but made a comparison to the likely forecasted returns under the scheme and a liquidation scenario (which was the appropriate comparator). It was held that a consent fee between 0.5%–1.0% (*Re Codere* at [26]) is unlikely to exert a material influence on the creditors' voting decision: *Re Codere* at [105]. This observation was made in the context where the company was expected to make full recovery if the scheme was implemented (*Re Codere* at [15]–[16]), as opposed to a likely liquidation scenario where the returns ranged between 0%–4.1% (*Re Codere* at [20]–[21]).

35 In the decision of *Re ColourOz*, Snowden J conducted a comprehensive survey of the English first instance cases and summarised the position regarding lock-up agreements as follows (at [98]): "… a consent fee … will not fracture a class provided that it is made available to all scheme creditors, and provided also that it does not induce creditors to commit to vote in favour of a scheme which they might otherwise reject." The general tenor of cases in England indicates that the mere fact that a benefit is conferred on some creditors who enter into lock-up agreements to vote in favour of a scheme is insufficient to require those creditors to be constituted as a separate class, and the overall inquiry is a highly fact-specific one (see *Re Seat Pagine Gialle SPA* [2012] EWHC 3686 (Ch) at [22]).

36 However, caution had also been expressed in *Re Sunbird Business Services Ltd* [2021] 2 All ER (Comm) 1019 ("*Re Sunbird*") (at [115]–[116]) regarding the increasing prevalence of lock-up agreements:

> 115 The widespread use of lock-up agreements in recent years is, however, not without difficulties. One such concern (not present in the instant case) relates to the payment of lock-up fees. In many schemes, the company might offer to pay a fee to induce scheme creditors to enter into a legally binding agreement at an early stage to support the proposed scheme. The payment of such fees has been accepted in a number of cases at first instance, but serious concerns remain … Questions may well arise as to whether the payment of such fees should either result in the court ordering separate class meetings for those who have locked-up (and may thus be unable to change their mind absent a material change of circumstances) and those who have not; or otherwise as to the reliability of a majority vote comprising creditors in receipt of a lock-up fee and those who have not qualified to receive it.
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> 116 A second concern, which is relevant in this case, relates to the unequal provision of information to different groups of creditors.

37 In *Re Sunbird*, Snowden J refused to sanction the scheme of arrangement despite the majority vote of the creditors. Amongst the various reasons cited was the fact that some majority creditors were misinformed (being hastily urged into signing the lock-up agreements) and were misled into signing the lock-up agreement under the erroneous impression that this was a requirement necessary to satisfy the court: *Re Sunbird* at [121].

38 While there is good commercial sense in offering lock-up agreements in conjunction with proposed schemes as it could "avoid a potential waste of time and costs of starting the scheme process" (*Re Sunbird* at [114]), the court must be cognizant of the attendant risks as well.

(2) Hong Kong authorities

39 In *Re Winsway Enterprises Holdings Ltd* [2017] 1 HKLRD 1 ("*Re Winsway*"), the Hong Kong Court of First Instance appeared to agree with the English position in *Re DX Holdings* regarding whether creditors who enter lock-up agreements should be classed separately when voting on a scheme (at [20]):

> 20 … the question will normally be the same: is the right to be paid an additional sum likely to influence materially a scheme creditor in deciding how to vote? Whether or not it may is likely to depend on whether or not the sum is substantial and has been offered in a manner, which creditors are likely to consider fair regardless of whether or not they took advantage of the opportunity to agree in advance to vote in favour of the restructuring. …

40 Harris J held that, on the facts of that case, there was no need to place the creditors who entered into lock-up agreements in a separate voting class from the rest as the consent fee of 2.0% is relatively small, the agreements were made available to all scheme creditors and it was a *bona fide* attempt to introduce certainty in the restructuring process: *Re Winsway* at [20].

41 Similarly, in the more recent decision of *Re Da Sen Holdings Group Ltd* [2022] HKCU 324 ("*Re Da Sen*") (at [16]), it was observed that a payment of a consent fee will not fracture a class of creditors if the lock-up agreement was made available to all creditors and the consent fee offered would not have distorted the outcome of the voting. Harris J then held that a consent fee of 5.0% was not unusually large and would not alter the classification of creditors: *Re Da Sen* at [16]. This conclusion was made in the context where the unsecured creditors' recovery under the scheme was estimated to be about 50.0%–60.0% and the recovery in a liquidation scenario (which was the appropriate comparator) was no more than 32.0%: *Re Da Sen* at [8].

The legal position to be adopted in Singapore

42 In my determination, lock-in agreements will generally not fracture a class when voting on a scheme of arrangement, subject to certain requirements.

43 In determining the classification of creditors, the court considers any rights conferred or to be conferred in other agreements that are provided for under the terms of the scheme or which are conditional on the scheme: *Re DSG Asia* at [58]. Hence, the presence of lock-up agreements with some creditors is relevant to the court's consideration for the classification of creditors when voting on a scheme.

44 The rationale for offering lock-up agreements to creditors in a proposed restructuring is to reduce the risk that the proposed scheme that is introduced will fall through due to it not being able to garner the necessary statutory majority support: *Re Winsway* at [20]. There can be significant savings of time and costs if properly employed.

45 Lock-up agreements (with their accompanying benefits, *eg,* consent fees payable) are undeniably designed to provide some material inducement for creditors to commit on their voting intentions so that the company proposing a scheme would not embark on the process in vain without sufficient support: *Re ColourOz* at [97]. It cannot be the case that the entering into lock-up agreements by creditors, in and of itself, would mean that those creditors must be classed separately when voting. One must be careful not to fracture a class too easily without a clear dissimilarity of rights such that minority creditors in another class would have a disproportionate right of veto (see *Re Noble* at [158]). The classification of creditors remains a perennially thorny issue given the myriad contexts which might arise (see the *Report of the Insolvency Law Review*

Committee (2013) at pp 138–139, para 11). Hence, the assessment must remain a fact-specific one with all the circumstances considered *in toto*.

46 Distilling the assistance from the cases in England and Hong Kong, the following, non-exhaustive, principles are to my mind relevant in determining whether creditors who enter into lock-up agreements should be classed separately for the purposes of voting on a scheme of arrangement, even for the notional tabulation of votes under s 71 of the IRDA:

(a) While the benefits that can be conferred on creditors who enter into lock-up agreements are varied, the most common of which are the payment of consent fees, the critical question in every case is whether the benefit conferred is so sizeable that it would have a significant influence on the decision of a reasonable creditor when voting for the proposed scheme. In assessing whether there was a significant influence, one would look at the relative size of the consent fee (or benefit) when compared to the forecasted returns to creditors under the implemented scheme and the estimated recovery in liquidation (or another appropriate comparator).

(b) The lock-up agreement must have been made available to all scheme creditors within the relevant class such that they were all given the equal right to enter into the agreement, and the agreements made with each creditor must be on substantially the same terms. Beyond that, whether a creditor chooses to exercise that right to enter into the lock-up agreement is beyond a scheme company's control.

(c) The use of the lock-up agreement must be done *bona fide* (*eg*, no misleading of creditors). It is trite that the court will not sanction a scheme if the company and/or its majority creditors are not acting *bona*

fide: *TT International (No 1)* at [74]. This applies with equal force in the context of s 71 of the IRDA: *Re DSG Asia* at [66].

Application to the facts – classification of Locked-in Creditors

47 Applying the principles set out above to the facts at hand, I determined that there was no need to place the Locked-in Creditors in a separate class from the other Non-Locked-in Creditors for the purpose of determining whether the notional voting outcomes satisfied the statutory majority requirements, and the reliability of the notional majority vote was not compromised. I found that the Scheme Creditors whose votes were solicited for the notional voting outcomes were fairly representative of the class of creditors to which they belong.

48 Regarding the size of the BOHL Consent Fee offered, the question was whether it is so sizeable that it would have a significant influence on the decision of a reasonable creditor when voting for the proposed scheme. When compared to the figures in the abovementioned cases like *Re Codere* and *Re Da Sen*, to my mind, the consent fee of 1.0% of the Scheme Creditor's admitted debt would not be so significant as compared to the potential recovery of 12.0% under the BPS Scheme and a 0.2% recovery in liquidation.

49 By acceding to the BPS Scheme compared to the recovery in liquidation, there is a potential 60-fold recovery of the admitted debt value which would have been sufficient commercial justification alone for the Scheme Creditors to vote in favour of the BPS Scheme. In these circumstances, even without the additional BOHL Consent Fee of 1.0%, it is foreseeable that a reasonable creditor would have voted in favour of the scheme regardless. There is little reason to think that the voting outcomes were distorted.

50 At this juncture, I caution that such an assessment is not one that is based purely on numerical comparison but must be done contextually, taking into account the other reasons as to why a reasonable creditor might enter the scheme and compromise on their debts.

51 Next, the BOHL Lock-up Agreements were offered as a *bona fide* attempt, as part of the BPS Scheme, to introduce certainty into the restructuring process.[30] BPS had informed the Scheme Creditors of the present application to sanction the scheme under s 71 of the IRDA and, as of the date of the application, there had been no objections.[31] It is also important that the lock-up agreement does not mislead creditors as to what could be recovered under the proposed scheme of arrangement. I noted that the expected recovery under the scheme was described in the BOHL Lock-up Agreements to be "between 8.8% and 18.1%" of the admitted debt, whereas it was stated that there would be "no recovery" in liquidation.[32] This is not too far off from the eventual 12.0% and 0.2% recovery that was estimated by BPS in the respective scenarios.

52 As an aside, some of the English authorities suggests that it is appropriate for lock-up agreements to include a provision that allows a signatory to terminate the agreement and cease to support the scheme in the event of a "material adverse change" to the company's financial position (see *Re ColourOz* at [94]). This would ensure that a creditor is not irrevocably bound in all circumstances. I noted that within the BOHL Lock-up Agreement, there was no such clause.[33] My tentative view is that while the presence of such a provision

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30 Ng's 1st Affidavit at para 41.

31 Ng's 2nd Affidavit at paras 6 and 8.

32 Ng's 1st Affidavit, Exhibit NCH-7, at para 6.

33 Ng's 1st Affidavit, Exhibit NCH-7, at pp 309–312.

in the lock-up agreement goes towards the *bona fides* and fairness of the arrangement, this is not a mandatory requirement. A conclusive pronouncement will need to await full arguments in an appropriate case.

53 Lastly, the BOHL Lock-up Agreements were made available and sent to all Scheme Creditors.[34] Hence, each Scheme Creditor was conferred an equal right to enter the arrangement proffering a consent fee of 1.0%, and none was being exalted over the other. These offers were all made on the same terms.

54 As mentioned above at [12], a complication arises as, amongst the three Locked-in Creditors which acceded to the BOHL Lock-up Agreement, TPCL had entered into a modified agreement – where BOHL would make a separate payment in the amount of US$1.25 million in part satisfaction of BOHL's obligations under a guarantee.[35] Nevertheless, I agree broadly with the Applicant's submissions that TPCL's legal rights against BOHL in respect of the guarantee is distinct and independent from TPCL's legal rights against BPS regarding the unsecured loans. It is trite that each incorporated entity has a separate legal personality with distinct legal rights and liabilities, and this principle applies to companies within an ownership group as well: *Goh Chan Peng and others v Beyonics Technology Ltd and another and another appeal* [2017] 2 SLR 592 at [71]. Hence, the fact that BOHL agrees to make a payment to TPCL in part satisfaction of its outstanding guarantee obligations will not change substantively TPCL's legal rights *vis-à-vis* BPS, despite the fact that BPS is one of the indirect wholly-owned subsidiaries of BOHL. This would mean that TPCL could still be classed with the other Scheme Creditors for

34 Ng's 1st Affidavit at para 42.

35 Ng's 1st Affidavit at para 45.

voting as its rights were not so dissimilar with the others such that it could not sensibly consult together with a view to their common interest.

55 The court should not look at the scheme in isolation, but must consider rights conferred or to be conferred in other agreements that are conditional on the scheme: *Re DSG Asia* at [58]. Under the BPS Scheme, it is expressly provided under one of the clauses that:[36]

> 4.3 For the avoidance of doubt, unless expressly provided in this Scheme:
>
> …
>
> (b) a Scheme Creditor shall not be required to waive, release or discharge its claims against any other party, including any Brightoil Group Entity, or any liability and obligation owing by such other party to the Scheme Creditor, in connection with or in relation to the Claims of the Scheme Creditor against the Company or otherwise.

Hence, BOHL's outstanding guarantee obligations owed to TPCL would not be waived even if the BPS Scheme were sanctioned. Put it another way, it could not be said that BOHL's part payment of its existing guarantee obligation was one that was conditional upon the scheme being sanctioned. The court is not required to consider rights that are genuinely independent of the scheme: *Re DSG Asia* at [58]. That independence trumped the possible argument that the guarantee was commercially part of the same transaction.

Votes of related creditors

56 Regarding the votes of related creditors, the six Related Creditors are also the indirect wholly-owned subsidiaries of BOHL (just like BPS), and

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[36] Ng's 1st Affidavit, Exhibit NCH-7, at p 80.

hence, they are related to BPS (the scheme company) as they share a common controlling shareholder.

57 The votes of creditors which are also wholly-owned subsidiaries of the scheme company should be discounted to zero: *TT International (No 1)* at [158], while it appears that a partial discounting approach should be taken for other related creditors which are not wholly-owned subsidiaries of the scheme company: *TT International (No 1)* at [170]–[171]. On the other hand, I note the *obiter* observations in *SK Engineering & Construction Co Ltd v Conchubar Aromatics Ltd and another appeal* [2017] 2 SLR 898 ("*SK Engineering*") (at [66]–[67]) that disagreed with the partial discounting approach taken in *TT International (No 1)* as it is inevitably arbitrary, not amenable to definitive guidance, and because it appears more principled and certain to wholly discount the votes of creditors once they are found to be related to the scheme company. Here, we are dealing with the situation where the Related Creditors are not the wholly-owned subsidiaries of the scheme creditor. Without having to resolve the divergent views expressed in *TT International (No 1)* and *SK Engineering*, my decision is that no discount should be applied to the votes of the six Related Creditors.

58 I agreed with the Applicant's submission that these six Related Creditors ceased to be within the management control of BOHL as they had been placed into a creditors' voluntary liquidation on 16 August 2021.[37] The decision by the six Related Creditors on whether to vote for or against the BPS Scheme, therefore, stemmed from an independent decision made by the appointed liquidator who owed duties to the creditors of the respective companies. The

[37] Ng's 1st Affidavit at para 33.

liquidators also confirmed that this decision was made without any discussion with the Related Creditors.[38] Hence, no discount should be applied.

Conclusion

59 Accordingly, as the notional voting outcome satisfied the statutory majority requirements and the reliability of the majority vote was not compromised due to any improper classification of creditors, the application was granted.

Aedit Abdullah
Judge of the High Court

Hing Shan Shan Blossom, Chan Wei Meng, Foo Guo Zheng Benjamin and Clarie Ong Bee Sim (Drew & Napier LLC) for the applicant.

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[38] Ng's 1st Affidavit at para 33.