SAAG Oilfield Engineering (S) Pte Ltd (formerly known as Derrick Services Singapore Pte Ltd) *v* Shaik Abu Bakar bin Abdul Sukol and another and another appeal
[2012] SGCA 7

Case Number	: Civil Appeals Nos 55 and 56 of 2011
Decision Date	: 30 January 2012
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Tito Isaac, Justin Chan, Ho Seng Giap and Denyse Yeo (Tito Isaac & Co LLP) for the appellant in Civil Appeals Nos 55 and 56 of 2011; Krishna Morthy and Udeh Kumar s/o Sethuraju (S K Kumar Law Practice LLP) for the first respondent in Civil Appeal No 55 of 2011; K Anparasan and Grace Tan (KhattarWong) for the second respondent in Civil Appeal No 55 of 2011; Ramasamy K Chettiar (Acies Law LLC) and Nasser Ismail (Md Nasser Ismail & Co) for the respondent in Civil Appeal No 56 of 2011.
Parties	: SAAG Oilfield Engineering (S) Pte Ltd (formerly known as Derrick Services Singapore Pte Ltd) — Shaik Abu Bakar bin Abdul Sukol and another

Companies

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2011] 4 SLR 825.]

30 January 2012

Chao Hick Tin JA (delivering the grounds of decision of the court):

Introduction

1 The present appeals, *viz*, Civil Appeal No 55 of 2011 ("CA 55/2011") and Civil Appeal No 56 of 2011 ("CA 56/2011"), were appeals from the decision of the High Court judge ("the Judge") in, respectively, Summons No 4266 of 2010 in Suit No 717 of 2009 ("S 717/2009") and Summons No 2768 of 2010 in Suit No 183 of 2010 ("S 183/2010"), wherein he determined the following question of law posed under O 14 r 12 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) in the negative (see *Azman bin Kamis v Saag Oilfield Engineering (S) Pte Ltd (formerly known as Derrick Services Singapore Pte Ltd) and another suit* [2011] 4 SLR 825 ("the GD") at [1]):

> Whether the … causes of action [of the first respondent in CA 55/2011 and the respondent in CA 56/2011] … against the [appellant in the present appeals] have been extinguished and/or barred and/or precluded from being maintained consequent to the Scheme of Compromise and Arrangement dated 3 July 2008 which has been duly completed, performed and fulfilled according to its terms by 4 May 2009.

2 After hearing the submissions of the parties, we allowed both appeals. The result of our decision was that the first respondent in CA 55/2011 and the respondent in CA 56/2011 (collectively, "the Respondents") were precluded from pursuing their common law claims for damages against the appellant in the present appeals ("the Appellant") because of the Scheme of Compromise and Arrangement dated 3 July 2008 ("the Scheme"). We now give the reasons for our decision.

Facts

The parties

3 The Appellant, SAAG Oilfield Engineering (S) Pte Ltd ("SAAG Singapore"), was formerly known as Derrick Services Singapore Pte Ltd ("Derrick") until Derrick was rehabilitated and taken over by SAAG Singapore pursuant to the Scheme.

4 The first respondent in CA 55/2011, Shaik Abu Bakar bin Abdul Sukol ("Shaik"), and the respondent in CA 56/2011, Azman bin Kamis ("Azman"), were workmen employed by Derrick. They sustained injuries in the course of their employment, and commenced common law tort actions against Derrick and/or SAAG Singapore. The second respondent in CA 55/2011 had no role in the appeal.

Background to the dispute

5 The relevant facts giving rise to the claims by the Respondents were not in dispute and may be shortly stated.

The Respondents suffered injuries and lodged statutory compensation claims

6 On 14 August 2007, Azman suffered an injury due to an industrial accident. On 4 February 2008, Shaik also suffered injuries due to an industrial accident.

7 Both the Respondents lodged statutory claims for workmen's compensation under the Workmen's Compensation Act (Cap 354, 1998 Rev Ed) ("WCA"). Shaik's WCA claim was lodged on or around 11 February 2008, while Azman's WCA claim was lodged on 7 April 2008.

Derrick entered provisional liquidation

8 On 24 March 2008, Derrick entered provisional liquidation. The efforts of the provisional liquidator, M/s Ferrier Hodgson, resulted in the securing of SAAG Singapore as a "white knight" investor prepared to save Derrick from liquidation by acquiring control of Derrick pursuant to an investment agreement conditional upon creditor approval of the Scheme.

9 The material terms of the Scheme for present purposes were as follows: [note: 1]

> **1. Definitions**
>
> **1.1** In this Scheme, except where the context or subject matter otherwise indicates or requires, the following expressions shall have the meaning set out opposite or following the expressions respectively:
>
> **Act** means the Companies Act (Cap. 50, 2006 Rev. Ed.);
>
> …
>
> **Claims Cut-Off Date** means 22 October 2008;
>
> **Company** means Derrick …
>
> …

Court Meeting means the meeting (or adjournment thereof) of the Scheme Creditors summoned pursuant to [an] order of the Court made pursuant to sections 210 and 211 of the Act for such meeting to be convened for the purpose of considering and, if thought fit, to approve this Scheme;

Court Meeting Date means a date not later than 25 July 2008 or, in the case of an adjournment of any of the Court Meetings, the date of the later adjournment thereof;

…

Excluded Creditors means Preferential Creditors hereto and persons to whom any rights of the foregoing persons have been assigned or transferred, and Excluded Creditor means any one of the Excluded Creditors;

…

Liability means *any obligation, liability or indebtedness of a person whether it is present, future, prospective or contingent, whether its amount is fixed or unliquidated, whether it arises in contract, tort, restitution or otherwise*, whether or not it involves the payment of money, which arises at common law, in equity, by statute (in Singapore or in any other jurisdiction) or which arises pursuant to a valid assignment or a valid authority to pay any amount on behalf of a person or in any other manner whatsoever provided that such expression does not include any obligation or liability which is barred by statute or one for which no remedy may be granted or is otherwise unenforceable. For the avoidance of doubt, where any obligation or liability under a contract or policy is void or, being voidable, has been duly avoided, no obligation or liability shall arise in respect of such obligation or liability;

…

Preferential Creditors means any person who has a claim against the Company that would be entitled to priority in the case of a winding-up of the Company as set out in Schedule 1 [Schedule 1 of the Scheme sets out a number of "Preferential Creditors", the most important for present purposes being creditors for "all amounts due in respect of workmen's compensation under the [WCA] accrued before, on or after the commencement of the winding up"]; [note: 2]

Proof of Debt means a declaration executed by a Scheme Creditor in respect of the Scheme Claims claimed against the Company …

…

Scheme means this scheme of compromise and arrangement including all such amendments, additions and variations thereto as may be required, approved or sanctioned by the Court in accordance with the relevant provisions of the Act;

Scheme Claim in relation to any Scheme Creditor means the total amount of Liabilities (including any Liabilities that had been agreed between the Company and the respective Scheme Creditor but had not [been] paid prior to 24 March 2008), if any, as at 24 March 2008 for which the Company is or may be liable to that Scheme Creditor (whether contingently or otherwise) after deducting the value of any Security held by the Scheme Creditor, in respect of or arising from any and all act[s], omissions, agreements,

transactions, dealings, matters and events whatsoever effected, occurring or otherwise taking place at any time prior to … 24 March 2008, and which determination shall be subject to the provisions of this Scheme;

Scheme Creditor means a creditor of the Company (other than an Excluded Creditor) who has a Scheme Claim;

…

Security means any mortgage, pledge, charge or other security on or against any property, right or entitlement whatsoever of the Company, that a Scheme Creditor has as at 24 March 2008 to secure its Scheme Claim;

…

2. The Scheme

2.1 Preliminary

2.1.1 The purposes of this Scheme which is proposed by the Company are to procure, in consideration of the matters set out in this Scheme the discharge and release of all claims by Scheme Creditors relating to the Scheme Claims against the Company.

…

5. Payment to Scheme Creditors

…

5.4 Notwithstanding anything to the contrary herein, any Scheme Creditor who has failed to submit … a Proof of Debt in respect of its Scheme Claim on or before the Claims Cut-Off Date, shall not be entitled to payment of his Scheme Claim, and with effect from the Claims Cut-Off Date, the Company shall be completely and absolutely discharged from that Scheme Creditor's Scheme Claim.

…

7. Effect of Scheme

…

7.2 Save as provided for and permitted in this Scheme, no Scheme Creditor shall be entitled to take any action or commence or continue any proceedings against the Company in any jurisdiction after the Court Meeting Date for or in connection with the payment or recovery of any sum in respect of or in connection with the Scheme Creditor's Scheme Claim.

…

[emphasis in bold in original; emphasis added in italics]

The Scheme

10 Pursuant to s 210(1) of the Companies Act (Cap 50, 2006 Rev Ed), on 24 June 2008, Belinda Ang Saw Ean J ("Belinda Ang J") ordered that a meeting of "Scheme Creditors" (as defined in cl 1.1 of the Scheme) be held on 25 July 2008. Notice of the meeting was accordingly sent to all Scheme Creditors (in accordance with s 211 of the Companies Act). Azman allegedly did not receive such notice, nor did he see the notice of the meeting advertised in *The Straits Times*. In contrast, Shaik did receive notice of the meeting or was otherwise aware of the Scheme.

11 On 25 July 2008, the meeting of the Scheme Creditors unanimously approved the Scheme, but neither of the Respondents was present at or participated in the meeting.

12 In accordance with ss 210(3) and 210(4) of the Companies Act, Belinda Ang J approved the Scheme on 25 August 2008, and the court order approving the Scheme was lodged with the Accounting and Corporate Regulatory Authority the following day.

The Respondents did not participate in the Scheme

13 On 27 August 2008, Shaik was notified that the Scheme had been approved and that he was to file a proof of debt.

14 On 20 October 2008, the Ministry of Manpower ("the MOM") notified Shaik that it had assessed his WCA compensation at $29,400, but Derrick's insurance company objected to this assessment (as did Shaik himself).

15 By 22 October 2008 (the deadline provided by the Scheme for Scheme Creditors to submit proofs of debt to be dealt with under the Scheme), neither of the Respondents had submitted any proof of debt, and, thereafter, neither of them participated in or received payments under the Scheme, which was terminated as per its terms on 4 May 2009.

The Respondents commenced common law actions

16 On 8 April 2009, Shaik gave notice to the MOM of his intention to withdraw or suspend his WCA claim and proceed with a common law claim in tort. He filed a writ (*viz*, the writ for S 717/2009) against Derrick (subsequently amended to SAAG Singapore) on 20 August 2009.

17 Likewise, on 15 March 2010, Azman gave notice to the MOM of his intention to withdraw or suspend his WCA claim and proceed with a common law claim in tort. He filed a writ (*viz*, the writ for S 183/2010) against SAAG Singapore on 16 March 2010.

18 It was common ground that Derrick (and SAAG Singapore) was at all material times covered by a valid insurance policy in respect of the Respondents' claims, whether under the WCA or at common law.

The decision below

19 In determining the question of law set out at [1] above ("the O 14 r 12 question"), the Judge first identified (at [20]–[25] of the GD) the purpose of s 210 of the Companies Act as explained by this court in *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2008] 3 SLR(R) 121 ("*The Oriental Insurance Co*").

20 The Judge next considered whether the Respondents were "creditors" within the meaning of s 210(3) of the Companies Act (see [26]–[31] of the GD). At one point (*viz*, [29] of the GD) the

Judge stated that it was not necessary for him to decide whether unliquidated tort claimants such as the Respondents were "creditors" within the meaning of s 210(3). Subsequently, however, he appeared to conclude (at [30]–[31] of the GD) that the Respondents were not "creditors". The main consideration which seemed to have swayed the Judge's mind in this regard was the fact that the Respondents' unliquidated claims in tort were covered by insurance, and, thus, if the Appellant were held to be liable, that liability would be met by its insurer and would not affect the coffers of the Appellant. The Judge then considered whether the Respondents were "Scheme Creditors" within the meaning of that term as defined by the Scheme, and held that they were not (see [33] of the GD). In so holding, he was again influenced by the fact that any tortious liability of the Appellant to the Respondents would effectively be borne by the Appellant's insurer. He also held (at [37] of the GD), however, that even if the Respondents were to be considered "Scheme Creditors", they were nonetheless not bound by the Scheme because they had not received consideration for it.

21 In short, therefore, the Judge held that a scheme of arrangement carried out in compliance with ss 210–212 of the Companies Act was not binding on tort claimants (whose claims would necessarily be for unliquidated sums) who did not participate in the scheme and whose claims were covered by a valid policy of insurance, with the result that such claimants could commence and maintain common law tort actions against the company in question notwithstanding the completion of the scheme.

22 The Appellant was dissatisfied with this result and appealed.

The issues before this court

23 The issues before us on appeal were:

(a) whether the Respondents were "creditors" within the meaning of s 210 of the Companies Act;

(b) whether the Respondents were "Scheme Creditors" within the meaning of that term as defined in the Scheme; and

(c) whether the Respondents were therefore bound by the Scheme.

24 In addition, we also gave consideration to a number of other issues which had not been squarely raised by the parties, but which were also material to our decision.

Our analysis

25 In the GD, the Judge made a number of prefatory comments regarding the purpose of s 210 of the Companies Act, and at [23], he said:

> The courts have given effect to the underlying legislative policy of the antecedents of s 210 of the Companies Act by holding that such creditor and court approved schemes of compromise or arrangement bind all creditors. I should underscore that what binds the creditors is the compromise or arrangement set out in the scheme. A compromise or arrangement ordinarily means a variation by way of restructuring and/or rescheduling of the company's debts owed to creditors. **The question here is whether a scheme has the effect in law of unilaterally *extinguishing* an insured claim in totality, quite apart from compromising it. A careful reading of s 210 of the Companies Act** and the underlying legislative policy set out in the cases cited above, **reveals nothing which supports the proposition that s 210 of the Companies Act by its terms confers a statutory result that the scheme extinguishes an**

> **insured claim against a company, after the completion and termination of a scheme**. Debts or claims can ordinarily only be *compromised* to the extent provided and performed by the company as set out in the scheme *vis-à-vis* each individual creditor or claimant. [emphasis in italics in original; emphasis added in bold]

With respect, in our opinion, the portions in bold in the above quotation reveal that the Judge asked the wrong question and therefore misdirected himself. He drew a distinction between the *compromise* of a claim or debt and its *extinction*, and was of the view that s 210 of the Companies Act only encompassed the former but not the latter. However, this was a false dichotomy: as the Judge himself noted in the same paragraph, what binds the creditors of a company is the compromise or arrangement set out in a scheme of arrangement, and, therefore, the extent to which a claim against or a debt owed by the company is compromised obviously depends on the terms of the scheme itself. If the terms of the scheme dictate it, there is nothing at all objectionable in concluding that it results in the extinction of claims against or debts owed by the company. As will be seen, this false premise coloured the Judge's approach and affected his conclusions.

Whether the Respondents were "creditors" within the meaning of s 210 of the Companies Act

26 If the Respondents were not "creditors" within the meaning of s 210 of the Companies Act, then there could be no question of the Respondents being bound by the Scheme, and there would be no need for any further inquiry. In every sense, this was a threshold question, and unless it was answered in the affirmative, there would be nothing more to be considered and it would, in turn, also provide the answer to the O 14 r 12 question.

27 The approaches taken by the courts in England and Australia as to the proper interpretation of the term "creditor" in their respective companies legislation, upon which our Companies Act is modelled, are not uniform.

The English cases

28 The English cases adopt a very broad approach to the term "creditors", an approach which can be traced back to *In re Midland Coal, Coke, and Iron Company* [1895] 1 Ch 267 ("*Re Midland Coal*"). In that case, a lessee of certain mines assigned his leases to a company, which covenanted to indemnify him against the future rents, royalties and liabilities thereunder. After the company went into liquidation, a scheme of arrangement under s 2 of the Joint Stock Companies Arrangement Act 1870 (c 104) (UK) ("the 1870 Act") was approved by the court, resulting in the formation of a new company to take over the assets and liabilities of the old company and to pay or satisfy the claims of unsecured creditors of the old company. The lessee was aware of the scheme and did not oppose its approval by the court. However, after the scheme was approved and the new company formed, he applied, in the liquidation of the old company, to admit a claim by him of £45,787 against the old company based on its covenant to indemnify him against the future rents, royalties and liabilities under the leases.

29 The English Court of Appeal held (at 277) that the lessee was bound by the scheme:

> … *the word "creditor" is used* in the [1870] Act … *in the widest sense, and* … it *includes all persons having any pecuniary claims against the company*. Any other construction would render the [1870] Act practically useless. [emphasis added]

30 What *Re Midland Coal* decided, therefore, was that the word "creditor" in s 2 of the 1870 Act was broad enough to include a contingent creditor whose claim could be admitted to proof in a

winding up, even if it was for an unproven, unliquidated amount.

31 Section 2 of the 1870 Act was only applicable to companies in liquidation, but its descendants (*viz*, s 206 of the Companies Act 1948 (c 38) (UK), s 425 of the Companies Act 1985 (c 6) (UK) and now s 896 of the Companies Act 2006 (c 46) (UK)), like s 210 of our Companies Act, applied regardless of whether or not the company in question was in liquidation.

32 Notwithstanding this change in the legislation, the broad approach in *Re Midland Coal* was followed in the subsequent English cases of *Re Cancol Ltd* [1996] 1 All ER 37 ("*Re Cancol*"), *In re T & N Ltd and others* [2006] 1 WLR 1728 ("*Re T & N*")) and *Re T & N Ltd and others (No 3)* [2007] 1 All ER 851 ("*Re T & N (No 3)*"), all of which held that a claimant with some sort of contingent claim against a company (which might or might not be admitted to proof in the company's winding up) was to be considered a "creditor" for the purposes of the various English equivalents of s 210 of our Companies Act.

33 The upshot of the English cases, therefore, was that for the purposes of the various English equivalents of s 210 of our Companies Act, the position was as follows (see Roy Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, 4th Ed, 2011) at para 12-18):

> The word "creditor" is used in the widest sense and includes a creditor whose debt has not yet become payable [citing *Re Cancol*] and a contingent creditor [citing *Re Midland Coal*], whether or not his claim is provable and, indeed, even if he has yet to make a claim or is unknown [citing *Re T & N* and *Re T & N (No 3)*], provided that the facts that may give rise to his claim already exist.

The Australian cases

34 In contrast to the unanimously wide approach of the English courts to the interpretation of the term "creditors", there is a divide in Australia between a number of jurisdictions which follow the English approach, and South Australia, which does not. The disagreement among the Australian courts concerns whether or not tort claimants are to be considered "creditors" within the meaning of the various Australian equivalents of s 210 of our Companies Act.

35 In the South Australian Supreme Court case of *Trocko v Renlita Products Pty Ltd; The Commonwealth Trading Bank and Shepherd (Claimants)* (1973) 5 SASR 207 ("*Trocko*"), the plaintiff commenced an action against the defendant company in 1967 claiming unspecified damages for personal injuries caused by the defendant's negligence. The defendant denied liability, but judgment was entered in the plaintiff's favour in 1971. In the intervening period, however, a scheme of arrangement was approved by the necessary majority of creditors in 1970, and was approved by the court pursuant to s 181 of the Companies Act 1962–1972 (No 56 of 1962–No 52 of 1972) of South Australia ("the South Australian Companies Act"), which is identical to s 210 of our Companies Act. The question, therefore, was whether the plaintiff was barred from enforcing his judgment against the defendant as a result of the scheme.

36 Hogarth J in the Supreme Court of South Australia held that the plaintiff was not so barred since the plaintiff was not a "creditor" within the meaning of s 181 of the South Australian Companies Act. His Honour reached that conclusion for a number of reasons. First, his Honour was of the view (at 209) that:

> In general, the word creditor means a person who is entitled to payment (either *in praesenti* or *in futuro*, and either unconditionally or subject to conditions) of a sum certain from some other identified person, the debtor. In this sense, a person with only a claim for an unspecified amount

> of damages arising out of an accident is not a creditor. He becomes a creditor only when judgment is given in his favour.

Second, Hogarth J held that this plain meaning of the word "creditor" was applicable to s 181 of the South Australian Companies Act, dismissing *Re Midland Coal* as *obiter* (see *Trocko* at 209–210). Third, Hogarth J thought (at 210) that s 181 could "usefully be compared with the provisions relating to the proof and ranking of claims in a winding up", and that it was significant that s 291(1) of the South Australian Companies Act (identical to s 327(1) of our Companies Act) distinguished between "debts" on the one hand and "claims … 'sounding only in damages'" (see *Trocko* at 210) on the other. Fourth, Hogarth J was of the view that s 181(2) of the South Australian Companies Act (equivalent to s 210(2) of our Companies Act), in requiring the agreement of "a majority in number representing 'three-fourths in value of the creditors … present and voting either in person or by proxy at the meeting'" (see *Trocko* at 210), clearly contemplated that "creditors" were "people whose claims [were] ascertained or capable of being quantified at the meeting at which the proposed scheme [was to be] adopted" (see *Trocko* at 210), especially since no statutory machinery had been provided to ascertain how unliquidated tort claims would be quantified for the purposes of determining whether the requisite majority of three-fourths in value of the creditors was made out.

37 The reasoning in *Trocko* was endorsed by a majority of the Supreme Court of South Australia sitting *en banc* in *In re Waymouth Guarantee and Discount Co Ltd* (1975) 10 SASR 407 ("*Re Waymouth*") (*per* Hogarth J at 449 and Walters J at 457), but this was only by way of *obiter dicta* as the case turned on other matters. The remaining judge, Bray CJ, considered that the question of whether a person with an unliquidated tort claim against a company for damages was a "creditor" within the meaning of s 181 of the South Australian Companies Act was "very puzzling" (see *Re Waymouth* at 443), but eventually remained agnostic as between the approaches in *Trocko* and *Re Midland Coal* (see *Re Waymouth* at 444).

38 In contrast, the Supreme Court of New South Wales (Equity Division), decisively disapproved of *Trocko* in *Re Glendale Land Development Ltd (in liq)* (1982) 7 ACLR 171 ("*Re Glendale*"). In that case, McLelland J examined the meaning of the word "creditors" in s 315 of the Companies (NSW) Code (the New South Wales equivalent of s 210 of our Companies Act). Rejecting all of Hogarth J's reasons in *Trocko* for excluding persons with unliquidated tort claims from the ambit of the word "creditors", McLelland J held (see *Re Glendale* at 176):

> [Hogarth J in *Trocko*] sought to distinguish … *Re Midland Coal* … but seems to me, with respect, to have done less than full justice to the grounds of [that decision].
>
> …
>
> His Honour also sought to draw support from the absence of statutory machinery to quantify a claim for unliquidated damages for the purpose of ascertaining value in relation to a meeting of creditors under s 181(2) [of the South Australian Companies Act].
>
> In relation to this last matter it may be said that the same consideration would have applied in … *Re Midland Coal* … Furthermore, difficulties as to quantification and disputes as to liability are not confined to unliquidated claims.
>
> …
>
> In my opinion, having regard to the history of the legislation, its evident purpose, the longstanding decision in *Re Midland Coal* … and the terms in which s 315 [of the Companies (NSW)

> Code] is now expressed, "creditors" in that section should be understood as embracing all persons with claims which would be entitled to be admitted to proof if the company were wound up.

39 Although the last sentence of the above quotation referred only to "claims which would be entitled to be admitted to proof if the company were wound up" (see *Re Glendale* at 176), McLelland J later clarified in *Re R L Child & Co Pty Ltd* (1986) 10 ACLR 673 ("*Re R L Child*") (at 674) that:

> This formulation was not intended to limit the scope of the expression ["creditors"], but rather to indicate that persons with unliquidated, prospective or contingent claims were not excluded, notwithstanding difficulties of assessment of value in such cases …

Perhaps more significantly for present purposes, in *Re R L Child*, McLelland J also gave consideration (at 674) to "the anomalous rule excluding from proof in the winding up of an insolvent company a person having an unliquidated claim in tort", which applied by virtue of s 438(2) of the Companies (NSW) Code and s 82(2) of the Bankruptcy Act 1966 (Cth) (the Singapore equivalents of these provisions (referred to at [27] of the GD) being, respectively, s 327(2) of the Companies Act and s 87(1) of the Bankruptcy Act (Cap 20, 2009 Rev Ed)). As McLelland J noted, the aforesaid provisions only applied in the case of an insolvent company, and on that basis, his Honour refused to exclude tort claimants from the ambit of the word "creditors" in s 315 of the Companies (NSW) Code (see *Re R L Child* at 674–675):

> It is highly unlikely that the legislature would have intended the ambit of that expression ["creditors"] to vary depending upon whether the company was solvent or insolvent, and to exclude persons having unliquidated claims in tort from the scope of s 315 would make little commercial sense.

Instead, McLelland J preferred to look to s 438(1) of the Companies (NSW) Code (the equivalent of s 327(1) of our Companies Act) – but *excluding the phrase referring to bankruptcy* (see *Re R L Child* at 675) – as a "convenient guide" (see *Re R L Child* at 675) for the purposes of determining who were "creditors" within the meaning of s 315 of the Companies (NSW) Code. It should be noted that s 438(1) of the Companies (NSW) Code was in more or less the same terms as s 291(1) of the South Australian Companies Act, which Hogarth J relied upon by analogy in *Trocko* (see [36] above), yet, the two judges came to starkly different conclusions.

40 It is clear, therefore, that in New South Wales, *Re Midland Coal* holds sway in this area of the law (see also *Re BDC Investments Ltd* (1988) 13 ACLR 201 at 203).

41 That the decision in *Trocko* is a distinctly minority view in Australia is also evident from the fact that both Victoria (see *Re Southern Australia Perpetual Forests Ltd* [1971] VR 475) and Western Australia (see *Bond Corporation Holdings Ltd v Western Australia* (1992) 7 ACSR 472 ("*Bond Corporation*")) have adopted the broad approach laid down in *Re Midland Coal*.

42 Indeed, *Bond Corporation* is particularly instructive as the points which found favour with Hogarth J in *Trocko* (such as the argument that the statutory machinery regulating schemes of arrangement did not provide a means for determining the quantum of a creditor's unliquidated claim at a creditors' meeting for the purposes of evaluating the value to be attached to that creditor's vote) were rejected by Anderson J, who held (see *Bond Corporation* at 477) that:

> [T]here is ample and persuasive authority for the proposition that the term "creditors" in [the Western Australian equivalent of s 210 of our Companies Act] is to be given a wide meaning and includes persons having any pecuniary claim against the company, including unliquidated,

prospective or contingent claims [citing, *inter alia*, *Re Glendale* and *Re R L Child*] …

The Singapore cases

43 Thus far, the only local case that has dealt with the foregoing authorities is *Pacrim Investments Pte Ltd v Tan Mui Keow Claire and another* [2010] SGHC 134 ("*Pacrim Investments*"), which concerned whether the plaintiff ("Pacrim") was bound by the scheme of arrangement in question, such that its entitlement to damages against the defendant company was extinguished. That turned on whether Pacrim was a "Scheme Creditor" within the meaning of the scheme in question, which in turn depended on whether Pacrim was a "creditor" within the meaning of s 210 of the Companies Act. The difficulty was that at the time the scheme was approved and implemented, Pacrim's contractual claim against the company for damages had been dismissed by the High Court, but its appeal to this court against that decision was pending (Pacrim's appeal was eventually allowed *after* the scheme had been completed).

44 At first instance, the assistant registrar ("the AR"), following *Re Midland Coal*, *Re T & N*, *Re Glendale* and *Re R L Child*, held (at [31] of *Pacrim Investments*) that the word "creditor" in s 210 of the Companies Act should be given a wide construction so as to include any person with a pecuniary claim against the company which was capable of estimate, regardless of whether such claim was unliquidated, prospective or contingent. Since, at the time the scheme was approved and implemented, the success of Pacrim's claim was contingent upon the decision of the Court of Appeal, Pacrim was a contingent creditor and came within s 210 of the Companies Act, and was thus bound by the scheme.

45 The AR's decision was upheld by the High Court in *Pacrim Investments Pte Ltd v Tan Mui Keow Claire and another* [2011] 2 SLR 438, which also proceeded on the basis of a wide definition of the word "creditors" in s 210 of the Companies Act (at [5]):

> At the time the [s]cheme [in question] was established, Pacrim had its claim dismissed by the High Court but its appeal was pending. This meant that in the event its appeal was allowed, it would be a creditor; indeed this was an eventuality that did materialise. *There was no basis on principle to exclude persons in Pacrim's position from the scope of "creditors".* In practice, doing so would unfairly benefit such companies who would be able to recoup its entire debt from a company resuscitated from the sacrifices of all the other creditors. Therefore there is also no basis on policy to do so. [emphasis added]

The correct approach in this case

46 As indicated at [20] above, the real reason for the Judge's ruling that the Respondents were not "creditors" within the meaning of s 210 of the Companies Act was that their common law tort claims were covered by insurance and, as such, their claims, even if successfully prosecuted, would not have affected the financial position of the Appellant. This was clear from [30]–[31] of the GD:

> 30 It is appropriate that the courts adopt an approach which gives the broadest scope to creditors for the purpose of facilitating corporate rehabilitations. *Thus an insured unliquidated tort claimant may opt in to participate in a scheme, receive compromised payments thereunder and be bound by the scheme. Other insured unliquidated tort claimants may elect to opt out of the scheme and commence court actions against the company between the period where the company has proposed [the] scheme and right up to the termination of the scheme.* …
>
> 31 … *The practical reality before me, is that the [Appellant's] insurer is the person who bears*

> *the liability* to meet the unliquidated tort claims should the [Respondents] succeed. It would not serve any statutory purpose of s 210(3) of the Companies Act, which is to facilitate rehabilitation of companies in financial difficulty, and neither is there any language in s 210(3) of the Companies Act which provides any basis to conclude that a scheme may statutorily extinguish *the insured claims of persons such as the [Respondents], which have no real impact on the [Appellant's] assets* …
>
> [emphasis added]

47 With respect, we found it difficult to see why the fact that the Respondents' claims were covered by insurance should make any difference to whether or not the Respondents were "creditors" for the purposes of s 210 of the Companies Act. In neither the *Re Midland Coal* line of cases nor *Trocko* was it suggested that the existence of insurance in relation to a claim prevented the claimant from being a "creditor". In *Trocko* (at 210), Hogarth J placed emphasis on the claim being "ascertained or capable of being quantified at the meeting at which the proposed scheme [was to be] adopted" (see [36] above), as opposed to whether or not the claim was covered by insurance. Indeed, in both *Re T & N (No 3)* and *Re R L Child*, it was quite clear that the claims were *prima facie* covered by policies of insurance, but it was nonetheless held that the beneficiaries of those claims were "creditors" for the purposes of the provisions corresponding to s 210 of our Companies Act. If the Judge were correct in holding that the existence of insurance was the touchstone, it would follow that *any* person whose claim was covered by a policy of insurance (or, for that matter, by a contract of guarantee or an indemnity), and not just persons with claims for unliquidated damages in tort, would be excluded from the ambit of the word "creditors" in s 210 of the Companies Act. This would mean that all manner of judgment or agreed creditors for liquidated damages in contract or for breach of statutory duty, not to mention those whose entitlements to damages had yet to accrue, would – so long as their claims were covered by insurance – thereby be deemed not to be "creditors" for the purposes of s 210, and would therefore not be bound by any scheme of arrangement entered into. If this were the correct position, the object of s 210 would become an impossible dream. No "white knight" would be willing to rescue a financially distressed company if he is to be burdened with the existing liabilities of the company.

48 Given the respectable pedigree of *Re Midland Coal*, we were of the view that it should be presumed, in the absence of contrary evidence, that Parliament, in enacting s 210 of the Companies Act using wording identical to that of the various equivalent English provisions mentioned at [31] above, intended the word "creditors" in s 210 to be given the meaning which had by then been regarded as settled in England. The whole purpose of s 210 of the Companies Act is to facilitate compromises and arrangements with a company's creditors as a practical and more sensible alternative to liquidation, and, as industrial disease litigation has revealed, tort claimants may form a substantial (or even the entire) class of a company's creditors. As the *Re Midland Coal* line of cases has noted, to exclude such claimants from the ambit of the term "creditors" would render s 210 of the Companies Act rather pointless. The objection raised in *Trocko* (*viz*, that no machinery was provided in the South Australian equivalent of s 210 of our Companies Act to quantify the claims of tort claimants for the purposes of deciding whether or not a scheme of arrangement had obtained the requisite creditor approval) would apply, as observed in *Re Glendale*, to all unliquidated claims (as well as all claims where liability is disputed). In our view, this objection would be adequately met by the procedure recommended by Ian M Fletcher, John Higham & William Trower, *Corporate Administrations and Rescue Procedures* (LexisNexis, 2nd Ed, 2004) at para 13.20:

> Where claims against the company have not been agreed, it is usual to permit creditors to vote for the amounts for which they estimate that the company is liable to them, provided such amounts appear reasonable. If there is an obvious error … the chairman of the meeting will

correct the figure and admit it for the corrected amount. If he believes that a claim is totally groundless, he may reject a claim altogether. If he believes that the amount claimed is excessive, he may reduce it to what he believes to be a reasonable estimate. In any such case the creditor would be informed and, if the figure for which the claim is admitted for voting purposes will be material in deciding whether or not the statutory majority has or has not been obtained, the creditor would have the right to object, at the hearing for sanction, to the amount for which his claim is admitted by the chairman of the meeting for voting purposes. The chairman of the meeting is not expected to be an adjudicator of disputed claims and if there is real doubt as to whether the person claiming to be a creditor is a creditor, or as to the amount for which he claims the company is liable to him, which cannot be resolved by agreement with the creditor, the chairman of the meeting should admit the vote but mark it as objected to, so that if it becomes necessary, the court may adjudicate upon the issue.

49 Consistently with this, it should be borne in mind that s 210(2) of the Companies Act provides that a creditors' meeting under s 210(1) may be adjourned if such adjournment is approved by a majority in number representing three-fourths in value of the creditors or class of creditors present and voting either in person or by proxy at the meeting. If there is genuine doubt over the existence and/or size of a tort claimant's unliquidated claim, and if such a claim appears to be critical to determining whether the requisite statutory majority has been made out, the most prudent and practical course of action would be to adjourn the meeting for the matter to be decided by the court.

50 As a matter of principle, authority and policy, therefore, the approach in *Re Midland Coal* is preferable to that of *Trocko*, and we endorse it accordingly.

Whether the Respondents were "Scheme Creditors" within the meaning of the Scheme

The Judge's approach

51 Turning now to the question of whether the Respondents were "Scheme Creditors" as defined in the Scheme, the Judge concluded (at [33] of the GD) that the Respondents were not "Scheme Creditors":

> It is clear that each Scheme Claim is defined to mean a claim "for which the [Appellant] is or may be liable to that Scheme Creditor". The definition of "liability" … resonates the same point. I note that an Australian court has following its construction of the scheme document held that an unliquidated tort claimant was not a creditor bound by a scheme of arrangement (see *Smith v Carr and others* (1993) 10 ACSR 427). *As a matter of construction of the Scheme document's definition clauses, the [Respondents'] insured claims for which the [Appellant] bears no substantive actual or contingent liability would not, in my view, be claims for which the [Appellant] "is or may be liable … (whether contingently or otherwise)".* [emphasis added]

52 In other words, the Judge held that following the approach (but not the actual decision) in *Smith v Carr and others* (1993) 10 ACSR 427 ("*Smith v Carr*"), whether or not a particular claimant fell within the definition of "Scheme Creditor" as set out in cl 1.1 of the Scheme was a question of construction. The Judge concluded that as a matter of construction, when an insurer, pursuant to a valid policy of liability insurance, indemnified an insured in respect of a particular liability (in this case, unliquidated tort claims), any such claim against the insured would not result in the insured incurring any "substantive actual or contingent liability" (see the GD at [33]) to the claimant; rather, it would be the insurer who incurred such liability. Consequently, the Judge held, since the Appellant was insured in respect of the Respondents' claims, it was not liable to them and they were therefore not "Scheme Creditors" as defined in cl 1.1 of the Scheme.

53 It is undoubtedly true that the court in *Smith v Carr*, in construing the terms of the scheme in that case, came to the conclusion that the plaintiff tort claimants were not "scheme creditors" as that term was defined in the scheme. As a general proposition, there is nothing objectionable about this approach: the meaning of any contractual term (even if the contract, like a scheme of arrangement, is one entered into pursuant to legislative provisions) is a question of construction. In that regard, what will be determinative will be the facts of the case and the relevant terms of the scheme in question.

5 4 *Smith v Carr*, therefore, was something of a red herring in the present context. The Judge seemed to have referred to it only as authority for an uncontroversial proposition regarding contractual interpretation. The Judge did not purport to follow the actual *decision* in *Smith v Carr*, and it is quite clear that he could not have done so since the relevant definition of "scheme creditor" in that case was not the same as that in the present appeals. As we saw it, the actual decision in *Smith v Carr* was probably correct: in order to maintain consistency as between the various groups of creditors envisioned by the scheme of arrangement in that case, there were good grounds for concluding that on the true construction of the relevant terms of that scheme, tort claimants whose claims were covered by a valid policy of insurance were not intended to be considered "scheme creditors". The same, however, could not be said about the terms of the Scheme in the present case.

Whose liability?

55 As a matter of law, it is quite difficult to see how it could be said that an insured such as the Appellant does not bear any "substantive actual or contingent liability" (see the GD at [33]) when sued by a claimant (whether for unliquidated damages in tort or otherwise). If the claim is good, it is clearly the insured who is liable on the claim. The fact that the insurer may then be liable on the policy of insurance to the insured is irrelevant. Certainly, the insurer is not, at common law, directly liable to the claimant as a result of the doctrine of privity of contract.

56 Indeed, as E R Hardy Ivamy, *General Principles of Insurance Law* (Butterworths, 6th Ed, 1993) notes at p 12: "[i]n liability insurance, in which *the assured insures against liability to third parties* … the liability insured against is the real subject-matter of insurance" [emphasis added]. The same point is repeated in Robert Merkin, *Colinvaux's Law of Insurance* (Sweet & Maxwell, 9th Ed, 2010) at para 20-006: "[l]iability insurance provides cover against the risk of *the assured incurring liability to third parties*" [emphasis added], and similarly at para 20-034:

> The assured's right to indemnification under a liability policy will, in the absence of express wording to the contrary, be regarded as arising *once the assured's liability to the third party has been ascertained* … [emphasis added]

The same point is also made repeatedly in Desmond Derrington & Ronald Shaw Ashton, *The Law of Liability Insurance* (LexisNexis, 2nd Ed, 2005), and it suffices to quote the following extract from para 1-10: "liability insurance cannot be easily classified other than as relating to the *legal liability of the insured to another party*" [emphasis added].

57 It was clear to us from these authorities that the Appellant was to be considered "liable" to the Respondents notwithstanding that it was indemnified against that liability by virtue of its policy of insurance with its insurer. That this must be the case is obvious from the very *raison d'être* of liability insurance. It followed, therefore, that we found it difficult to agree with the Judge that "[a]s a matter of construction" (see the GD at [33]), the Respondents were not "Scheme Creditors" within the meaning of the Scheme. On the true construction of the relevant terms of the Scheme, the Appellant clearly "[was] or [might] be liable to" [note: 3] the Respondents in respect of a "Liability" as

defined in cl 1.1 of the Scheme, and, consequently, the Respondents were indeed "Scheme Creditors" within the meaning of the Scheme.

58 At this juncture, we wish to make an observation with regard to the Judge's point that regardless of the formal legal position (which we have stated at [55] above), as a matter of commercial substance and reality, even if the Respondents were allowed to proceed with (and were successful in) their common law claims against the Appellant, the interests of the Appellant would not be affected because its insurance cover obliged its insurer (and not the Appellant itself) to meet the Appellant's liability to the Respondents. While it is true that in such a scenario, whatever damages a court might adjudicate against the Appellant would largely (depending on the specific wording of the insurance policy as to whether any portion of such damages would have to be borne by the Appellant) be underwritten by the insurer, such payment out by the insurer would impact the Appellant's standing before the insurer as well as the premium which the insurer would likely impose for the renewal of the policy. Clearly, the interests of the Appellant would be affected, and this would in turn be unfair to SAAG Singapore, which might not have agreed to rescue Derrick in those circumstances. To allow the Respondents to proceed with their common law claims against the Appellant would also be unfair to other Scheme Creditors who have accepted the Scheme. This is not to say, however, that where justice so demands, exceptions may not be expressly made to a scheme of compromise or arrangement before approval by the court is obtained (see [68] below).

Whether the Respondents were bound by the Scheme

59 Turning now to the issue of whether the Respondents were bound by the Scheme, since the Respondents were "creditors" within the meaning of s 210 of the Companies Act and were also "Scheme Creditors" as defined in cl 1.1 of the Scheme, it followed quite naturally that by operation of s 210(3) of the Companies Act, they were bound by the terms of the Scheme. This in turn entailed that by operation of cll 5.4 and 7.2 of the Scheme, the Respondents were precluded from maintaining their common law claims against the Appellant.

60 However, the Judge went on to hold (at [34]–[37] of the GD) that even if (contrary to his view) the Respondents were "Scheme Creditors" for the purposes of the Scheme, the Scheme did not bind them and preclude their common law claims because cl 2.1.1 of the Scheme contemplated that the Appellant had to provide some consideration to the Scheme Creditors in exchange for their Scheme Claims being compromised and discharged. According to the Judge, cl 5.4 (and presumably cl 7.2) of the Scheme was subject to cl 2.1.1, and he appeared to have concluded from this that since the Respondents had not participated in the Scheme, they had not received any consideration from the Appellant, and the Appellant could not therefore enforce cl 5.4 (and presumably cl 7.2) against them.

61 With respect, we were unable to agree with this line of reasoning. It is trite that ordinarily, consideration must be supplied before a contract is binding. A scheme of arrangement, however, is not an ordinary contract, but a statutory one. Parliament has, by s 210(3) of the Companies Act, made an exception to the normal requirement of consideration, and has in effect mandated that as long as the requisite statutory majority of creditors agree to be bound by a scheme of arrangement (and receive the specified consideration in exchange), *all* creditors will be bound by the scheme, even those who did not so agree or receive consideration thereby.

62 The Judge in fact cited this court's decision in *The Oriental Insurance Co*, where, to quote from holding (3) of the headnote, it was held (*inter alia*) that the purpose of s 210 of the Companies Act was to overcome "the impossibility or impracticability of obtaining the individual consent of every member of the class intended to be bound by the scheme of arrangement". From this perspective, it

is difficult to see how there can be any room for asserting that a creditor (who is intended to be bound by a scheme of arrangement so long as it is approved by the requisite majority of creditors) is not bound because he did not consent to or participate in the scheme and therefore did not receive any payouts thereunder.

63 In conclusion, since the Respondents were "creditors" within the meaning of s 210 of the Companies Act as well as "Scheme Creditors" within the meaning of the Scheme, they were bound by the terms of the Scheme, pursuant to which they were precluded from maintaining their common law claims against the Appellant. On that basis, we allowed the present appeals.

Other considerations

64 In reaching that conclusion, we had regard to two other considerations.

No injustice to the Respondents

65 The first was that the result which we reached was not an unjust one because under the terms of the Scheme, both the Respondents still had recourse to their WCA claims (by virtue of claims under the WCA being included in Schedule 1 of the Scheme, the Respondents were "Preferential Creditors" and, thus, "Excluded Creditors" who were not bound by the Scheme (see [9] above)).

66 While the amount of compensation recoverable by the Respondents under the WCA would likely be less than that recoverable at common law, the Respondents had no real cause for complaint for, in a scheme of arrangement situation, all unsecured creditors of a company would be expected to take a "haircut" and receive less than the full amount of their claims in return for avoiding a winding up of the company (which would likely result in even smaller sums being returned to them).

Guidelines for the future

67 That said, it was fortuitous that the Respondents could still rely on their WCA claims because of the definition of "Preferential Creditors" in the Scheme. The Appellant's other tort claimants who were not aware of and/or did not participate in the Scheme might not be so fortunate, and could find their claims entirely barred without their knowledge as a result of the wide approach to the meaning of the word "creditors" (as established by *Re Midland Coal*) which we have endorsed for the purposes of s 210 of the Companies Act.

68 In *Re R L Child*, McLelland J was clearly aware of the potential pitfalls of the broad view espoused in *Re Midland Coal* for his Honour went on to give guidance to ensure that the courts would not unwittingly approve schemes of arrangement which had the unintended effect of binding tort claimants in circumstances where such claimants had never heard of the scheme and had no chance to object to it (see *Re R L Child* at 675):

> I consider that where the definition of creditors intended to be bound by the scheme is in a catch-all form, evidence should normally be adduced, from a responsible officer of the company, to the effect that the company has received no notice of any pecuniary claim against it and that the deponent is not aware of any circumstances likely to give rise to a pecuniary claim against the company, other than as revealed to the court. In the case of any disputed or anticipated claim the court can then determine what, if any, notice of the meeting should be given to the claimant or potential claimant, or whether some amendment of the scheme is appropriate to accommodate such a claim.

> There is always the possibility of some potential claim, particularly in tort, of which the company is unaware. It seems to me that the court should be slow to approve a scheme which would have the effect of barring such a claim with no effective notice to the potential claimant where this can be avoided without frustrating the commercial purpose of the scheme. I have in mind particularly a claim against which the company is effectively insured. In many cases where a catch-all definition of creditors is employed it would, in my view, be appropriate to qualify the definition by adding an exclusion along the following lines: "excluding any person having a claim in respect of which the company is entitled to indemnity under a policy of insurance, to the extent of the amount recoverable under such policy in respect of such claim."

Indeed, McLelland J went on to introduce just such an exception into the scheme in that case. If this authority had been drawn to Belinda Ang J's attention during either the hearing to convene a Scheme Creditors' meeting or the hearing to approve the Scheme, it is likely that she would have taken a similar course of action as that taken by McLelland J, and the situation in the present appeals would not have arisen.

69 As such, in order to ensure that the wide interpretation which we have adopted for the term "creditors" in s 210 of the Companies Act does not cause injustice, we take this opportunity to also endorse the guidance given by McLelland J in *Re R L Child* at 675.

Conclusion

70 For the foregoing reasons, the present appeals were allowed, but with no order as to costs here and below.

71 Ordinarily, costs here and below would have been ordered in the Appellant's favour, but given that such an order might easily negate whatever compensation the Respondents would obtain via their WCA claims, we inquired of the Appellant's counsel whether the Appellant would be willing to forego seeking costs against the Respondents. In this regard, we were very gratified to be informed that the Appellant was agreeable to such a course of action.

[note: 1] See the Core Bundle for CA 55/2011 ("CB for CA 55/2011") at vol 2, pp 55–63.

[note: 2] See para 4 of Schedule 1 of the Scheme (at CB for CA 55/2011 vol 2, p 70).

[note: 3] See CB for CA 55/2011 vol 2, p 58.

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