Econ Piling Pte Ltd and another *v* Sambo E&C Pte Ltd and another matter [2010] SGHC 120

Case Number : Originating Summons No 1084 of 2009/Z and Originating Summons No 54 of 2010/S

Decision Date : 22 April 2010

Tribunal/Court : High Court

Coram : Steven Chong JC

Counsel Name(s) : Balachandran s/o Ponnampalam (Robert Wang & Woo LLC) for the plaintiffs in OS No 1084/2009Z and the defendants in OS No 54/2010S ; Karam S Parmar/Esther Yang (Tan Kok Quan Partnership) for the plaintiff in OS No 54/2010S and the defendant in OS No 1084/2009Z.

Parties : Econ Piling Pte Ltd and another — Sambo E&C Pte Ltd

Companies – Scheme of Arrangement

Partnership – Partners and Third Parties

22 April 2010

Steven Chong JC:

Introduction

1 By Notice of Arbitration dated 23 September 2004, Sambo E&C Pte Ltd ("Sambo") commenced an *ad hoc* arbitration against Econ Piling Pte Ltd ("Econ") and NCC International Aktiebolag ("NCC"). On 25 October 2004, the High Court sanctioned the Scheme of Arrangement ("the Scheme") in respect of the debts and liabilities of Econ. Five years later, Econ and NCC (hereinafter collectively referred to as "ENJV") applied by way of Originating Summons No 1084 of 2009/Z ("OS 1084/2009") for the High Court to determine two questions of law pursuant to s 45(2)(a) of the Arbitration Act (Cap 10, 2002 Rev Ed). In response, Sambo applied by way of Originating Summons No 54 of 2010/S ("OS 54/2010") for an additional question of law to be determined arising from the two questions of law raised by ENJV. The key issue arising from the three questions of law raised by both Sambo and ENJV is whether the joint liability of NCC as a partner of Econ was released as a result of the Scheme which released the debts and liabilities of Econ.

2 The determination of the key issue would entail a critical analysis of the scope of the principle that a release of a joint debtor releases all other joint debtors. In *Deanplan Ltd v Mahmoud* [1992] 1 WLR 467 ("*Deanplan Ltd*"), Judge Baker QC observed at 483 that this principle has been described by some as "illogical". Similarly, Steyn LJ (as he then was) in *Watts v Aldington* [1999] L&TR 578, has also described it as an "absurd" rule that requires "re-examination". Nevertheless, it has withstood the test of time for more than a century.

3 I heard both OS 1084/2009 and OS 54/2010 together on 19 March 2010. On 23 March 2010, I delivered my oral decision with brief grounds. In respect of the key question of law before me, I arrived at the conclusion that the Scheme did not release NCC from its joint liability with Econ. I now give my reasons for my decision.

The facts

The facts

4 Sometime in 2001, the Land Transport Authority ("LTA") invited tenders to construct two underground stations at Macpherson and Upper Paya Lebar including the tunnels between the two stations and for other ancillary works ("the Contract"). NCC invited Econ to submit a joint bid for the Contract. Econ and NCC then entered into a Joint Venture Agreement dated 13 May 2002 ("the JVA"). Econ had a 55% interest while NCC had the balance 45% interest in the joint venture. The JVA specifically provided that ENJV was not a partnership. Notwithstanding the terms of the JVA, the High Court in Originating Summons No 694 of 2006 found that ENJV was in fact a partnership.

5 In August 2002, ENJV's tender for the Contract was accepted by LTA. ENJV invited Sambo to submit a quotation for the construction of the diaphragm walls and barrette pipe works for the two underground stations ("the Sub-Contract"). By letter of award dated 28 December 2002 and duly signed on 21 April 2003, ENJV engaged Sambo as their domestic sub-contractor for the Sub-Contract.

6 By early 2003, Econ had fallen into financial difficulties. Following Econ's financial woes, the parties' participating interests in the JVA were altered pursuant to a Deed of Variation dated 22 May 2003 under which NCC's interest was increased to 99.9% leaving Econ with the balance 0.1%. Nothing turned on this variation. Eventually, by an Order of Court dated 15 March 2004 in Originating Petition No 24 of 2003, Econ was placed under judicial management and Timothy James Reid was appointed as Econ's judicial manager. On 15 September 2004, the Scheme was proposed by the judicial manager to Econ's creditors. The Scheme was approved by three-quarters in value of the creditors of Econ. Thereafter, the Scheme was sanctioned by an Order of Court dated 25 October 2004. Timothy James Reid was appointed the Scheme administrator. The Scheme was duly administered by the Scheme administrator and on 19 March 2009, the Scheme administrator, having completed the distribution, applied for and was given a discharge.

7 One week after the Scheme was proposed by the judicial manager but a month prior to the court's sanction, Sambo commenced an *ad hoc* arbitration against ENJV in respect of claims arising under the Sub-Contract.

8 Arising from the above undisputed facts, three questions of law were referred to the High Court for determination by Sambo and ENJV:

(a) 1st Question of Law (OS 1084/2009)

Whether by virtue of clause 4.1.3 of the Scheme of Arrangement dated 15 September 2004 ("the Scheme") sanctioned by Court Order dated 25 October 2004 in Originating Petition No 23 of 2003/Z, the Defendants required the consent of the 1st Plaintiff before the Defendants commenced against the Plaintiffs an *ad hoc* arbitration by way of a Notice of Arbitration dated 23 September 2004.

(b) 2nd Question of Law (OS 1084/2009)

Whether the joint debts and liabilities of the 1st Plaintiffs as a partner in any joint venture or business including ENJV were compromised or settled in accordance with the terms of the Scheme including (but not limited to) clauses 1.2, 2 and 9 thereof.

(c) 3rd Question of Law (OS 54/2010)

If the claims in the abovenamed arbitration proceedings commenced by the Plaintiffs are

compromised by the Scheme of Arrangement dated 15 September 2004 (and sanctioned by an Order of Court dated 25 October 2004 in Originating Petition No 23 of 2003/Z) against the 1st Defendant and the 1st Defendant is released by such compromise (if any), whether the 2nd Defendant, the partner of the 1st Defendant in ENJV at the material time, was also released by the compromise (if any)."

1st Question of Law

9 The original question posed by ENJV for determination was whether Sambo required the consent of Econ before Sambo could *commence* the arbitration proceedings against ENJV by way of Notice of Arbitration dated 23 September 2004. Counsel for Sambo submitted that no such consent was required simply because the arbitration proceedings were commenced prior to the Order of Court dated 25 October 2004 which sanctioned the Scheme. Technically, this submission was correct. However, counsel for ENJV drew my attention to clause 4.1.3 of the Scheme which provided that "no creditor shall, without the consent in writing of Econ, take any step to *commence or continue* in proceedings against the company for the adjudication of any claim." It was apparent that clause 4.1.3 of the Scheme applied not only to the commencement of proceedings, but to its continuance as well. Accordingly, the continuance of the arbitration proceedings commenced by Sambo did require the consent in writing by Econ. I allowed ENJV to amend the 1st Question of Law to cover continuance of the proceedings.

10 In the light of the amendment, counsel for Sambo readily conceded that the 1st Question of Law, as amended, would be answered in the affirmative.

2nd Question of Law

11 A proper determination of the 2nd Question of Law would necessarily entail an examination of the terms and legal effect of the Scheme.

Purpose of the Scheme

12 The purpose of the Scheme can be gleaned from the following relevant provisions:

2.1 The Scheme is a quasi-liquidation under which Creditors are largely afforded the same rights and obligations imposed by a liquidation process but with the additional gross realisation of $350,000 (less costs), resulting from the Investor seeking to purchase the shell of the Company, being available for distribution to the Creditors. If the Scheme is not approved the Judicial Manager will request the Court to discharge the Judicial Management Order and place the Company in liquidation.

...

2.3 The Participating Creditors shall look only towards the Pool of Assets for the recovery of their debts.

...

2.5.1 Each Participating Creditor shall accept his rights as stated in the Scheme as full and equivalent substitution of his original rights against the Company, and fully discharge and

release the Company from any further liability under the original rights by assigning such original rights to the Investor.

...

2.7 Any Creditor who is entitled to participate in the Scheme, but who does not take all necessary steps as set out herein to participate in the Scheme, or is precluded from doing so pursuant to the terms of the Scheme, *shall have no Claim whatsoever against the Pool of Assets, the Company, the Judicial Manager or the Scheme Administrator. All Claims of such a Creditor shall be extinguished*.

[emphasis added]

It is clear from the above terms that the purpose of the Scheme was to compromise the rights and claims of all creditors against Econ and to fully discharge and release Econ from all further liabilities.

Scope and legal effect of the Scheme

13 Clause 1.2 of the Scheme defined the categories of creditors and types of claims that were subjected to the Scheme.

"Claim"	Any claim whatsoever or right of claim by a Creditor against the Company, including any interest, penalties, late payment charges or other sums howsoever defined, as at the Fixed Date
"Creditors"	All creditors of the Company, whether secured, preferential, contingent or unsecured, to whom a liability is owed by the Company, arising out of any transaction entered into or act or omission of the Company and/or any persons, carried out or which took place before the Fixed Date, whether their claims be liquidated or sounding only in damages and whether in contract or in tort howsoever arising and whether or not their claims have crystallised as at the Fixed Date and whether the creditors are based in Singapore or otherwise, including all related companies and related parties of the Company.

It is self-evident from the above definitions that the Scheme applied to any claim of whatsoever nature by any creditor against Econ. Furthermore, it also applied to all creditors of Econ whether secured, preferential, contingent or unsecured to whom a liability was owed by Econ arising out of any transaction entered into or act or omission of Econ which took place before 16 September 2004.

14 The authorities are clear that once a scheme of arrangement is sanctioned by an order of court, it binds all creditors including objecting creditors. This is clear from the decision of the High Court in *Re CEL Tractors Pte Ltd* [2001] 1 SLR(R) 700 ("*Re CEL Tractors*") where the court held as follows:

26 In my view s 210(3) should be given its plain meaning, ie that *an approved arrangement binds all the creditors. It cannot matter that an objecting creditor has not consented to be bound because he is nevertheless bound by the operation of law*. I do not see any reason why the arrangement has to have his support for the provision to take effect and for the arrangement to bind him.

27 I do not agree that an arrangement cannot discharge the liability of a party who is not a party to it. That view ignores the commercial framework of such arrangements…

28 It should be remembered that a scheme of arrangement must have the support of the majority of the creditors and approved by court before it takes effect. After a scheme is accepted by the creditors, an objecting creditor can persuade the court to withhold its approval, or to approve it subject to such alternatives or conditions as it thinks fit (see s 210(4)). The objecting creditor would succeed if he can show that the creditors did not vote bona fide for the benefit of the creditors or the company as a whole…or that the scheme is not fair and reasonable...

[emphasis added]

15 Counsel for Sambo acknowledged that the Scheme operated to release Econ from all its liabilities including partnership liabilities. This would include Econ's partnership liabilities which arose in the course of its partnership with NCC under the JVA. However, the ultimate objective of ENJV's application was to determine whether the Scheme had released NCC from its joint partnership liabilities with Econ. Accordingly, a determination of the 2nd Question of Law would not be complete without examining the pivotal question of whether NCC was released from its joint partnership liabilities with Econ. In this connection, it was eminently sensible for Sambo to have framed the 3rd Question of Law for determination.

16 To avoid any ambiguity and to prevent any overlap with the 3rd Question of Law, I determined the 2nd Question of Law in the affirmative subject to the qualification that the joint debts and liabilities of Econ as a partner in any joint venture, including the JVA, were compromised or settled in accordance with the terms of Scheme *in that no claim can be brought against Econ in respect of such joint debts and liabilities* (the qualification in italics). The qualification is necessary because the express purpose of the Scheme was only to release Econ from all liabilities and claims.

3rd Question of Law

17 The determination of the 3rd Question of Law was hotly contested by both parties. Counsel for ENJV submitted that NCC was released from its joint liabilities with Econ as a legal consequence of the Scheme. The submission was well crafted by counsel for ENJV in the following manner:

(a) First, partnership liabilities of Econ and NCC constituted a single joint liability. In support, ENJV relied on s 9 of the Partnership Act which provides as follows:

> Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course administration for such debts and obligations, so far as they remain unsatisfied, but subject to the prior payment of his separate debts.

Counsel for ENJV also directed my attention to *Pirie v Richardson* [1927] 1 KB 448 which concerned a claim against a partnership for damages for breach of contract. The partners pleaded separate defences. The court accepted the defence pleaded by one of the partners. The other partners applied to plead the same defence upon which the partner was successful but the judge refused leave to amend. On appeal, the Court of Appeal held at 451 that "where there is a joint contract there is but one cause of action, and the aggrieved party may sue all the joint

contractors or he may sue one of them, but for the purposes of that decision they all stand on the same footing."

(b) Second, the legal effect of the Scheme had released all of Econ's liabilities including partnership liabilities. This explained the purpose behind ENJV's request for the determination of the 2nd Question of Law which I have determined above in the affirmative subject to the qualification. I should add that the Scheme had also released all of Econ's liabilities vis-à-vis NCC, the significance of which I will elaborate below in connection with the 3rd Question of Law.

(c) Third, discharge of one joint debtor by accord and satisfaction discharges all other joint debtors. The defendant relied on *Morris v Wentworth-Stanley* [1999] QB 1004. In that case, the plaintiff brought a claim against a partnership for sums due under a contract for works done on a farm. Eventually, the claim was settled and consent judgment was entered against one of the partners for a compromised sum. The sum was not paid. Subsequently, the son of the defaulting partner settled the compromised judgment debt. The plaintiff then commenced a separate action against another partner for the same debt less the payment received. The court held at 1011 that the "discharge of one joint debtor by accord and satisfaction discharges all other joint debtors in accordance with the general principle that a joint liability creates only a single obligation", and that a plaintiff who sued the other co-debtor in a separate action later might be viewed as having committed an abuse of process (at 1018).

(d) Fourth, the Scheme which discharged all the liabilities of Econ was equivalent to accord and satisfaction which thereby discharged NCC's joint partnership liabilities to Sambo as well.

18 At face value, ENJV's submission appeared to be very appealing and seemingly simple. In response, counsel for Sambo essentially accepted the first three planks of ENJV's submission. However, Sambo disagreed with ENJV that the Scheme had the same legal effect as accord and satisfaction. Sambo drew a critical distinction between release by accord and satisfaction and release by operation of law. Sambo submitted that the release of Econ's liabilities under the Scheme was by operation of law and it did not constitute accord and satisfaction such as to release NCC from its joint partnership liabilities.

19 There was at least one area where both parties were on common ground. They both accepted that the issue whether a release constituted accord and satisfaction of joint debts/liabilities is essentially a question of construction. In *Deanplan Ltd*, the court held at 483 that whether a release of one joint debtor was by way of accord and satisfaction is a question of construction:

> From this long review of the cases, I draw the following conclusions. First, a release of one joint contractor releases the others. There is only one obligation. A release may be under seal or by accord and satisfaction. A covenant not to sue is not a release. It is merely a contract between the creditor and the joint debtor which does not affect the liabilities of the other joint contractors or their rights of contribution or indemnity against their co-contractor. *It is a question of construction of the contract between the creditor and joint debtor in the light of the surrounding circumstances whether the contract amounts to a release or merely a contract not to sue*. [emphasis added]

Release by operation of law versus release by accord and satisfaction

20 ENJV cited a number of authorities in support of the proposition that discharge of a joint debtor by accord and satisfaction discharges all other joint debtors. None of the cases concerned release by operation of law. In each of those cases, the discharge was pursuant to an agreement with the

creditor and it was on that basis that the court held that the release and discharge by the creditor constituted accord and satisfaction. Counsel for ENJV was, however, not able to refer me to any authority that the discharge of a joint debtor's liability under a scheme of arrangement or by operation of law is either tantamount to accord and satisfaction or has the legal effect of discharging the other joint debtors as well.

21 On the other hand, the authorities cited by Sambo were more germane to the determination of the 3rd Question of Law. In the case of *In re Garner's Motors Limited* [1937] Ch 594 ("*In re Garner*"), two companies (Sentinel and Garner's Motors) were jointly liable to Temple Press Ltd. Sentinel went into receivership and a scheme of arrangement was proposed and sanctioned by the court. Temple Press Ltd accepted a compromised payment under the scheme. Garner's Motors subsequently went into liquidation and Temple Press Ltd filed a proof of debt for the balance amount owing. The proof of debt was rejected by the liquidator. When the dispute was referred to court, Crossman J held that the scheme did not have the legal effect of discharging the joint liability of Garner's Motors. The court highlighted the fact that the scheme only discharged the liability of one of the joint debtors, *ie* Sentinel, by operation of law and did not discharge the other joint debtors, *ie* Garner's Motors. The following passage from the decision (at 598–599) is instructive:

> It is settled law that accord and satisfaction between a creditor and one of several debtors, who are jointly and severally liable to the creditor, discharges the other debtors unless it appears from the terms of the agreement or the surrounding circumstances that the creditor intended to reserve his rights against them. *But in my judgment a discharge of one of several joint debtors by operation of law does not discharge the other debtors. In my judgment the effect of s. 153 of the Companies Act, 1929, is to give to a scheme when sanctioned by the Court under the section a statutory operation. The scheme when sanctioned by the Court becomes something quite different from a mere agreement signed by the parties. It becomes a statutory scheme*. In my judgment, therefore, *the discharge of Sentinel Waggon Works, Ld., from the debt to Temple Press, Ld., which was effected under clause 15 of the scheme sanctioned by the Court on March 23, 1936, did not have the effect of discharging Garner's Motors, Ld., from its liability in respect of the debt*. It is settled law that a discharge of one of several judgment-debtors by operation of law does not release the other debtors. But in my judgment the effect of s. 153 of the Companies Act, 1929, is to give a scheme when sanctioned by the Court a statutory operation. Per Crossman J at 598–599.
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> [emphasis added]

22 This distinction received judicial endorsement in Australia in the decision of *Hill v Anderson Meat Industries* [1971] 1 NSWLR 868 ("*Hill v Anderson*"). Anderson Meat Industries Ltd ("Anderson") and its five subsidiaries fell into financial difficulties and a scheme of arrangement was agreed between the subsidiaries and their creditors. Under the terms of the scheme, the debts of the subsidiaries were extinguished upon payment of a compromised sum to the creditors. One of the subsidiaries was indebted to Mrs Hill and the debt was guaranteed by Anderson. However, the scheme did not specifically discharge the guarantees that were provided in respect of the debts and liabilities of the subsidiaries. The court held that the guarantee provided by Anderson for the debt of the subsidiary was not discharged by the scheme. Significantly, the court held that the scheme only applied to the relationship between the debtor and its creditors and did not concern the guarantor in the absence of any special arrangement in the guarantee.

23 The decision was affirmed on appeal. Although the Court of Appeal agreed that a guarantee is an accessory obligation and that upon extinguishment of the principal debt there would be no principal debt to which the accessory liability could attach, it nonetheless held that the principle regarding

discharge or release of a guarantor did not apply where the obligation of the principal debtor was discharged by operation of law. This was clear from the decision of the Court of Appeal in *Hill v Anderson Meat Industries* [1972] 2 NSWLR 704 ("*Hill v Anderson CA*") at 706:

> What has been submitted to this Court is that by the terms of the scheme, particularly cl. 3 which I have set out, the debt owing by the packing company to Mrs Hill is extinguished. Next, because a guarantee is an accessory obligation, upon the extinguishment of the principal indebtedness the guarantee goes also, as a result of the fact that there is no principal debt to which the accessory liability can attach. *It is conceded, as of course it must be, that these principles do not apply where the obligation is extinguished by operation of law, as for instance in the case of bankruptcy or the winding up of a company, but it is submitted that the obligation in the present case is not extinguished by operation of law but rather is extinguished by the terms of the scheme which impose not only upon those creditors who assent to it, but upon all creditors, the effect of the document which constitutes the scheme*. In this way it is submitted that the cases which are referred to by Street J are distinguishable.
>
> The argument is not substantially different from that which was propounded before the judge at first instance. He rejected it upon the ground that there is in fact a discharge of the obligation by operation of the law. I agree with this conclusion. Mrs Hill was never a party to the release of the obligation. The release came through the operation of a law which bound her as though she were a party. This seems to me in principle to be within that line of authority which so clearly establishes that the extinguishment of a principal obligation, when it is brought about by operation of law, does not result in a discharge of the surety.
>
> [emphasis added]

Similar pronouncements were made in New Zealand. See *Re Southern World Airlines* [1993] 1 NZLR 597 at 605 ("*Re Southern World Airlines*") and *Buttle v Allan as Official Liquidator of Buttle & Co Sharebrokers (in liquidation)* [1994] 1 NZLR 396 ("*Buttle v Allan*") at 404.

24 The decisions from Australia and New Zealand were cited with approval by the Court of Appeal in *Daewoo Singapore Pte Ltd v CEL Tractors Pte Ltd* [2001] 2 SLR(R) 791 *(*"*Daewoo*") at [21]:

> [o]n the basis of these authorities [such as *Hill v Anderson, Hill v Anderson CA, Re Southern World Airlines and Buttle v Allan*], *it is settled law that a scheme of arrangement or compromise made between a company and its creditors in relation to its debts and liabilities, approved by the requisite majority of the creditors and by the court, affects only the rights of the creditors against the company, and does not affect the rights of the creditors against a third party, such as a guarantor, for the same debts and liabilities of the company*. Consequently, where such scheme discharges either in whole or in part the debts owed by the company to its creditors, it does not operate as a discharge of the liability of the guarantor for the same debts or liabilities of the company.
>
> [emphasis added]

25 Several of the decisions where the court recognised the distinction between the release by operation of law and release by accord and satisfaction in the context of a scheme of arrangement (*eg In re London Chartered Bank of Australia* [1893] 3 Ch 540 and *Hill v Anderson*) drew support from *Ex parte Jacobs, In re Jacobs* (1875) LR 10 Ch App 211 ("*In re Jacobs*"). Counsel for ENJV submitted that the decision was of no assistance because it was based on the UK Bankruptcy Act 1869 (c 71) and was not a case involving a scheme of arrangement under the Companies Act (Cap 50, 2006 Rev

Ed) ("Companies Act"). With respect, this distinction has missed the point. In *In re Jacobs*, the claimant was the holder of a bill of exchange which was drawn by the defendant and accepted by one Philips. The bill of exchange was dishonoured and Philips as acceptor called for a meeting of his creditors pursuant to the UK Bankruptcy Act 1869. At the meeting, the majority of the creditors voted in favour of receiving a composition from Philips including the plaintiff. Thereafter, the plaintiff brought a claim against the defendant as drawer of the bill of exchange. In defence, the drawer alleged that he was discharged from liability under the bill of exchange as the plaintiff had accepted the composition from Philips. The court, however, held that as the acceptor was discharged only by operation of law, the liability of the drawer to the holder remained unaffected. James LJ at 213 stated:

> There can be no doubt that, if the holder of a bill, by becoming party to a deed or agreement, independently of any bankruptcy Act, agrees to accept a composition from the acceptor, he thereby discharges the drawer; but, on the other hand, it is equally clear that if the acceptor is discharged from his liability by operation of law by becoming a bankrupt, the liability of the drawer to the holder is not thereby affected.

26 The common denominator in each of these cases was the consistent recognition by the courts that a release by operation of law, be it under the Bankruptcy Act 1869 or under a scheme of arrangement, did not release the other joint or co-debtors from their liabilities.

27 I accept that the specific issue that confronted the court in a number of the above decisions did not specifically concern partnership liabilities. ENJV acknowledged that *In re Garner* did concern a joint liability under a contract. In my view, the crucial point to note is the consistent distinction drawn by the courts in several jurisdictions that a release by operation of law does not have the same legal effect as accord and satisfaction.

28 ENJV in recognising that *In re Garner* is on point, sought to distinguish the decision on the basis that it does not represent the law in Singapore because in Singapore, unlike the position in the UK or Australia, a release under a scheme of arrangement is not by operation of law. Instead, ENJV submitted that a scheme is consensual in nature. *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2008] 3 SLR(R) 121 ("*Oriental Insurance*") was cited as authority for this somewhat novel submission. In *Oriental Insurance*, the issue before the court was whether it had the residual jurisdiction to extend time for a creditor to file its proof of debt under the scheme. At first instance, the High Court, adopting the English approach embodied in the Privy Council decision in *Kempe v Ambassador Insurance Co* [1998] 1 WLR 271, came to the view that the scheme operated like a statutory contract and save for cases of mistake or fraud, the court did not have the jurisdiction to extend time. On appeal, the decision was reversed. The Court of Appeal preferred the Australian approach over the English position in holding that a scheme of arrangement derived its efficacy not from the statute but from the order of court approving the scheme. The scheme therefore did not operate as a statutory contract under which the court had abdicated the powers conferred on it by s 210 of the Companies Act. By holding that a scheme of arrangement does not operate as a statutory contract, it does not follow that a scheme of arrangement is therefore consensual in nature. The underlying flaw in ENJV's submission is that it regarded a statutory contract and release by operation of law as one and the same. However, that is not so. Instead they represent separate and distinct points of law and are not to be confused one for the other. It seems to me that the decision in *Oriental Insurance* only served to reinforce the trite proposition that a scheme of arrangement and its attendant legal consequences owe its efficacy entirely to the order of court that sanctioned it. Put simply, it amounts to a release by operation of law.

29 Interestingly, the Court of Appeal observed in *Oriental Insurance* at [67] that a scheme is

contractual if all the creditors agree. The Court of Appeal in *Daewoo* also made a similar observation at [24] that a scheme that is approved by all creditors is binding on the creditors and the company because such a scheme would be wholly contractual in nature and there would be no requirement to invoke s 210 of the Companies Act. In the present case, the Scheme was not approved by all of the creditors. Therefore, contrary to ENJV's submission, the Scheme could hardly be described as consensual such as to constitute accord and satisfaction.

30 In further support that a scheme of arrangement is consensual in nature, Counsel for ENJV also relied on *Johnson and Another v Davies and Another* [1998] 3 WLR. 1299 ("*Johnson*"). The case considered the effect of a voluntary arrangement under s 260 of the UK Insolvency Act 1986 (c 45) ("the UK Insolvency Act"). Chadwick LJ observed that a voluntary arrangement is treated as "consensual". However on a close scrutiny of the decision, it would be apparent that it does not support ENJV's submission that a release under a scheme of arrangement is likewise consensual and not by operation of law. In that case, the plaintiffs were the sureties of the lease taken out in the name of their company. The plaintiffs then sold their shares in the company to the two defendants and one Hopkins. In the sale agreement, the two defendants and Hopkins covenanted to indemnify the plaintiffs against all claims arising out of the lease. The company subsequently went into receivership and the plaintiffs paid the claims under their sureties. Hopkins then entered into a voluntary arrangement with his creditors under the UK Insolvency Act. The plaintiffs were given notice of the meeting and the arrangement was approved by the creditors. Thereafter, the plaintiffs brought a claim against the two defendants to recover the sums paid under the lease as sureties. Before the Deputy District Judge, the court held that the defendants were discharged from liability as a result of the voluntary arrangement entered into between Hopkins and his creditors.

31 On appeal, the decision was reversed by the High Court who held that the agreement was merely a covenant not to sue. The defendants then appealed to the Court of Appeal who dismissed the appeal, albeit on different grounds. The Court of Appeal agreed that the discharge of a debtor under the voluntary arrangement depended entirely on the terms of the arrangement. It held that the voluntary arrangement in that case did not amount to a release of Hopkins' liabilities due to the presence of inconsistent provisions in the voluntary arrangement. Although that finding was sufficient to dispose of the appeal, the Court of Appeal nevertheless went on to consider the nature and legal effect of the voluntary arrangement under the UK Insolvency Act.

32 In my view, the decision in *Johnson* does not take ENJV's case any further. In *Johnson*, the court traced the history of the UK Insolvency Act and how it evolved to its present state from the UK Bankruptcy Act, 1869. It concluded that the UK Insolvency Act was not a consolidating Act, and therefore there was no presumption that it was not intended to change the existing law. The court also found that there is a crucial difference in the two legislations in that discharge under the UK Bankruptcy Act, 1869 took effect from the statute while discharge under the UK Insolvency Act took effect from the scheme which becomes operative when sanctioned by the court. Crucially, the court treated the voluntary arrangement under s 260 of the UK Insolvency Act as consensual in nature because, it created a statutory hypothesis that the approved voluntary arrangement binds every person "as if he were a party to the arrangement." Accordingly, it is clear that the court's treatment of a voluntary arrangement as consensual was premised entirely on the specific wording of the UK Insolvency Act. In *Daewoo*, the Court of Appeal was invited to consider *Johnson* but declined from doing so as it was not necessary for the purposes of that case. Nonetheless it observed that *Johnson* "was based on the express wording in s 260 of the Insolvency Act 1986." There is no local equivalent of s 260 of the UK Insolvency Act. Section 210(3) of the Companies Act simply provides that a scheme of arrangement "shall, if approved by order of the Court, be binding on all creditors or class of creditors…as the case may be." As pointed out above at [29] the position in Singapore is that a scheme of arrangement is only treated as consensual if all the creditors agree: *Oriental Insurance* and

Daewoo. In any event, there is clear authority that a scheme of arrangement is regarded as a release by operation of law: *Re CEL Tractors*. This is no different from the position in the UK (*In re Garner*), Australia (*Hill v Anderson*), Hong Kong (*The Bank of Canton v Mak Lai Ting and Others* [1923] HKLR 27 ("*The Bank of Canton*") and New Zealand (*Re Southern World Airlines*).

33 Finally, the Court of Appeal in *Johnson* observed that the question whether co-debtors and sureties should be discharged as a consequence of a voluntary arrangement is a matter of policy. In that regard, it was observed that there was merit in the argument that the release of a joint or co-debtor would not be complete if it could be frustrated by an action of a co-debtor in enforcing rights of contribution. Obviously, this policy consideration would be irrelevant if the co-debtor is unable to seek contribution against the released co-debtor by operation of law or by the terms of the court order approving the arrangement or the scheme as the case may be.

Is reservation of rights necessary

34 In addition, ENJV also submitted that in the absence of any reservation of rights against a joint-debtor, the default position is that the release of a joint-debtor releases all the other joint-debtors. ENJV contended that Sambo did not raise any objection or reservation to the terms of the Scheme and having failed to do, should be bound by the Scheme. This proposition presupposed that there was a requirement for Sambo to have reserved its rights against NCC when the Scheme was approved pursuant to the order of court. This submission, according to ENJV, found support in *In Re E.W.A., A debtor* [1901] 2 KB 642 at 648–649 ("*In Re E.W.A.*"):

> [I]t is not disputed that the rule of law applies, namely, that the release of one of two joint debtors has the effect of releasing the other.
>
> …
>
> [A]lthough a document in terms purports to release one of two joint debtors, yet it may contain in terms a reservation of rights against the other joint debtor. Where you find these two provisions, you construe the document not as a release but merely as an undertaking not to sue a particular individual and the result is that the right to proceed against the co-debtor is reserved and can be put in force against him. Whenever you can find from the terms of the document an agreement for the reservation of rights against the co-debtor, then, I agree, the document cannot be construed as an accord and satisfaction of the joint debt and therefore as a release of the co-debtor.

3 5 *In Re E.W.A.* was a case where the release was not by operation of law. In cases involving release by operation of law, reservation of rights is strictly not necessary in the first place. In *In Re London Chartered Bank of Australia* [1893] 3 Ch 540, an objection was raised to the scheme on the ground that the rights of the creditors were not reserved against the sureties of the company. The court at 546–547 held that there was no need for such a reservation since the release was by operation of law:

> The scheme contains no release of the bank or the contributories; it contains no covenant not to sue, and it is by operation of law that the scheme becomes effective to relieve the company and contributories from further liability than that contemplated or imposed by the scheme. The scheme of arrangement under the Act of 1870 is…an alternative mode of liquidation which the law allows the statutory majority of creditors to substitute for the pending winding-up, whether voluntary or under the Court, just as the Bankruptcy Act, 1869, allowed the creditors the substituted liquidation by arrangement under sect. 125, or composition under sect. 126, of that

Act, for a pending bankruptcy. The discharge of the bankrupt in such case was statutory and not conventional, and therefore by operation of law. Just so here under the Act of 1870. The discharge of the company or contributories under the Joint Stock Companies Arrangement Act, 1870, is by operation of law effected by the stay of actions imposed…*It seems to me, then, that, the discharge being clearly by operation of law consequent upon statutory liquidation, the principles laid down by Lord Justice Mellish in In re Jacobs (1875) LR 10 Ch App 211 apply, and that, therefore, there is no need, and it would not be right, to introduce a reservation of rights against sureties into the scheme of arrangement*. [emphasis added]

36 Furthermore, ENJV submitted that the cases relied on by Sambo did not concern partnership liabilities. I do not agree that this is a valid distinction. The principle governs all joint liabilities. Partnership liability is but a species of joint liability and should be treated no differently from joint liability under a contract or accessory liability under a guarantee. In either case, a release by accord and satisfaction of the joint-debtor, as distinct from release by operation of law, would release the other joint-debtor or guarantor.

37 The fact that no distinction should be drawn between a discharge by operation of law in respect of a joint debtor and a surety in the context of a scheme of arrangement was reaffirmed in the Hong Kong decision of *The Bank of Canton*. In that case, an action was brought against several defendants as makers, jointly and severally, of a promissory note. Two of the defendants also stamped the promissory note as guarantors. In resisting an application for summary judgment, the defendants contended that since one of the defendants has already been discharged pursuant to a scheme of arrangement, they were all likewise discharged as the debt was a joint debt. The court disagreed and held at 30:

In my opinion, there is no distinction in law in the case of joint liability on an instrument between principals and sureties, the discharge of one, *prima facie*, operates as a discharge of all, but where the principal debt is gone by operation of law, as in this case the legal position of joint debtors (whether the liability is joint or several) and sureties is the same.

No express provision to release any third party under the Scheme

38 It is not disputed that the Scheme did not expressly provide for NCC to be released from its joint partnership liabilities with Econ. The position would be different if the Scheme had provided for the release of NCC's joint liabilities as well. Indeed this was precisely the experience in *Daewoo* where the court (at [22], [23] and [32]) gave effect to an express term under a scheme of arrangement whereby the guarantor of the company's debts was discharged from its liability under the guarantee:

22 It seems to us that in this case there are really two issues for determination. The first is whether it is permissible to incorporate in a scheme of arrangement or compromise under s 210 of the Companies Act, as was incorporated in the present scheme under consideration, a term to the effect that, upon the company performing its obligations as regards payments and other things vis-à-vis the creditors under the scheme, the creditors will release the guarantors from their obligations under the respective guarantee. The second is whether such a term is valid and effectual for the purpose.

23 On the first question, we can see no reason in principle why a scheme of arrangement or compromise under s 210 of the Companies Act cannot incorporate such a term. No cases have been cited to us to say that such a term cannot be embodied in a scheme. After all, a scheme of arrangement or compromise proposed by a company to be made with its creditors or a class of creditors under s 210 of the Companies Act is no more than a proposal to vary or modify its

obligations in relation to its debts and liabilities owed to its creditors or a class of creditors on certain terms and conditions…

[A]s the scheme is binding on the company and its creditors, there is no reason in principle why the company cannot in principle enforce the terms of the scheme as against the creditors. It must be borne in mind that the scheme contains reciprocal rights and obligations of the company and the creditors, and once the company has observed and performed all its obligations under the scheme, the creditors likewise must observe and perform their obligations thereunder, and if they fail or refuse to do so, the company is entitled to take proceedings to enforce their obligations under the scheme

Summary of the governing principles

39 From my review of the cases cited by both parties, the following principles can be derived:

(a) Even in cases of release of a joint-debtor by a creditor, it is still a question of construction whether the release constituted accord and satisfaction so as to release the other joint-debtors. The release could on a true construction merely amount to a covenant not to sue in which event the joint-debtor is not released from the joint liability. In other words, there is no default rule that a release of a joint-debtor would invariably release the other joint-debtors.

(b) The law recognises a clear distinction between release by accord and satisfaction and release by operation of law. It is only in the former case that the joint-debtors are likewise released from such joint liability.

(c) In cases where a joint-debtor is released by operation of law such as a scheme of arrangement, the release applies only to the joint-debtor under the scheme.

(d) The scheme of arrangement would only release third parties, *ie* any party other than the company, if the court order specifically provides for such release.

40 The position becomes even clearer when the *raison d'etre* of the principle regarding release of joint-debtors is carefully scrutinised and understood. It has been expressed in various ways though they effectively refer to the same mischief:

(a) If the joint-debtor who has not been released is sued, he has a right to enforce contribution from the other joint-debtor and if that right remains, then the release of the joint-debtor is not complete: *Ex parte Good; In re Armitage* (1876) 5 Ch D 46 at 51.

(b) In bringing another action to recover the balance amount from other joint-debtors, the creditor commits a breach of the contract to the released joint-debtor for such an action would inevitably lead to the very claim from which the release has been purchased by accord and satisfaction: *Deanplan Ltd* at 483.

41 Neither of the above reasons would be relevant in the context of a release under the Scheme. First, the release of Econ under the Scheme was in fact complete because NCC cannot seek contribution from Econ when sued by Sambo as the Scheme has also compromised and released all of NCC's claims against Econ. (see para 17(b) above) Secondly, unlike release by accord and satisfaction, under the terms of the Scheme, all creditors including Sambo, have only agreed or deemed to have agreed that they have no further claims whatsoever against Econ. There was no undertaking or confirmation by the creditors that they will drop any claims that they have against

third parties like NCC for its joint liabilities. Accordingly, any claim brought against NCC would not be in breach of any contract or undertaking to Econ.

42 In the circumstances, as there was no express provision under the Scheme that has released NCC from its joint liabilities to Sambo, the 3rd Question of Law must be answered in the negative.

Conclusion

43 I would like to record my appreciation to both counsel for their well researched and ably presented submissions, both written and oral. I found their submissions to be extremely helpful in enabling me to distil the issues to arrive at my determination in a timely manner.

44 It is clear to me, both as a matter of law as well as on a true construction of the terms of the Scheme, that NCC was not released from its joint liabilities to Sambo. If ENJV is right in its submission, it would mean that NCC would enjoy an unexpected "windfall" in being released from its joint liability to Sambo, a consequence which was neither contemplated nor intended under the Scheme. The very fact that ENJV took five years to raise this issue after the Scheme was sanctioned bears testimony to my observation that such a "windfall" would indeed be unexpected.

45 I ordered the costs of both applications to be costs in the arbitration.