

Write Up on Latest Court of Appeal Decision on Scheme of Arrangement

Scheme of Arrangement – s.210 Companies Act – Procedure to follow for Creditors' Meeting – Appeal on Chairman's adjudication of Proof of Debts – Different voting classes for creditors with dissimilar rights – Scheme Manager's duties – Votes of wholly owned subsidiaries of subject company excluded from general class of unsecured creditors

Introduction

On 31 January 2012, in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Limited* [2012] SGCA 9, the Court of Appeal in an illuminating judgment set out and clarified the procedures to be followed for the implementation of Schemes of Arrangements.

The Facts

In 2009, TT International Limited (“**TT International**”) obtained approval for a Scheme of Arrangement under section 210 of the Companies Act. Pursuant to section 210(3) of the Companies Act, the company needed 75% of the creditors present and voting (either in person or by proxy) in each class of creditors to vote in favour of the Scheme at the Creditors' Meeting before the company could ask the Court to sanction the Scheme. Disputes arose over the conduct of the Creditor's Meeting and questions were raised as to whether the 75% was indeed met such that the Scheme was validly approved by the creditors. These disputes were heard in the High Court in February 2010. The Court sanctioned the Scheme. Two of the creditors, OCBC Bank and Ho Lee Construction Pte Ltd, appealed to the Court of Appeal. The Court of Appeal set aside the sanction given by the

High Court. However, it ordered a re-vote by the Creditors on the Scheme subject to some alterations. At the re-vote in September 2010, the Scheme was passed.

A Scheme of Arrangement Entails Three Steps

- i **First Step:** The subject company applies ex-parte to Court for a Creditors' Meeting to approve the Scheme. Upon approval by the Court, a Creditors' Meeting will be held to vote to approve the Scheme.

- i **Second Step:** The Creditors' Meeting
 - Proof of Debts (“**PODs**”) must be submitted to the Chairman of the Creditors' Meeting (the proposed Scheme Manager) before the Creditors' Meeting.
 - The Chairman must decide whether to admit or reject each of the PODs (for voting purposes) before the Creditors' Meeting.
 - The Chairman must post a list of the Scheme Creditors and the corresponding amounts of their admitted claims (for the purpose of voting) at the meeting venue *before* the Creditors' Meeting. This practice is to safeguard the integrity of the voting outcome.

- i **Third Step:** The Court must sanction the Scheme in order that the Scheme becomes binding. To do so, the Court must first satisfy itself of the integrity of the voting outcome at the Creditors' Meeting and the objective fairness of the proposed Scheme.

Adjudication Of Proof of Debts

- i The Chairman's role is akin to that of a judicial manager in deciding whether to admit or reject PODs lodged with him. He must act objectively and not arbitrarily.

- i In the admission and rejection of PODs, the Chairman has 3 options.
 - First he can admit the claim wholly.
 - Second, he can reject a claim wholly or partially. In which case he should provide to the creditor written grounds of his rejection. His duty to give reasons puts the onus on him to look at each proof more carefully in his exercise of his quasi-judicial function.

- Third, if the Chairman has doubts whether a POD should be admitted or rejected, he should mark it as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained.
- i In deciding which proportion of a creditor's claim to admit, the Chairman need only make a reasonable estimate by doing his best with the factual material furnished without undertaking any detailed inquiry.
- i A creditor who has submitted a POD to the Chairman has standing to challenge the Chairman's decisions on the PODs submitted by other creditors. However, a creditor has no legal right to have access to the PODs of other creditors unless he produces prima facie evidence of impropriety in the admission or rejection of such PODs.
- i The Chairman's decision to admit or reject PODs for the purpose of voting is subject to appeal to the Court and is no different from that of a judicial manager or liquidator. Such appeal should only be taken after the votes have been counted and it can be seen whether the vote in question can affect the result.
- i However, the Court stated that the court should be slow to override the professional decision of the Chairman unless it was affected by bad faith, a mistake as to facts, an erroneous approach to the law, or an error of principle. The Court's role is not to engage in its own evaluation of a claim.

Extension Of Time For Submitting PODs

- i If the Chairman wishes to extend the time for submission of PODs, he must obtain prior court sanction for this and inform all creditors to ensure that the extension of time benefits all and not merely a particular group of sympathetic creditors.

Scheme Creditors Who Have Dissimilar Rights Must Vote In Different Voting Classes

- i If the Scheme favours or prejudices a group of creditors (against other creditors) differently from how they would be favoured or prejudiced in a liquidation, such as to give them an additional non-private interest to vote for or against the scheme, then that group of creditors belong in a separate voting class. In this case, the Court of Appeal held that the CEO and the Executive Director of TT International, both being Scheme Creditors who held Rights of First Refusal under the Scheme ought to have voted in a separate class from the general class of creditors.

Wholly Owned Subsidiaries of the Subject Company Are To Vote in Separate Class From The General Class of Unsecured Creditors

- i Wholly owned subsidiaries of subject companies are extensions of the holding company and are entirely controlled by the latter. The votes of these subsidiaries are therefore to be excluded from the general class of unsecured Scheme Creditors and they are to vote in a separate class.

Chairman's Duties of Transparency and Objectivity

- i The objectivity of the Chairman is a critical aspect of the entire process. His responsibility to be independent in managing differences between the Company and Creditors is in a broad sense not different from the legal obligations imposed on other insolvency practitioners, e.g. a liquidator.
- i The Chairman must seek to strike the right balance and manage the competing interests of successfully securing the approval of his proposed scheme and uncompromisingly respecting the procedural rights of all involved in the scheme process.
- i In this case, the Court of Appeal held that it was inappropriate and an unacceptable position of unavoidable conflict of interest for the Chairman to also have been the nominee for the individual voluntary arrangements filed by the 2 majority shareholders of TT International.