The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others *v* TT International Ltd and another appeal
[2012] SGCA 9

Case Number	: Civil Appeal Nos 44 of 2010 and 47 of 2010
Decision Date	: 31 January 2012
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Lee Eng Beng SC, Low Poh Ling, Nigel Pereira, Raelene Pereira (Rajah & Tann LLP) for the 4th appellant in CA No 44 of 2010; Thio Shen Yi SC (TSMP Law Corporation) (instructed), Doris Chia and Aveline Chan (David Lim & Partners) for the appellant in CA No 47 of 2010; Alvin Yeo SC, Chang Man Phing, Tan Yee Siong, Lawrence Foo (Wong Partnership LLP) for the respondent in both appeals.
Parties	: The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others — TT International Ltd

Companies – Schemes of arrangement

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2010] SGHC 177.]

31 January 2012

V K Rajah JA (delivering the grounds of decision of the court):

Introduction

1 A High Court Judge ("the Judge") approved the Respondent's scheme of arrangement ("the Scheme") pursuant to s 210 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") notwithstanding vigorous objections made by a number of creditors, including the two appellants (see *Re TT International Ltd* [2010] SGHC 177 ("the Judgment") at [2]). After considering the submissions made to us, we allowed the appeals and ordered that new creditors' meetings ("the Further Meetings") be called within four weeks for the Scheme to be put to a re-vote, subject to certain directions. These directions are stated in Annexure I. We should also explain that the issuance of these detailed grounds for our decision has been deferred until the resolution of a number of consequential issues arising from our directions.

2 Schemes of arrangement are a useful democratic process following which the claims of creditors asserting their ordinary legal rights against a company in financial straits may be compromised or varied. They sanction a process that restrains a minority from frustrating the will of a majority of creditors to implement a beneficial scheme for a distressed company. The objective of such schemes is to empower creditors to devise a composition with the company that will, on the whole, be more beneficial than the likely default alternative: liquidation. While the law allows the rights of a majority in number representing 75% in value of the creditors at a scheme creditors' meeting (or meetings, if there is more than one class of creditors) to prevail over the objections of dissentients, it is also equally important that the rights of the minority are not illegitimately trampled over. The convening of a separate meeting for each disparate class of creditors, in particular, is a means of protecting a minority with different rights from the possibly oppressive conduct of the majority. Schemes of arrangement now appear to be the locally preferred mode of resuscitating

salvageable businesses in parlous financial circumstances. For this reason, it is crucial that there be clarity in how such schemes are to be properly implemented and monitored in a practical way in the common interest of the creditors and the company. These grounds of decision emphasise the importance of scrupulous adherence to the integrity of the processes by all involved in the oversight of such schemes.

The facts

The parties to the appeal

3 In Civil Appeal No 44 of 2010 ("CA 44"), the fourth appellant (the remaining appellants withdrew before the hearing), Oversea-Chinese Banking Corporation Limited ("OCBC") took issue with the propriety of several aspects of the Scheme. OCBC was one of the respondent's creditors and had an admitted claim of $21.66m. [note: 1] It had voted against the Scheme at a creditors' meeting held on 16 October 2009 ("the Scheme Meeting"). [note: 2] It bears mention that the total value of the admitted claims was originally $502.82m. [note: 3]

4 In Civil Appeal No 47 of 2010 ("CA 47"), the appellant was Ho Lee Construction Pte Ltd ("Ho Lee"). Ho Lee was the respondent's main contractor for building works valued at $226m. [note: 4] It commenced work in March 2008 [note: 5] but suspended works in October 2008 under instructions from the Superintending Officer ("SO"), Jurong Consultants Pte Ltd ("Jurong Consultants"). [note: 6] Ho Lee submitted $84.56m worth of claims to Mr Nicky Tan Ng Kuang ("the proposed Scheme Manager"), of which $22.77m was admitted. [note: 7] It had also voted against the Scheme at the Scheme Meeting. [note: 8]

5 The respondent in both appeals was TT International Limited ("the Respondent"). The Respondent was incorporated locally in October 1984 as a private limited company. [note: 9] It was listed on the Main Board of the Singapore Exchange Securities Trading Limited under its present name, TT International Limited, in June 2000. [note: 10] The Respondent is primarily in the business of trading and distributing consumer electronic products under the brand name of AKIRA. [note: 11] Accordingly, the main value of its business is in its trade receivables, inventory and distribution networks in various countries. [note: 12]

6 The Respondent is the main distributor and licensee of the AKIRA brand worldwide. [note: 13] AKIRA is a locally grown brand for electronic products, and the trademark AKIRA was registered in 1995. [note: 14] The AKIRA trade mark has been registered in 141 countries worldwide. [note: 15] The Respondent has a significant overseas presence through its subsidiaries (collectively referred together with the Respondent as "the Group") in Australia, South Africa, Poland, France, the United Arab Emirates and Nigeria, among other countries. [note: 16]

Events leading to the proposal of the Scheme

7 The Group's main business activities required high liquidity and it was heavily reliant on credit facilities. [note: 17] Unsurprisingly, the global credit crunch which followed the American subprime mortgage crisis in 2008 significantly affected the Group's business. [note: 18] As of 31 October 2008, $66m out of $332m of the Respondent's bank facilities and $17m out of $117m of the Respondent's subsidiaries' bank facilities had been cancelled, withdrawn, reduced and/or frozen by their lender

banks. [note: 19] This severely impacted the Group's existing working-capital, seriously disrupted its businesses and operations and had an immediate knock on effect on the Respondent's operations. [note: 20]

8 Unable to obtain new credit facilities, the Respondent faced severe cash flow problems which in turn made it difficult for it to service its borrowings. [note: 21] As a result, some bank creditors declared default events in respect of their facility agreements with the Respondent, recalled their facilities and demanded prompt repayment of the sums due. [note: 22] The financial pressure on the Respondent was further compounded when some of its trade and other creditors threatened to or commenced legal proceedings against the Respondent to recover the moneys owed to them. [note: 23]

9 On 31 October 2008, the Respondent moved to improve its financial situation. It announced the appointment of nTan Corporate Advisory Pte Ltd ("nTan") as an independent financial advisor to the Group and the appointment of WongPartnership LLP ("WongP") as its legal advisor. [note: 24] Subsequent to an informal creditors' meeting held that same day, the Respondent announced that pending some consensual restructuring of its operational activities and financial arrangements, it would implement an immediate standstill of repayment of amounts owing to the bank creditors and all other unsecured creditors, except for operationally essential trade creditors. [note: 25]

10 On 4 December 2008, PricewaterhouseCoopers LLP ("PwC") was appointed by the Respondent as the independent Special Accountant to the Group's bank creditors, to advise them on the restructuring of the Respondent. [note: 26]

11 On 29 January 2009, the Respondent applied for and received approval from the court pursuant to s 210(1) of the Act to summon a meeting of its creditors to propose a scheme of arrangement. [note: 27] That meeting was to be held by 29 July 2009. [note: 28] However, on 21 July 2009, the Respondent applied for and was granted an extension of time to call the meeting by 21 October 2009. [note: 29] Further, the Respondent also obtained a court order restraining the commencement or continuation of proceedings against the Respondent pending the approval by the court of the proposed scheme of arrangement. [note: 30] Consequently, a winding up application which Ho Lee filed on 19 January 2009 [note: 31] was stayed. [note: 32]

12 Meanwhile, the key terms of the proposed scheme were the subject of a number of discussions and meetings between the Respondent, nTan, PwC and the Respondent's bank creditors between November 2008 and September 2009. [note: 33] Despite the discussions, no consensus could be reached. [note: 34] Finally, in September 2009, the Respondent decided to propose the Scheme for voting by creditors despite not having secured the support of all its major creditors. [note: 35]

Salient features of the Scheme

13 The proposed Scheme had three main features. First, the Respondent was empowered to employ the Reverse Dutch Auction ("RDA") process to settle its debts with creditors who wanted early compromises. Creditors coming under the Scheme ("Scheme Creditors") who were willing to accept a minimum discount of 80% on the repayment of their debts would have their debts retired on a priority basis under the RDA. [note: 36] The Respondent was to set aside $30m for the RDA. [note: 37] The Scheme Creditors who were willing to accept the deepest discounts on their claims would be paid off first. When the parties came before us, the RDA had been conducted and allowed for some $92.3m

of the Respondent's debts to be extinguished by the payment to participating creditors of a sum of around $14.7m. [note: 38] The $14.7m was to be paid out in three equal tranches. [note: 39] The first tranche of $4.91m had been paid out on 20 July 2010. [note: 40] At the initial hearing on 18 August 2010, we stayed further payments to be made pursuant to the Scheme. [note: 41]

14 Second, $150m of the remaining debt would be restructured into "Sustainable Debt" (maintained as term or revolving loan facilities) to be repaid within five years of the Scheme's effective date. [note: 42]

15 Third, the rest of the debt ("the Non-Sustainable Debt") would be converted into Redeemable Convertible Bonds ("RCBs") with a 0% coupon rate and a tenor of 10 years from the effective date. [note: 43] The Respondent had to offer to convert a limited number of RCBs into shares between the third and fifth anniversaries of the effective date; [note: 44] and to convert the remaining RCBs into shares by the 10th anniversary of the effective date. [note: 45]

16 The RCBs and the shares they were converted into could be sold subject always to rights of first refusal ("ROFRs") granted to Mr Sng Sze Hiang ("Mr Sng") and Ms Julia Tong ("Ms Tong"). [note: 46] Pertinently, the shares had to be offered to Mr Sng and Ms Tong at preferential prices fixed under the Scheme. [note: 47] By way of background we ought to mention that Mr Sng is the Chairman and Chief Executive Officer [note: 48] of the Respondent, owning 31.35% of its shareholding. [note: 49] Ms Tong is his wife. [note: 50] She is an Executive Director of the Respondent, [note: 51] owning 12.30% of its shareholding. [note: 52] Mr Sng and Ms Tong filed claims worth $0.26m and $6.17m respectively against the Respondent. [note: 53] Mr Sng's entire claim was in respect of unpaid dividends declared by the Company on 30 October 2008 at a rate of 0.2 cents per share. [note: 54] As for Ms Tong, $0.18m of her claim pertained to the same unpaid dividends, while the remaining $5.99m related to a shareholder's loan recognised in the Respondent's financial statements as at 31 March 2009. [note: 55]

The conduct of the Scheme Meeting

17 On 9 September 2009, documents relating to the Scheme ("the Scheme documents") were despatched to the Scheme Creditors who had claims against the Respondent as at 31 July 2009 ("the Ascertainment Date"). [note: 56] The Scheme documents informed the Scheme Creditors that the meeting to vote on the Scheme would be held on 16 October 2009. [note: 57]

18 The Scheme documents dated 9 September 2009 comprised the Scheme of Arrangement document itself (setting out the terms of the Scheme); the Explanatory Statement containing information required to be furnished under s 211 of the Act; and the proxy form for use at the Scheme Meeting. [note: 58] On 28 September 2009, [note: 59] the Respondent issued an addendum to the Scheme documents which extended the deadline for lodgement of proofs of debt from 28 September 2009 at 5.00pm to 6 October 2009 at 5.00pm. [note: 60]

19 The proposed Scheme Manager chaired the Scheme Meeting at which all the Scheme Creditors voted in just one class on 16 October 2009. [note: 61] It is noteworthy that the proposed Scheme Manager was also concurrently the nominee for Mr Sng and Ms Tong in their proposed individual

voluntary arrangements with their creditors under the Bankruptcy Act (Cap 20, 2000 Rev Ed). [note: 62] The minutes of the Scheme Meeting merit reference on some matters. According to the minutes of the Scheme Meeting prepared by the proposed Scheme Manager, the Scheme Creditors were initially informed that the voting results would be announced only after 5.00pm on that day as the Respondent's shares were still being traded before that. [note: 63] The minutes also noted that shortly after 5.00pm, there was an unexpected change in the procedure as initially notified to them. The Scheme Creditors were abruptly informed that the final outcome of the voting could only be determined and announced after the proposed Scheme Manager completed his adjudication of the proofs of debt. [note: 64] Pertinently, the Scheme Creditors were not, at this stage, informed of how long this process might take.

20 On 26 October 2009, the Respondent applied to court for additional time of a month from the date of the order for the proposed Scheme Manager to complete the review and assessment of the proofs of debt and for the proposed Scheme Manager to report the results of the Scheme Meeting to the court and apply for further directions within two weeks thereafter. [note: 65] The affidavit supporting this application disclosed for the first time that the proposed Scheme Manager had, despite the earlier publicised cut off date, allowed several Scheme Creditors to lodge their proofs of debt after 6 October 2009 – with the last proof lodged on 16 October 2009, the day of the Scheme Meeting. [note: 66] On 3 November 2009, the court granted the extension of time for the Chairman to report the results of the Scheme Meeting to the court by 17 December 2009. [note: 67]

The results of the Scheme Meeting

21 The Chairman's Report, dated 17 December 2009, stated that 84.81% of the Scheme Creditors attending in person or by proxy, representing 75.06% of the value of debts owing to the Scheme Creditors, had voted in favour of the Scheme. [note: 68] In tabular form, the results as reported were as follows: [note: 69]

		Number of Scheme Creditors	**Admitted value of the Scheme Creditors' Claim SGD'million**
A.	Scheme Creditors present and voting at the Meeting (inclusive of proxies)	79	485.39
B.	Scheme Creditors voting in favour of the proposed Scheme of Arrangement	67	364.34
C.	Scheme Creditors voting against the proposed Scheme of Arrangement	12	121.05
D.	Scheme Creditors abstaining from voting on the proposed Scheme of Arrangement	4	17.43

22 Pursuant to s 210(3) of the Act, a majority in number representing 75% in value of the Scheme Creditors had to vote in favour of the Scheme before the court could sanction the Scheme. Apparently, the Scheme only barely met the statutory threshold. It had been approved by just a majority of Scheme Creditors representing 75.06% in value, exceeding the statutory threshold by a razor thin margin. The Scheme would not have passed muster if the supporting Scheme Creditors'

claims were reduced by $1.3m or if an additional $0.4m of the opposing Scheme Creditors' claims had been admitted.

The PwC report

23 In January 2010, Rajah & Tann LLP ("R&T"), representing a group of creditors including OCBC ("the Opposing Bank Creditors"), wrote to the Respondent seeking copies of the proofs of debt (accompanied by supporting documents) lodged by certain Scheme Creditors and other information regarding the other Scheme Creditors' claims. [note: 70] The Respondent provided some information on a "goodwill basis", insisting at the same time that the Opposing Bank Creditors were not entitled to conduct an audit of the proposed Scheme Manager's assessment of the proofs of debt filed by other Scheme Creditors. [note: 71] Unsurprisingly, given the curious delay in announcing the voting results, the sympathetic treatment by the Scheme Manager of certain proofs that were out of time and the announcement of this barest satisfaction of voting requirements, the Opposing Bank Creditors were dissatisfied with the result of the voting. We should add that the Respondent has not clarified whether this special indulgence was granted to all creditors who were tardy, or only to supporting creditors. [note: 72] What is, however, clear to us is that no prior court sanction was sought to extend the original deadline and that all creditors were not officially notified of this extension of time prior to its expiry.

24 The proposed Scheme Manager was, however, adamant that access to the relevant proofs could and would not be given to the Opposing Bank Creditors. Nevertheless, to assuage their concerns, the Respondent appointed PwC on 4 February 2010 to independently review the assessment of the proofs of debt undertaken by the proposed Scheme Manager. [note: 73] Here, it should be mentioned that R&T had originally written to the Respondent on 7 October 2009, requesting that PwC independently verify all proofs of debt lodged by the Scheme Creditors related to the Respondent before the said proofs were admitted for the purpose of voting. [note: 74]

25 PwC rendered its report ("the PwC Report") on 12 February 2010. In conducting its review, PwC performed, *inter alia*, the following: [note: 75]

(a) reconciled the claim(s) in each proof to source documents supporting the claim(s) on a test basis;

(b) obtained an appreciation of the basis upon which the proof was assessed by the proposed Scheme Manager;

(c) considered the reasonableness of the quantum of the claim(s) submitted in the proof; and

(d) obtained an explanation for the difference, if any, in each proof between the amount reflected as owing by the Respondent as of 31 March 2009 (*ie*, the date of the Respondent's latest financial statement) and the amount claimed in the proof as at the Ascertainment Date.

Except for certain negligible amounts, PwC found that reasonable grounds existed for the proposed Scheme Manager to have admitted or rejected the claims that he did. [note: 76]

The decision below

26 The Judge approved the Scheme. She held (at [27] of the Judgment) that the two issues before her were:

(a) whether the Scheme had been approved by the requisite majority in number and value of the Scheme Creditors voting in person or by proxy at the Meeting; and

(b) whether there had been such lack of transparency on the Respondent's part that the Scheme should not be considered fair and reasonable to the Scheme Creditors as a whole.

27 The Judge answered the first question affirmatively. First, she held that the contingent creditors could vote in the same class as the other unsecured Scheme Creditors (see the Judgment at [42]). The Scheme provided that contingent creditors only had entitlements under the Scheme if their contingent claims crystallised within five years of the effective date. Notwithstanding that, the Judge found that the rights of contingent creditors were not so dissimilar (from those of the other Scheme Creditors) as to make it impossible for them to consult with the other Scheme Creditors (see the Judgment at [41]). She stated that given the financial difficulties of the Respondent, there was a real possibility that the Respondent would not be able to meet its liabilities to the contingent creditors, and that the contingent creditors had an interest in common with the other Scheme Creditors to assess the advantages and risks of the Scheme (see the Judgment at [42]).

28 Second, the Judge held that the related creditors (subsidiaries or substantial shareholders of the Respondent) had rights against the Respondent which were similar to those of the other unsecured Scheme Creditors and were entitled to vote in the same class as them (see the Judgment at [48]). Although she noted that she was entitled to attach less weight to their votes on account of their special interest in the Respondent and the Scheme (see the Judgment at [47]), she did not do so, finding that there was no good reason to question their *bona fides* (see the Judgment at [122]). She also found that the ROFRs (see above at [16]) granted to Mr Sng and Ms Tong did not disqualify them from voting in the same class as the other unsecured Scheme Creditors. In her view, although the ROFRs might cause them to have an additional private interest to support the vote, that interest was not derived from their legal rights as shareholders claiming unpaid dividends from the Respondent (see the Judgment at [48]).

29 Third, the Judge held that substantial shareholders who had claims which pertained to unpaid dividends and were thus subordinated in liquidation pursuant to s 250(1)(*g*) of the Act ("the subordinated claims") could vote in the same class as the other unsecured Scheme Creditors (see the Judgment at [54]). She reasoned that s 250(1)(*g*) of the Act was irrelevant as it applied only when the company concerned was being wound up (see the Judgment at [53]).

30 Fourth, the Judge dismissed objections that the Opposing Bank Creditors raised against the proposed Scheme Manager's admission or rejection of specific proofs of debt, namely:

(a) The questionable basis of a claim by Akira Corporation Pte Ltd ("Akira Pte Ltd"), a wholly owned subsidiary of the Respondent and a supporting Scheme Creditor, which saw an "astronomical increase" from $5.155m as at 31 March 2009 to $86.97m as at the Ascertainment Date. $75.73m of Akira Pte Ltd's $86.97m claim was based on license and distribution agreements with the Respondent which did not tally with the Respondent's audited and unaudited financial statements before and after the Ascertainment Date.

(b) The inconsistent treatment of the proofs of debt lodged by Bank of East Asia ("BEA") and St George Bank Limited ("St George Bank"), in that while the security that BEA (an opposing Scheme Creditor) held was deducted from its claim, the security that St George Bank (a supporting Scheme Creditor) held was not deducted from its claim. Also, St George Bank's claim for $28m, which was based on a guarantee granted by the Respondent for banking facilities

granted to its subsidiary TEAC Australia Pty Ltd ("TEAC Australia"), was admitted in full. However, the Opposing Bank Creditors submitted that it was unreasonable for St George Bank's claim to be admitted in full since the Respondent would be liable on the corporate guarantee only if TEAC Australia failed to pay St George Bank.

(c) The admission in full of a $53.8m claim by Ascendas Real Estate Investment Trust ("Ascendas") arising from the Respondent's corporate guarantee on a lease of 10 Toh Guan Road to TT International Tradepark Pte Ltd ("Tradepark"), a subsidiary of the Respondent. The Opposing Bank Creditors also objected to the double counting of the $53.8m claim by Ascendas and a $6.86m claim by First Capital Insurance Limited ("First Capital"), which arose from the Respondent's indemnification of an insurance guarantee First Capital granted in favour of Ascendas as a security deposit under the 10 Toh Guan Road lease. Both Ascendas and First Capital were supporting Scheme Creditors.

31 With respect to Akira Pte Ltd's claim, the Judge was satisfied that the claim arose properly out of, *inter alia*, the license and distribution agreements. She did not have sight of the distribution agreement and was content to rely on the PwC Report which described it (see the Judgment at [71]–[72]). Although she noted that the Respondent's balance sheets as at 31 March 2009 did not fully reflect the Respondent's indebtedness to Akira Pte Ltd resulting from the licensing agreements, she noted that the unaudited balance sheets disclaimed reliability (see the Judgment at [74]). She expressed her concurrence with PwC's view that it was reasonable for the proposed Scheme Manager to admit Akira Pte Ltd's claim in full (see the Judgment at [75]).

32 Regarding BEA's and St George Bank's claims, she noted that while BEA had already enforced its security over real property, it would not make commercial sense for St George Bank to enforce its security in the form of fixed or floating charges over the Respondent's assets (which excluded real property) as that would interfere with the Respondent's business operations (see the Judgment at [80]). Also, she noted that under the Scheme, any creditor with contingent claims against the Respondent was required to prove its debt in respect of its whole claim against the Respondent, *including the amounts of any contingent claims* (see the Judgment at [79]). On that basis, she accepted that St George Bank's $28m claim was correctly admitted in full (see the Judgment at [81]).

33 Next, the Judge rejected the Opposing Bank Creditors' suggestion that the admission in full of Ascendas' $53.8m claim was questionable (see the Judgment at [86]) as the claim had been verified in the PwC Report (see the Judgment at [85]). As for the double counting of Ascendas' and First Capital's claims, the Judge found that the 12 November 2008 announcement and the 18 January 2010 press release by Ascendas which referred to Ascendas' potential use of a security deposit from an unnamed "previous anchor tenant" as "bridging income" to be insufficient evidence to suggest that First Capital's security deposit had not been used to offset Ascendas' claim (see the Judgment at [89]). She also did not think that Ascendas' claim against the Respondent included the $6.86m claimed by First Capital (see the Judgment at [90]). She thus concluded that First Capital's claim was reasonably admitted (see the Judgment at [91]).

34 The Judge also dismissed Ho Lee's objections to the proposed Scheme Manager's rejection of $61.79m of its $84.56m claim. In particular, two heads of Ho Lee's claims were rejected wholly: (a) the damages payable to sub-contractors and suppliers due to the termination of Ho Lee's contract ("the damages claim"); and (b) the loss of profits suffered due to the termination of Ho Lee's contract. Ho Lee opposed the Scheme ("the loss of profits claim").

35 The PwC report concluded that these amounts were reasonably rejected as they were supported by insufficient documentary evidence. The Judge relied on it to find that the proposed

Scheme Manager had acted in a *bona fide* manner in rejecting the claims (see the Judgment at [95]). The Judge also stated that the proposed Scheme Manager's "duty to assess the claims presented in the proofs of debt objectively should only extend to examining the claims on the basis of the supporting documentation provided by the Scheme Creditors" and she found that he had fairly and reasonably carried out that duty (see the Judgment at [97]).

36 While Ho Lee disputed the rejection of its claim, the Judge adopted what was in her view the practical step forward (see the Judgment at [99]):

> ... to accept the [proposed] Scheme Manager's rejection of [Ho Lee's] claim for the purpose of ascertaining the requisite majority, leaving it open to [Ho Lee] to resort to the adjudication process to determine its final entitlement under the Scheme.

37 As regards the second issue which the Judge identified (see above at [26]), the Judge found the "crucial question" to be "whether the further information requested by the Opposing Bank Creditors would have caused any Scheme Creditor voting in favour to change its view or any abstaining Scheme Creditor to vote against the Scheme" (see the Judgment at [110]). She thought that since PWC, whose independence and qualification was unquestioned by the Opposing Bank Creditors, had reconciled the claims in each proof to the source documents (which the Opposing Bank Creditors had requested) and had concluded that the challenged claims were reasonably admitted and rejected, then the same documentation if provided to the Scheme Creditors would not have affected the voting outcome (see the Judgment at [112]).

38 The Judge also held that the authorities did not lay down the strict rule that the Respondent must provide supporting documentation for each proof of debt so long as the same was requested by any opposing creditor, or risk the Scheme being disapproved by dint of lack of transparency (see the Judgment at [115]).

39 As can be seen from our summary of the Judge's decision, the Judge relied extensively on the findings of the PwC Report in evaluating the proposed Scheme Manager's decisions to admit or reject the proofs submitted by various creditors. This is an appropriate juncture for us to add that we have carefully perused the PWC Report and it seems to us that the authors quite rightly did not purport to make any legal assessment about the correctness of the subject proofs. Our view, with respect to the Judge, is that it would therefore be a mistake to place too much weight on the conclusions reached in the PWC Report.

The parties' arguments on appeal

OCBC's arguments

40 On appeal, OCBC made, *inter alia*, the arguments set out below.

41 First, scheme creditors have the right to review the proofs of debt of all other scheme creditors, hence the Respondent had a duty to grant OCBC access to the proofs of debt (accompanied by supporting documents) filed by the other Scheme Creditors. [note: 77]

42 Second, the court must satisfy itself that the supermajority approval required under s 210(3) has been achieved. Hence, where the company's admission or rejection of a proof of debt raises serious queries or doubts, the court should insist that the company provide an explanation and the evidence for its decisions. In a case like the present, where a slight difference in the quanta of debts admitted or rejected can swing the outcome of the vote, the court must undertake a stringent

inquiry. The court cannot delegate this function to an independent accounting firm. Thus, the court should have refused to sanction the Scheme on the basis that there was insufficient evidence that the Scheme has received supermajority approval. [note: 78]

43 Third, where a disputed debt has the potential to swing the outcome of the vote, the company must exclude the disputed debt from the scheme while the dispute is being resolved. If the disputed debt is eventually established, the company will settle the debt or bring the debt within the main scheme *via* a supplemental scheme which also has to receive supermajority approval. Thus, the Respondent should not have refused Ho Lee's vote on the rejected part of its claim and yet insisted that the rejected part of the claim (if ultimately established as valid) be subject to the Scheme. [note: 79]

44 Fourth, contingent creditors whose claims are not crystallised by the Scheme cannot vote in the same class as the other unsecured Scheme Creditors. The Judge's statement that there was a real possibility that the Respondent would not be able to meet the contingent liabilities when they fell due was speculative. Therefore, the contingent creditors should not have been allowed to vote in the general class of unsecured Scheme Creditors. [note: 80]

45 Fifth, regarding the subordinated claims, it did not matter that the Respondent was not being wound up. In *Re Telewest Communications plc* [2004] BCC 342 ("*Re Telewest*"), the English High Court made clear (at [29]) that "the relevant rights of creditors to be compared against the terms of the scheme are those which arise in an insolvent liquidation." Therefore, the creditors with subordinated claims should not have been allowed to vote in the general class of unsecured Scheme Creditors. [note: 81]

46 Sixth, Mr Sng's and Ms Tong's ROFRs gave them additional substantive legal rights which the ordinary Scheme Creditors did not enjoy. Thus, they should not have been allowed to vote in the same class as other unsecured Scheme Creditors. [note: 82]

47 Seventh, the Judge ought to have treated the votes of related parties sceptically and attached significantly less weight to their votes in the exercise of her discretion to sanction the Scheme. [note: 83]

48 Eighth, as regards to its specific objections to the proofs of debt filed by Akira Pte Ltd, St George Bank, Ascendas and First Capital, OCBC largely repeated the arguments it submitted to the Judge. [note: 84]

Ho Lee's arguments

49 Apart from its arguments which adopted those of OCBC (see above at [41]–[48]), Ho Lee submitted that the Judge had erred in finding that the proposed Scheme Manager had acted reasonably in a *bona fide* manner in assessing Ho Lee's claim. The crux of Ho Lee's argument was that the proposed Scheme Manager should either have asked Ho Lee to explain any of the discrepancies which led to the rejection of its claims or sought technical assistance from the SO, Jurong Consultants. [note: 85]

50 Further, Ho Lee pointed out that its contract with the Respondent was governed by cl 31.4 of the Public Sector Standard Conditions of Contract for Construction Works (2006 Edition), which states that the SO shall certify payment to the contractor for work executed prior to the date of

termination (including the cost of materials reasonably ordered for the works) and any loss and expense suffered by the contractor in connection with the employer's termination; yet, the Respondent did not appoint the SO to certify Ho Lee's claim despite the SO volunteering to do so. [note: 86]

The issues

51 Essentially, these appeals raised the following core issues:

(a) when a proposed scheme manager might be placed in a position of a conflict of interest;

(b) whether scheme creditors are entitled to examine the proofs of debt submitted by other scheme creditors in respect of a proposed scheme;

(c) when a scheme creditor should be notified of the chairman's decisions to admit or reject its own and other creditors' proofs of debt;

(d) whether a scheme creditor may appeal the chairman's decisions to admit or reject its own and other creditors' proofs of debt;

(e) whether the chairman's decisions to admit or reject certain proofs of debt for the purpose of voting, in this case, were correct;

(f) when scheme creditors should be classified differently for voting purposes in a s 210 scheme of arrangement; and

(g) when scheme creditors should have their votes discounted.

52 We summarise here, for easy reference, our answers to the preceding issues:

(a) a proposed scheme manager is in a position of conflict of interest when he without good reason aligns his interests with those of the company, such as in this case, where the proposed Scheme Manager was the nominee for the individual voluntary arrangements ("the IVAs") filed by Mr Sng and Ms Tong (see [74]–[78] below);

(b) yes, scheme creditors are entitled to examine the proofs of debt submitted by other scheme creditors in respect of a proposed scheme (see [79]–[93] below);

(c) a scheme creditor should be notified of the chairman's decisions to admit or reject its own and other creditors' proofs of debt before the votes are cast at the creditors' meeting (see [94]–[99] below);

(d) yes, a scheme creditor may appeal the chairman's decisions to admit or reject its own and other creditors' proofs of debt (see [100]–[110] below);

(e) the proposed Scheme Manager's decisions to partially reject Ho Lee's proof of debt (to the extent that he did) and wholly admit St George Bank's, Ascendas' and First Capital's proofs of debt for the purpose of voting were incorrect (see [111]–[129] below);

(f) scheme creditors should be classified differently for voting purposes when their rights are so dissimilar to each other's that they cannot sensibly consult together with a view to their

common interest (see [130]–[151] below);

(g) related party creditors should have their votes discounted in light of their special interests to support a proposed scheme, by virtue of their relationship to the company; wholly owned subsidiaries should have their votes discounted to zero and are effectively classified separately from the general class of unsecured creditors (see [152]–[171] below).

Overview of schemes of arrangement under s 210

Objective

53 Section 210 of the Act, as its heading states, confers on a company that meets the stipulated criteria the **"[p]ower to compromise with creditors and members**". This court has recently considered the purpose of schemes of arrangement under s 210 in *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2008] 3 SLR(R) 121 ("*Oriental Insurance*") at [38]–[40]. We affirm our agreement (see *Oriental Insurance* at [38]) with Street J's summary (in *Re Norfolk Island And Byron Bay Whaling Co. Ltd.* (1969) 90 WN (Pt 1) (NSW) 351 at 354D) of the purpose of s 181 of the Companies Act 1961 (NSW) of the State of New South Wales (which was the statutory inspiration for our s 210, although it has since been replaced by s 411 of the Corporations Act 2001 (Cth)):

> The section is intended to provide machinery (i) for overcoming the impossibility or impracticability of obtaining the individual consent of every member of the class intended to be bound thereby [*ie*, by the scheme of arrangement], and (ii) for preventing, in appropriate circumstances, a minority of class members frustrating a beneficial scheme.

54 The updated edition of *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell Asia, Rev 3rd Ed, 2009) ("*Walter Woon*") also helpfully restates the objectives of s 210 (at para 16.2) which we reproduce here for ease of reference:

> **16.2** Section 210 [of the Companies Act (Cap 50, 1994 Rev Ed)] provides for schemes of arrangement to be binding on creditors and members alike after the requisite approval by the specified majority and upon confirmation by the court. *This section obviates the need for a messy and complicated series of negotiations with a view to obtaining the unanimous approval of the members or creditors to a novation or assignment or other variation of their rights.* A scheme of arrangement may be proposed where it is desired to adjust members' or creditors' rights *inter se*, or to reorganise the share capital of the company, or in the case of a group, ... [with a view to] reconstruction or merger. In particular, recourse to s 210 is often made when it is desired to compromise creditors' claims against an insolvent company. [emphasis added]

Procedure

55 In *Re Hawk Insurance Co Ltd* [2001] 2 BCLC 480 ("*Re Hawk Insurance*"), Chadwick LJ instructively outlined the process by which a compromise or arrangement became binding on the company and its creditors *via* s 425 ("the UK s 425") of the Companies Act 1985 (c 6) (UK) ("the 1985 UK Act") (the UK s 425 is *in pari materia* with s 210 of the Act; it has since been replaced by s 895 of the Companies Act 2006 (c 46) (UK)). Chadwick LJ pointed out (at [11]–[12]):

> 11 … First, there must be an application to the court under s 425(1) of [the 1985 UK Act] for an order that a meeting or meetings be summoned. It is at that stage that a decision needs to be taken as to whether or not to summon more than one meeting; and, if so, who should be summoned to which meeting. Second, the scheme proposals are put to the meeting or meetings

held in accordance with the order that has been made; and are approved (or not) by the requisite majority in number and value of those present and voting in person or by proxy. Thirdly, if approved at the meeting or meetings, there must be a further application to the court under s 425(2) of [the 1985 UK Act] to obtain the court's sanction to the compromise or arrangement.

12 It can be seen that each of those stages serves a distinct purpose. At the first stage the court directs how the meeting or meetings are to be summoned. It is concerned, at that stage, to ensure that those who are to be affected by the compromise or arrangement proposed have a proper opportunity of being present (in person or by proxy) at the meeting or meetings at which the proposals are to be considered and voted upon. The second stage ensures that the proposals are acceptable to at least a majority in number, representing three-fourths in value, of those who take the opportunity of being present (in person or by proxy) at the meeting or meetings. At the third stage the court is concerned (i) to ensure that the meeting or meetings have been summoned and held in accordance with its previous order, (ii) to ensure that the proposals have been approved by the requisite majority of those present at the meeting or meetings and (iii) to ensure that the views and interests of those who have not approved the proposals at the meeting or meetings (either because they were not present or, being present, did not vote in favour of the proposals) receive impartial consideration. …

56 While the passages cited above are helpful in outlining the general procedure by which a scheme of arrangement is finalised, there appears to be a paucity of judicial guidance on the more precise mechanics of implementation. Also, as OCBC took pains to emphasise, there is no statutory guidance on the many procedural issues relating to passing a scheme of arrangement under s 210. [note: 87] These issues relate, *inter alia*, to the conduct of creditors' meetings as well as the admission and rejection of proofs of debt. Therefore, we think it will be useful to companies and their creditors for us to further particularise the proper procedures that ought to be adopted in the local context *vis-à-vis* s 210 of the Act.

First stage: formal steps towards the scheme creditors' meeting(s)

57 The first formal step towards obtaining approval for a scheme of arrangement is for the subject company to apply *ex parte* to court for a meeting of all creditors, or meetings of all classes of creditors to approve the scheme ("scheme creditors' meeting(s)"). The court can grant such an application pursuant to s 210(1), which reads:

210. —(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them, *the Court may*, on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, *order a meeting of the creditors or class of creditors or of the members of the company or class of members to be summoned in such manner as the Court directs.* [emphasis added]

58 *Woon's Corporations Law* (LexisNexis, Looseleaf Ed, 1994, Issue 37 (July 2011 release)) at p L6 states correctly at para 53 that at this stage, "[o]ne of the key tasks and responsibilities of the promoter of a scheme of arrangement is to classify its creditors according to their separate interests." This is not just a matter of form. If the scheme creditors' meeting(s) are not properly conducted, the court has no jurisdiction to sanction the proposed scheme (see *UDL Argos Engineering & Heavy Industries Co Ltd & Others v Li Oi Lin & Others* [2001] 3 HKLRD 634 ("*UDL Argos*") at [27(5)]).

59 In England, the practice regarding applications to court for meetings is governed by an updated

Practice Statement (Companies: Schemes of Arrangement) [2002] 1 WLR 1345 ("the Practice Statement") that replaced an earlier Practice Note issued in 1934 (see Practice Note [1934] WN 142). The Practice Statement states that it is the applicant's responsibility to determine whether more than one meeting of creditors is required by the scheme and for that purpose, to notify persons affected by the scheme of its purpose and the meetings which the applicant considers will be required. *The court, in considering whether or not to order meetings of creditors, "will consider whether more than one meeting of creditors is required and if so what is the appropriate composition of those meetings*" [emphasis added] (see the Practice Statement at 1345G). *It is also stated that it is the applicant's responsibility to raise any issues relating to creditors to the court for its directions.* Notwithstanding the above, it is further provided that creditors who consider themselves unfairly treated will still be able to raise objections at the sanction hearing, though the court will expect a good explanation for why they were not raised earlier.

60 Lord Millett NPJ's view in the Hong Kong Court of Final Appeal case of *UDL Argos*, which suggests that issues of creditors' classification should rather be left to the sanction hearing (see below at [70]), should also be noted. This particular view was grounded on the belief that processes seeking to address those issues earlier could prematurely attract contentious legal proceedings which might otherwise have been avoidable (see *UDL Argos* at [14]):

> It might be thought singularly unhelpful to leave the question whether the meetings were correctly convened to the third stage, by which time a wrong decision by the company at the outset will have led to a considerable waste of time and money. *But in my opinion the practice is a sound one. The only alternative would be to require notice of the initial application to be made* inter partes *and for notice of the application together with a copy of the Scheme to be given to everyone potentially affected by it, with the risk of incurring the costs of a contested hearing and possible appeals before it could be known whether the Scheme was likely to attract sufficient support in any event.* The present practice ensures that those advising the company take their responsibility seriously, since an error on their part will be fatal to the Scheme. At the same time it leaves the question, which goes to the jurisdiction of the Court to sanction the Scheme, to be decided at the appropriate time, that is to say when the Court is asked to sanction it. By then the outcome of the meeting or meetings will be known and the question, which will no longer be hypothetical, can be argued between the appropriate parties, that is to say the company on the one hand and those who object to the Scheme on the other. [emphasis added]

61 While Lord Millett NPJ's view certainly has some force, it seems to us that it avoids the classic chicken and egg conundrum facing every applicant. Indeed, without a preliminary determination of the correct classification of creditors, how can it be known whether a scheme is likely to attract sufficient support and subsequently pass muster? Further, if it were certain from the outset that certain opposing creditors would be classified separately so that the scheme would never pass, then it would be a futile exercise to even conduct scheme creditors' meetings. The reality of what happens in practice has also to be factored into this dynamic process. Almost invariably, the applicant would have made the effort to ascertain, as best as it could at an early stage, prior to any court application, how particular creditors might be inclined to vote.

62 Concerns about delays and contentious proceedings at an early stage may be somewhat overstated as the court has complete carriage over timelines and the conduct of the proceedings. In our view, even if there is a need at this stage to hear potentially dissenting creditors, such a hearing could usually be conducted expeditiously and summarily. Having considered the relative advantages of both approaches, we are inclined to prefer the approach in the Practice Statement which commends itself for the greater degree of certainty it injects into the process of passing a scheme. The adoption

of this procedure in Singapore requires the company's solicitors, when applying for an order to summon the scheme creditors' meeting, *to unreservedly disclose all material information* to the court to assist it in arriving at a properly considered determination on how the scheme creditors' meeting is to be conducted. Any issues in relation to a possible need for separate meetings for different classes of creditors ought to be unambiguously brought to the attention of the court hearing the application. *As time is ordinarily of the essence in such applications, all scheme related matters (including appeals therefrom) should be heard on an expedited basis.*

63 Following the court's consideration of the issues raised by the applicant and the creditors in relation to the creditors' meetings for the proposed scheme, it may give directions for the calling of scheme creditors' meeting(s). However, two points should be noted. First, the court should not consider the merits and fairness of the scheme at this stage, as this stage really concerns the court's jurisdiction to sanction the scheme later if it proceeds. In this regard, *Re Telewest* (see above at [45]) at [14] (approved by the English Court of Appeal in *Re Telewest Communications plc* [2005] BCC 29 ("*Re Telewest Communications plc*") at [9]) is instructive:

> In considering the primary position of the opposing bondholders, *it is important to keep in mind the function of the court at this stage. This is an application by the companies for leave to convene meetings to consider the schemes. It is emphatically not a hearing to consider the merits and fairness of the schemes.* Those aspects are among the principal matters for decision at the later hearing to sanction the schemes, if they are approved by the statutory majorities of creditors. *The matters for consideration at this stage concern the jurisdiction of the court to sanction the scheme if it proceeds. There is no point in the court convening meetings to consider the scheme if it can be seen now that it will lack the jurisdiction to sanction it later. This is principally a matter of the composition of classes. ... and the practice now is to deal so far as possible with issues of class composition at the first stage of the application for leave to convene meetings.* There might exceptionally be other issues which would go to jurisdiction and could be properly raised at this stage: see *Re Savoy Hotel Ltd* [1981] Ch 351. *What the court should not do is to consider the fairness of the scheme with a view to deciding whether at the later hearing it will or will not sanction it.* [emphasis added]

64 Second, it should be borne in mind that where there is no realistic prospect of a scheme receiving the requisite approval, the court should not act in vain in granting the application for meetings to be convened: see *Re Ng Huat Foundations Pte Ltd* [2005] SGHC 112 at [9]. This is something that the applicant's solicitors and the proposed scheme manager should take into account prior to making an application for leave to convene a scheme creditors' meeting. A failure to make a conscientious assessment of the likely prospects of scheme approval may result in adverse costs orders.

65 In the event that the court issues directions for the calling of scheme creditors' meeting(s), notices summoning the meeting(s) must be sent to the creditors. Section 211 of the Act requires that such notices be accompanied by a statement that clearly explains the intent and purport of the compromise or arrangement and, in particular, discloses any material interests of the directors and the effect of the scheme thereon. Further, it is essential that the explanatory circular must be "*perfectly fair and, as far as possible, give all the information reasonably necessary to enable the recipients to determine how to vote*": *In re Dorman, Long and Company Limited* [1934] Ch 635 at 657. Although s 211 does not expressly require it, a copy of the scheme of arrangement document and a proxy form for the creditor's use at the scheme creditors' meeting should usually be enclosed to ensure that the creditors have adequate information about the proposed scheme.

66 After this, the prospective scheme creditors will submit their proofs of debt together with any

supporting documents to the chairman of the meeting(s) for his adjudication. We pause to note that since the chairman of the meeting is almost invariably the proposed scheme manager (or his nominee), our references to chairmen (in the context of the s 210 scheme creditors' meetings) below may be taken generally as references to proposed scheme managers as well. Generally, submissions have to be made before a "cut-off point" stated in the scheme document and highlighted in the s 211 explanatory statement. If the chairman wishes to extend the time for submission of proofs, not only should prior court sanction for this be sought, all creditors should also be informed to ensure that the extension of time benefits all, and not merely a particular group of sympathetic creditors.

67 The chairman then has to perform the quasi-judicial task of adjudicating upon disputes as to the voting rights of anyone claiming to be a creditor. The chairman cannot act capriciously or arbitrarily and must determine issues objectively. His role is akin to that of a judicial manager in deciding whether to admit or reject proofs of debt lodged with him.

Second stage: the conduct of the scheme creditors' meeting(s)

68 As in the lead up to creditors' meetings in the judicial management context (see *ERPIMA SA v Chee Yoh Chuang and another* [1997] 1 SLR(R) 923 at [5]), the entire process of proof, admission or rejection is ordinarily completed before the scheme creditors' meeting(s) is held. Although s 210 does not expressly spell this out, it has also become the usual practice for the chairman to post a list of the creditors and the corresponding amounts of their admitted claims (for the purpose of voting) at the meeting venue prior to the meeting. Disclosure of material information about the scheme or the company's affairs ought not to be deliberately withheld until the meeting so as to influence its outcome. This would unfairly prejudice those which may have decided not to attend after considering the information sent to them earlier and will likely be seen as an attempt to improperly influence the voting outcome.

69 After the creditors cast their votes, the chairman will immediately thereafter tabulate the results and announce them by the end of the meeting. Section 210(3) of the Act reads as follows:

> (3) *If a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members present and voting either in person or by proxy at the meeting* or the adjourned meeting *agrees to any compromise or arrangement*, the compromise or arrangement shall, if approved by order of the Court, be binding on all the creditors or class of creditors or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.
>
> [emphasis added]

Thus, if the proposed scheme is accepted (within each designated class, if any), by a majority in number of the creditors (present and voting) who hold at least 75% of the total debts owed by the company (to the respective designated classes, if any), the proposed scheme can proceed to the third stage.

Third stage: seeking the court's approval

70 The third stage of the process is an application to the court for its approval of the scheme. This requirement is underscored by s 210(3) which states that the scheme will become binding only "if approved by order of the Court". As explained earlier (see above at [53]–[54]), s 210 allows a majority of creditors to "cram down" on the rights of a minority of objecting creditors and implement a

scheme notwithstanding the latter's objections. The requirement of the court's approval serves as an additional crucial check to ensure the integrity of voting outcome(s) at the scheme creditors' meeting(s) and the objective fairness of the proposed scheme. In *Oriental Insurance* (at [43]), we reaffirmed that the court must be satisfied of three matters before it sanctions a scheme, namely:

> (a) The court must be satisfied that the statutory provisions have been complied with. For example, the court must be satisfied that the resolution is passed by the requisite statutory majority at a meeting of the company's creditors or members (as the case may be) duly convened and held in accordance with the court order convening the meeting.
>
> (b) The court must be satisfied that those who attended the meeting were fairly representative of the class of creditors or the class of members (where applicable), and that the statutory majority did not coerce the minority in order to promote interests adverse to those of the class whom the statutory majority purported to represent.
>
> (c) The court must be satisfied that the scheme is one which a man of business or an intelligent and honest man, being a member of the class concerned and acting in respect of his interest, would reasonably approve.

If the court is so satisfied, it will issue an order of court approving the scheme. When that order is lodged with the Registrar of Companies and Businesses, the scheme becomes binding on all parties (including dissenting creditors) pursuant to s 210(5) of the Act.

Transparency and objectivity

71 Plainly, the integrity of voting outcome(s) of the scheme creditors' meeting(s) is dependent upon the fairness of the proof of debt adjudication process. The objectivity of the chairman is a critical aspect of the entire process. Regarding the objectivity of the chairman, we find the following passage from Edward Bailey and Huge Groves, *Corporate Insolvency: Law and Practice*, (LexisNexis, 3rd Ed, 2007) ("*Bailey & Groves*") at p 260, para 9.45 referring to the chairman of a creditors' meeting leading to a Company Voluntary Arrangement ("CVA") (a corporate rescue mechanism broadly similar to that of a s 210 scheme of arrangement) under the United Kingdom's Insolvency Act 1986, equally apposite in defining the role of the chairman of a scheme creditors' meeting:

> The chairman should bear well in mind that, whatever concerns he may have as to the approval of an arrangement with which he has been involved and where he may become the supervisor, *it is important that he approach the task of valuing debts in an independent manner without regard to the likely way in which the creditor holding the debt may vote.* [emphasis added]

72 The proposed scheme manager's responsibility to be independent in managing differences between the company and creditors is in a broad sense not different from the legal obligation imposed on other insolvency practitioners, *eg*, a liquidator. In this regard, our observations in *Fustar Chemicals Ltd (Hong Kong) v Liquidator of Fustar Chemicals Pte Ltd* [2009] 4 SLR(R) 458 ("*Fustar*") at [18] are pertinent in so far as the chairman's duty of adjudicating proofs is concerned:

> The principle that can also be gleaned from this brief overview is that the duty of the liquidator in assessing a proof of debt is to ensure that while genuine debts are admitted and false claims are rejected, he must act *fairly* in discharging his duties. He must, at all times, be independent and hold an even hand in dealing with the often competing interests of creditors, contributories and his appointers. *A liquidator must never favour the interests of his appointers over that of the other legitimate claimants to the company's assets*.[emphasis in original]

73 Notwithstanding that s 210 is silent on the issues of transparency and objectivity, we cannot overstate the importance of respecting and safeguarding the integrity of the voting outcomes of the scheme creditors' meeting(s). The minority creditor will be involuntarily bound by a scheme which it voted against. Its property rights might be very severely affected or compromised in a scheme. Often this could involve deep "haircuts", *ie*, accepting the repayment of an amount which is significantly less than the outstanding debt in full settlement of the debt. Its opposing vote suggests that it would prefer for the company to go into liquidation than to be bound by the scheme. *If the minority creditor is to be "crammed down" upon by the majority, then it has every right to insist that the majority is constituted strictly in compliance with the requirements of s 210 and that the chairman of the meeting scrupulously discharges his responsibilities fairly.*

Determination of issues

When a proposed scheme manager might be in a position of a conflict of interest

The evolving nature of the proposed scheme manager's duties

74 Before moving onto other aspects of this matter, it is apt that we make some observations on the proposed scheme manager's duties. The proposed scheme manager is engaged by a company that is usually in a parlous financial position. He formulates a scheme of arrangement to save the company and pitches it to the creditors to secure approval of his plan. At that stage of the process, he owes no direct duties to the creditors, save of course that he must act in good faith and must not mislead creditors or suppress material information from them. It is trite law that the court will not sanction a scheme if the company and/or its majority creditors are not acting *bona fide* (see *Daewoo Singapore Pte Ltd v CEL Tractors Pte Ltd* [2001] 2 SLR(R) 791 at [36]). It follows that before the scheme is sanctioned, the proposed scheme manager has a good faith obligation to the company and the body of creditors as a whole as well.

75 As stated above at [67], the proposed scheme manager's duties are then amplified when he assumes the quasi-judicial role of adjudicating on the admission and rejection of the proofs of debts. We mentioned *Fustar* earlier (see above at [72]) for the proposition that "[a] liquidator must never favour the interests of his appointers over that of the other legitimate claimants to the company's assets" [original emphasis omitted]. The same is true for a proposed scheme manager in the discharge of his responsibility of adjudicating proofs. In his quasi-judicial role, he owes duties to be objective, independent, fair and impartial (see above at [71]–[73]).

76 As for his duties upon appointment as scheme manager, we again think it fitting to refer to the office of the liquidator as a comparator. It is well-established that liquidators are fiduciaries, owing duties to, *inter alia*, the company and its creditors. In this regard, see Andrew R Keay, *McPherson's Law of Company Liquidation* (Sweet & Maxwell, 2nd Ed, 2009) ("*McPherson*") at para 8.018:

> *1. Fiduciary duties*
>
> From the practical point of view it does not seem to matter much whether the liquidator is treated as a trustee in the strict sense or simply as an agent, *for in either capacity a fiduciary position in relation to the company, its creditors and contributories is occupied.* ... In addition, two further duties of major importance follow from the fiduciary relationship: (a) that the liquidator must not allow private interests to come into conflict with duties, *and (b) that in discharging the duties he or she must at all times act with complete impartiality as between the various persons interested in the property and liabilities of the company.*

...

[emphasis added]

Earlier versions of the same passage (without material differences) were approved by the Federal Court of Australia in *Pace and another v Antlers Pty Ltd (in liq)* [1998] 26 ACSR 490 at 501 and Olney J in *Re G K Pty Ltd (in liq); Ex parte Deputy Commissioner of Taxation* (1983) 7 ACLR 633 at 639 respectively. In our view, the proposed scheme manager's duties to administer the approved scheme take on a fiduciary nature upon his appointment as the scheme manager.

Conflict of interest

77 To an extent, the proposed scheme manager is inherently in a position of conflict because if he successfully resuscitates the company, he is remunerated, *inter alia*, for managing the scheme and reviving the company. Therefore, there are undeniable incentives for the proposed scheme manager to prefer the interests of his appointers (not infrequently, the company itself as is the case here) over those of their creditors from the outset. He must, nevertheless, seek to strike the *right balance* and manage the competing interests of successfully securing the approval of his proposed scheme and uncompromisingly respecting the procedural rights of all involved in the scheme process. It must also be appreciated that an informed voting process can only take place if all material information a creditor might need to determine how to vote is made available (see *Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd* [2003] 3 SLR(R) 629 ("*Wah Yuen*") at [24]).

78 A proposed scheme manager goes too far when he begins to align his interests with those of the company beyond what we have described above. The temptation to do so is especially acute when his initial appointers are not the creditors, but the company's management. In this case, the proposed Scheme Manager was also surprisingly the nominee for the IVAs filed by Mr Sng and Ms Tong. The success of those IVAs in turn depended heavily on the success of the Scheme. [note: 88] In our view, this additional relationship with Mr Sng and Ms Tong, key personnel of the Respondent, was inappropriate because it put the proposed Scheme Manager in an unacceptable position of unavoidable conflict of interest. Therefore, we ordered the proposed Scheme Manager to elect either to continue as such only or as nominee for Mr Sng and Ms Tong in their proposed IVAs only (see Annexure I at [11]). He eventually chose to act for the Respondent alone.

Whether scheme creditors are entitled to examine the proofs of debt submitted by other creditors in respect of a proposed scheme

79 In considering the submission that creditors have the right to review the proofs of debt submitted by all other creditors in respect of a proposed scheme, the Judge held (the Judgment at [115]):

> I do not read the authorities as laying down the strict rule that so long as any opposing creditor asks for the supporting documentation for each proof of debt, the Company must of necessity provide the requested information in that form or else risk denial of the court's approval of the scheme of arrangement by dint of lack of transparency.

80 The Judge also reasoned that (at [110]):

> [the] crucial question [relating to whether the Respondent had provided sufficient information] was whether the further information requested by the Opposing Bank Creditors would have caused any Scheme Creditor voting in favour to change its view or any abstaining Scheme

Creditor to vote against the Scheme.

81 She also eventually came to the view (at [119]) that:

> there was no lack of transparency on the part of the [Respondent]. It had provided sufficient accurate information with regard to its assets and liabilities and those of its subsidiaries to enable the Scheme Creditors to make an informed choice between the Scheme and taking their chances at liquidation.

82 In her determination, the Judge relied on the case of *Wah Yuen* (see above at [77]) which was decided by this court; as well as the subsequent High Court cases of *Re Econ Corp Ltd* [2004] 1 SLR(R) 273 ("*Re Econ*") and *Re Horizon Knowledge Solutions Pte Ltd* [2004] SGHC 270 ("*Re Horizon*"), both of which relied on *Wah Yuen*. In *Wah Yuen*, this court found that the company presenting its scheme of arrangement for approval "had not been sufficiently transparent about the circumstances in which the related parties' debts were incurred" (see holding (5) of the headnote). As a result, this court withheld its approval for the proposed scheme of arrangement because it found "that the creditors were not in a position to assess the fairness and reasonableness of the scheme." (See *Wah Yuen* at [37]) This court explained (also at [37]) that this was because:

> [T]he creditors could not determine whether the returns under the proposed scheme of arrangement were *in fact* greater than what they could expect in a liquidation. It may well be that a proper verification of the related party debts would reveal that the related party debts did not in fact exist to the extent currently represented. In such a scenario, the returns to the creditors in a liquidation would be larger than that currently estimated. [emphasis in original]

83 In this appeal, OCBC's complaint was not so much that the creditors had insufficient accurate information to make an informed choice between the Scheme and liquidation or that given more information, they might have voted differently. Rather, its complaint was that it had inadequate information "to assess whether the [proposed] Scheme Manager's decisions in admitting and rejecting the proofs of debts were proper". [note: 89] OCBC was not seeking more information to evaluate the Scheme against a liquidation scenario. Rather, it was seeking more information to assess whether the proposed Scheme Manager's decision to admit the claims of certain creditors was proper. OCBC rightly submitted that the Judge did not adequately appreciate that the two complaints are different. [note: 90]

84 The question in *Wah Yuen* was whether the scheme there should have been sanctioned given that the lack of transparency regarding the related party debts prevented the creditors from assessing the fairness and reasonableness of the scheme. The issue raised by OCBC, however, was rather different: whether scheme creditors are entitled to examine the proofs of debt submitted by other scheme creditors to ensure the integrity of the voting process regardless of whether they are related parties or not. (We use the general term "scheme creditor" generously in this context, describing also creditors who have submitted proofs in respect of a proposed scheme that has yet to be passed.)

85 The issue of access to proofs of debt requires an assessment of the rights and interests of individual creditors in relation to the collective interests of the other creditors and the company. We have highlighted earlier (see above at [73]) why it is imperative for the process through which proofs of debt are adjudicated upon and admitted to be transparent. However, we also recognise the force of the Respondent's contention that the easier it is for individual creditors to challenge the chairman's decisions on the adjudication and admission of proofs of debt, the more difficult it might be to get the

scheme off the ground and this may unnecessarily frustrate the creditors supporting the scheme (possibly forming the requisite statutory majority) while the company convulses and shrivels into terminal decline in the meantime. Certainly, the quicker the scheme gets sanctioned, the earlier the company can be rescued.

86 Indeed, in *Wah Yuen*, this court remarked at [18] that:

> [i]f it were a condition precedent that a company had to satisfy each creditor of the genesis and extent of all of its debts before the scheme could be put to the vote, the entire process would be cumbersome and administratively inconvenient, especially when the scheme might itself already provide for a procedure for the adjudication of claims for voting purposes (as it did in this case).

87 However, OCBC submitted that there should be symmetry on this issue with the related regimes of bankruptcy and insolvency as a scheme is usually proposed in lieu of liquidation. Rule 179 of the Bankruptcy Rules (Cap 20, R 1, 2006 Rev Ed) ("the Bankruptcy Rules") expressly provides for the inspection of proofs:

> Inspection of proofs
>
> **179**. The Official Assignee or the trustee, as the case may be, shall upon payment of the prescribed fee, *allow proofs lodged with him to be inspected by, or provide details of the proofs lodged with him to*, any of the following persons:
>
> (*a*) *any creditor who has submitted his proof of debt (unless his proof has been wholly rejected for purposes of dividend or otherwise);*
>
> (*b*) the bankrupt; and
>
> (*c*) any person acting on behalf of any creditor or the bankrupt.
>
> [emphasis added]

88 Although there are no equivalent provisions in the Companies (Winding Up) Rules (Cap 50, R 1, 2006 Rev Ed) ("the Companies (Winding Up) Rules") or the Companies Regulations (Cap 50, Rg 1, 1990 Rev Ed) ("the Companies Regulations"), these rules and regulations do also contemplate creditors' challenges of liquidators' and judicial managers' decisions in respect of proofs of debt (see rr 93 and 95 of the Companies (Winding Up) Rules; and regs 80 and 82 of the Companies Regulations). The Bankruptcy Rules also have similar provisions (at rr 198 and 201) which provide for creditors' challenges of decisions of the Official Assignee or trustees, as the case might be. OCBC submitted that these provisions imply that creditors generally have the right to inspect the proofs of debt filed by other creditors.

89 As an example, we set out r 93 of the Companies (Winding Up) Rules here:

> Appeal by creditor
>
> **93**. *If a creditor or contributory is dissatisfied with the decision of the liquidator in respect of a proof, the Court may, on the application of the creditor or contributory, reverse or vary the decision*; but subject to the power of the Court to extend the time, no application to reverse or vary the decision of the liquidator in a winding up by the Court rejecting a proof sent to him by a

creditor, or person claiming to be a creditor, shall be entertained, unless notice of the application is given before the expiration of 21 days from the date of the service of the notice of rejection.

[emphasis added]

90 We noted that r 93 might be read as merely allowing a creditor to apply to court to reverse or vary the liquidator's decision as to its own proof (and not the proofs of other creditors). However, on reflection, it seems to us that if that were the case, r 93 would refer to the creditor's own proof of debt as "its proof" rather than "a proof".

91 We noted further that in England and Wales, liquidators are statutorily required to allow the inspection of proofs of debt lodged with him by any creditor who has submitted his own proof of debt. See the Insolvency Rules 1986 (SI 1986 No 1925) (UK):

4.79. Liquidator to allow inspection of proofs

The liquidator shall, so long as proofs lodged with him are in his hands, allow them to be inspected, at all reasonable times on any business day, by any of the following persons—

(a) *any creditor who has submitted his proof of debt (unless his proof has been wholly rejected for purposes of dividend or otherwise);*

(b) any contributory of the company;

(c) any person acting on behalf of either of the above.

[emphasis added]

92 We did not disagree with OCBC's submission that all the local insolvency and bankruptcy regimes allow creditors to inspect the proofs of debt submitted by other creditors and challenge the admission of the other creditors' claims, but the competing interests in a proposed scheme of arrangement are not the same.

93 In a proposed scheme of arrangement, the interest of a creditor is different from that of a creditor in a liquidation or a judicial management. In a proposed scheme of arrangement he has an autonomous voting right which may be critical to the jurisdiction of the court to sanction the scheme. Hence, claims to be given access to proofs of debt filed by other creditors can only be justified if the information is relevant to his voting rights. The creditor has a positive "right" to be given his voting rights according to the value of his lawful claims against the company, and he also has a negative "right" to protect his voting rights from being whittled down by excessive voting rights given to another creditor. Of course, he has an interest in the eventual payout if the scheme is proved, but may prefer not to have that payout, and instead may vote against the proposed scheme so that he could recover his claim in a liquidation. In principle, therefore, a creditor has no legal right to have access to the proofs of debt of other creditors, except where his voting rights have been or are likely to be affected. In other words, he is entitled to access only if he produces *prima facie* evidence of impropriety in the admission or rejection of such proofs of debt. At the hearing, we queried why OCBC did not apply earlier to the court for an order that the Respondent disclose the proofs of debt and supporting documentation which it requested. Counsel for OCBC responded that such an application was then unprecedented. In our view, if the proposed chairman of a scheme creditors' meeting rejects a scheme creditor's request for the disclosure of other scheme creditors' proofs of debt (together with supporting documentation), there is no bar against the requesting scheme creditor

applying to court for an order that the proofs and supporting documentation be disclosed to it. The court will determine this issue after weighing the rights of the applicant creditors against the collective interests of the other creditors and the company, taking into account any allegations about the *prima facie* dubiousness of the challenged debts. To this, we also add that should the proofs in question contain confidential information pertaining to the other creditors or the company, the court should ensure that there are proper safeguards to address any issues of confidentiality that have arisen.

When a scheme creditor should be notified of the chairman's decisions to admit or reject its own and other creditors' proofs of debt

94 As mentioned above at [68], it is common practice for the chairman to post a list of the scheme creditors and the corresponding amounts of their admitted claims (for the purpose of voting) at the meeting venue before the creditors' meeting. In describing the conduct of the analogous meeting for a CVA (see above at [71]), Bailey & Groves states at para 9.47 that "[t]he first task of the chairman will usually be to determine who is entitled to vote and in what amounts." This ought to be done before the votes are cast at the creditors' meeting.

95 This practice is sound as it safeguards the integrity of the voting outcome. The creditors commence voting knowing how much their votes will count with or against those of their fellow creditors. In addition, the information allows some measure of informed consultation between the creditors regarding the exercise of their votes. This is likely to lead to a more considered and informed vote by the body of creditors as a whole.

96 In the present case, the proposed Scheme Manager, in conducting the Scheme Meeting, did not adopt the practice referred to above at [94]–[95]. Prior to the meeting, the Scheme Creditors were not provided by the proposed Scheme Manager with a list of Scheme Creditors and the corresponding quanta of their claims that had been admitted for the purpose of voting. This was notwithstanding that counsel for OCBC had earlier written to the proposed Scheme Manager to request for a full list of the claims lodged by the Scheme Creditors for the purpose of voting and the amount of those claims. [note: 91]

97 Further, as explained above at [19], although the Scheme Creditors were first informed that the voting results would be released after the trading day at 5.00pm, they were then unexpectedly informed after 5.00pm that the proposed Scheme Manager had in fact not completed his adjudication of the proofs of debt submitted to him. The proposed Scheme Manager eventually reported the results of the Scheme Meeting slightly over two months later in the Chairman's Report on 17 December 2009 (see above at [21]). As a consequence of the proposed Scheme Manager's unexplained conduct of the Scheme Meeting, doubts were understandably sown in the minds of some opposing creditors about the integrity of the voting process.

98 During the subsequent two-month period between the Scheme Meeting and the Chairman's Report, the proposed Scheme Manager knew precisely which way each creditor had voted but had not determined how much of each creditor's claim was to be admitted. In the apt words of Mr Thio, lead counsel for Ho Lee, this gave the proposed Scheme Manager "perfect foresight" when it came to adjudicating the claims submitted for the purpose of voting. Mr Thio did not go so far as to allege dishonesty on the part of the proposed Scheme Manager; however, he did suggest that the proposed Scheme Manager might have suffered from a confirmation bias - which created a predisposition towards the hypercritical examination of evidence contrary to his own desired position (*ie*, documents supporting Ho Lee's proof of debt). While we need not determine this issue, we are constrained to observe that we find it unsatisfactory that the proposed Scheme Manager had placed himself in a

situation that invited such criticism.

99 As we have explained earlier (see above at [73]), the transparency of proofs of debt adjudication process and the objectivity of the chairman in evaluating the proofs are key aspects of every s 210 scheme. As the scheme created binds and often severely prejudices dissenting creditors, it is only fair that the integrity of the s 210 procedure be scrupulously observed. Therefore, in our view, before the Scheme Meeting took place, the proposed Scheme Manager should have:

(a) completed adjudicating all proofs of debt; and

(b) provided all the Scheme Creditors present with the full list of Scheme Creditors entitled to vote and the corresponding quanta of their claims that were admitted for the purpose of voting.

A proposed scheme manager who cannot comply with the above prior to the scheme creditors' meeting should act prudently and seek from the court leave to defer the meeting until after the adjudication is completed.

Whether a scheme creditor may appeal the chairman's decisions to admit or reject its own and other creditors' proofs of debt

100 As stated above at [56], there is no subsidiary legislation governing the admission and rejection of proofs of debt in relation to creditors' meetings summoned to consider a proposed scheme of arrangement under s 210. However, comparably in the context of judicial management (see above at [87]), the Companies Regulations provide for admission and rejection of proofs in, *inter alia*, regs 72, 75, 79 and 80:

> ***MEETINGS OF CREDITORS IN RELATION TO A JUDICIAL MANAGEMENT***
>
> ...
>
> 72. In the case of a first meeting of creditors or of an adjournment thereof, a person shall not be entitled to vote as a creditor unless he has duly lodged with the judicial manager not later than the time mentioned for that purpose in the notice convening the meeting or adjourned meeting a proof of the debt which he claims to be due to him from the company.
>
> ...
>
> 75. The chairman shall have power to admit or reject a proof for the purpose of voting, *but his decision shall be subject to appeal to the Court.* If he is in doubt whether a proof shall be admitted or rejected, he shall mark it as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained.
>
> ...
>
> ***ADMISSION AND REJECTION OF PROOFS AND APPEAL TO THE COURT***
>
> ...
>
> 79. The judicial manager shall examine every proof of debt lodged with him and the grounds of the debt, and shall in writing admit or reject it, in whole or in part, or require further evidence in support of it. If he rejects a proof he shall state in writing in accordance with Form 63V in the Second Schedule to the creditor the grounds of the rejection.

80. *If a creditor is dissatisfied with the decision of the judicial manager in respect of a proof, the Court may, on the application of the creditor, reverse or vary the decision*; but subject to the power of the Court to extend the time, no application to reverse or vary the decision of the judicial manager in a judicial management by the Court rejecting a proof sent to him by a creditor, or person claiming to be a creditor, shall be entertained, unless notice of the application is given before the expiration of 21 days from the date of the service of the notice of rejection.

[emphasis added]

For liquidations, the equivalent provisions are to be found at rr 124, 128, 92 and 93 of the Companies (Winding Up) Rules respectively.

101 The provisions relating to the admission and rejection of proofs of debt in the Companies Regulations and the Companies (Winding Up) Rules are not, however, free from difficulties. For example, if a creditor is entitled to vote under reg 72 of the Companies Regulations having duly lodged his proof of debt with the judicial manager, it is not clear how the chairman may reject his proof for the purpose of voting under reg 75 (see further the discussion of the Australian statutory "cousins" of the said provisions (regs 5.6.23 and 5.6.26 of the Corporations Regulations 2001 (Cth)) in *Selim v McGrath* [2003] NSWSC 927 (*Selim v McGrath*) at [88]–[106], endorsed by the Full Court of the Federal Court of Australia in *Bacnet Pty Ltd and Others v Lift Capital Partners Pty Ltd (in liq) and Others* [2010] FCAFC 36 ("*Bacnet*") at [76]). Nevertheless, in considering the admission and rejection of proofs of debt by the chairman of a s 210 creditors' meeting, it is worth bearing in mind the commonsensical procedure in these provisions. For convenience, all references made below to provisions in the Companies Regulations should be concurrently taken as references to their corresponding provisions in the Companies (Winding Up) Rules.

102 Thus, the chairman of a s 210 creditors' meeting has three options when assessing a contentious claim for the purpose of voting. First, he might admit the claim wholly. Second, he might reject a claim wholly or partially, in which case he should provide to the creditor written grounds of his rejection. We elaborate on this by stating our view that the chairman's decisions should not be peremptory. His duty to give reasons puts the onus on him to look at each proof more carefully in the proper exercise of his quasi-judicial function. This requirement also improves the transparency of the voting process (see above at [73]). Third, if the chairman has doubts whether a proof should be admitted or rejected, he should mark it as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained. We should add that in coming to his decision, the chairman may often require further evidence in support of a proof.

103 A judicial manager's (or his nominee chairman's) or a liquidator's (or his nominee chairman's) decisions in respect of the admission or rejection of proofs of debt are subject to appeal to the court. We see no reason why the position should be different for the chairman of a s 210 creditors' meeting when he admits or rejects proofs for the purpose of voting. In particular, as we have suggested above at [93], in so far as the scheme creditor is aggrieved by the potential diminution of its voting rights, it plainly has good reason (at least as good as that of creditors voting on a judicial manager's proposals) to be allowed to appeal the chairman's decisions in respect of the admission or rejection of proofs of debt.

104 Further, for the same reason, we took the view that a creditor who has submitted a proof to the chairman of a s 210 creditors' meeting has the standing to challenge the chairman's decisions on the proofs of debt submitted by other creditors. This is commonsensical as the chairman would otherwise have complete *carte blanche* to treat sympathetically proofs by supporting creditors,

without any possibility of any further audit of his decision. However, such appeals to court should only be taken after the votes have been counted and it can be seen whether the vote in question would affect the result (see *Selim v McGrath* at [140]), preferably concurrently during the sanction stage (see above at [70]).

105 We turned next to the court's approach in hearing an appeal against a chairman's admission or rejection of a claim for the purpose of voting in a s 210 creditors' meeting. We ought to make clear from the outset that the court should be slow in overriding the professional judgment of the chairman in admitting or rejecting proofs of debt for the purpose of voting. Indeed, we accepted as correct the following principles as stated in *Bacnet*, *viz*, that the court will not ordinarily interfere with the chairman's decisions based on his professional judgment unless it was affected by bad faith, a mistake as to the facts, an erroneous approach to the law or an error of principle (*Bacnet* at [72]); and that the court's role is not to engage in its own valuation of a claim (*Bacnet* at [73]).

106 Nonetheless, we were of the view that the court has to be satisfied that the proposed scheme manager has acted on the correct principles in his quasi-judicial role as chairman of a s 210 creditors' meeting. If a proof of debt is not capable of substantiation without the need for serious investigation or exertion, then the chairman should at least make the necessary enquiries regarding the proof. This is especially so if the proof of debt in question seeks to prove a substantial claim, as Ho Lee's proof does in the instant case (see [112]–[113] below).

107 Further, when deciding which proportion of a creditor's claim to admit (or to allow a creditor to vote, when his proof is marked as objected to), the chairman need only make a "reasonable estimate" (see Ian Fletcher, John Higham QC and William Trower QC, *Corporate Administrations and Rescue Procedures* (LexisNexis, 2nd Ed, 2004) at para 13.20) or, put another way, a "just estimate" of the claim in question by doing his best with the factual material the claimant furnishes, without undertaking any detailed inquiry (see reg 5.6.23(2) of the Corporations Regulations 2001 (Cth) and *Selim v McGrath* at [103], endorsed in *Bacnet* at [77]; note also that in the local context of a liquidation, a "just estimate" must be made, so far as possible, of unascertained claims: see s 327(1) of the Act). If it is impossible to ascribe any sensible value to a claim, the chairman should attribute a nil value to it and the claim should be rejected (see *Re UDL Holdings Ltd* [2001] 1 HKLRD 156 ("*Re UDL Holdings Ltd*") at p 165J–166C, cited with approval in *Bacnet* at [88]).

108 We should emphasise that up to now, we have only been discussing the position regarding the chairman's admission or rejection of claims *for the purpose of voting* in a s 210 creditors' meeting. It must be made clear that even though the court may order (on appeal by a creditor) that his claim be admitted or rejected for the purpose of voting, this is in the nature of a "rough and ready" determination keeping in mind that a vote on the proposed scheme should not be delayed unnecessarily. Such an order does not bar the creditor from going back to the court subsequently to seek determinative final adjudication of the same claim on its merits.

109 If the court determines that a creditor's claim was wrongly admitted or rejected for the purpose of voting and the scheme would not have been approved but for that wrongful admission or rejection, then the scheme must fail as the statutory supermajority of three-fourths in value of the creditors has not been satisfied. Unpalatable as this outcome may be to what could be the preponderance of creditors, the court has no alternative but to give effect to the statutory conditions.

110 Before such a final determination, however, contrary to OCBC's submission (see above at [43]), a disputed debt should be treated as being subject to the scheme. If OCBC's submission were correct, it might often require supplemental schemes for the approval of main schemes and could significantly

increase the time taken, costs and complexities of securing approval for schemes of arrangement. We did not accept OCBC's submission.

Whether the chairman's decisions to admit or reject certain proofs of debt for the purpose of voting, in this case, were correct

111 Having determined that the decisions of the proposed Scheme Manager (as chairman of the s 210 creditors' meeting) to admit or reject proofs are subject to appeal to this court, we then considered certain of his decisions that were impugned by Ho Lee and OCBC.

Ho Lee's contest over the partial rejection of its claim

112 In CA 47, Ho Lee contested the proposed Scheme Manager's rejection of $61.79m of its $84.56m claim. The proposed Scheme Manager had rejected these amounts on the basis that they were supported by insufficient documentary evidence and the PwC report confirmed that such rejection was reasonable. Ho Lee submitted that had the proposed Scheme Manager consulted it or the SO, Jurong Consultants, he would have been provided with explanations and evidence that would have justified the admissibility of Ho Lee's claims. Further, Ho Lee submitted that like the liquidator in *Fustar*, the proposed Scheme Manager had apparently gone out of his way to reject its claim. [note: 92]

113 The bulk of the $61.79m in claims that were rejected by the proposed Scheme Manager came under two heads: [note: 93]

(a) the damages claim of $26,860,439; and

(b) the loss of profits claim of $33,556,433.

In respect of the damages claim, we noted that no claims of damages by suppliers or subcontractors had been made against Ho Lee even until the date of the hearing of this appeal. [note: 94] Therefore, like the courts in *Re UDL Holdings Ltd* and *Bacnet* (see above at [107]), we found that it was impossible to sensibly ascribe to the proof the value claimed by Ho Lee. However, we agreed with Ho Lee that its claim for loss of profits should have been admitted for a reasonable amount and that the proposed Scheme Manager should have made basic enquiries before rejecting its claim outright. For want of a more precise method of valuing that claim, we ordered that Ho Lee's claim for loss of profits be valued by reference to the following objective criteria:

(a) Take the average of Ho Lee's profits (on a percentage basis) in three of its largest contracts over the last two years preceding the date of its Proof; and then

(b) Apply that average percentage profit to the value of Ho Lee's contract with the Respondent.

(This claim should then be certified by Ho Lee's auditors and submitted to the Scheme Manager within 14 days from [27 August 2010])

St George Bank

114 St George Bank's claim for $27,796,900 (converted from the total guaranteed amount of AUD$23.3m based on the interbank cross rate as at the Ascertainment Date as published in the

Business Times on 3 August 2009, in accordance with clause 4.1(i) of the Scheme [note: 95]) was based on a guarantee granted by the Respondent for banking facilities extended to its Australian subsidiary TEAC Australia. [note: 96] Its claim was admitted in full. [note: 97]

115 TEAC Australia is the sole operating subsidiary of TTA Holdings Limited ("TTA"), another of the Respondent's subsidiaries listed on the Australian Securities Exchange. [note: 98] TTA's Half Year Report for the period ended 30 September 2009 (after the 31 July 2009 Ascertainment Date) recorded total borrowings of only AUD$17.4m. [note: 99] This cast doubt on the $27,796,900 (or AUD$23.3m) claim admitted by the Respondent. If, say, TEAC Australia had only drawn down AUD$17.4m of the loan facility by the Ascertainment Date, then it seemed that the Respondent could only have guaranteed up to that amount by the Ascertainment Date. However, St George Bank's claim plainly exceeded what was drawn down by TEAC Australia by the Ascertainment Date.

116 The portion of St George Bank's claim which exceeded the amount drawn down was dressed up as a contingent claim and recognised as such by the Judge, together with the portion of the claim which matched the amount drawn down by TEAC Australia by the Ascertainment Date. The Judge admitted the whole of St George Bank's claim on the basis that clause 6.3 of the Scheme allowed creditors to lodge proofs of debt which included the amounts of any contingent claims, and it was for the proposed Scheme Manager to decide whether to admit such claims wholly or partially (see the Judgment at [79]).

117 The Judge, however, did not address the submission made to her by the Opposing Bank Creditors regarding how St George Bank's claim appeared to have far exceeded what had been drawn down by TEAC Australia by the Ascertainment Date. In our view, the Judge erred in not doing so, as, in our view, the definition of a "contingent claim" under clause 6.3 of the Scheme did not include the sums of money that had not been drawn down in respect of the loan facilities extended to TEAC Australia.

118 Although we did not have sight of the loan and guarantee documents in respect of the loan facility which St George Bank provided to TEAC Australia, it could not have been the case (especially given the Group's financial difficulties) that St George Bank was bound to allow TEAC Australia to draw down on the remaining undrawn portions of the loan facility after the Ascertainment Date. As at the Ascertainment Date, St George Bank surely still had control over whether to maintain its credit line to TEAC Australia. Counsel for the Respondent did not make a contrary submission.

119 In our view, it would not have been right to allow St George Bank to vote based on contingent claims (founded on the undrawn credit facilities) which St George Bank could later unilaterally ensure would never crystallise (by withdrawing those credit facilities). Therefore, we ordered that only the amounts of the St George Bank credit facilities which TEAC Australia had drawn down as of the Ascertainment Date be admitted by the proposed Scheme Manager as claims.

Ascendas

120 Our analysis pertaining to the claim by St George Bank applied equally to the claim by Ascendas. Ascendas filed a claim based on the Respondent's corporate guarantee over a lease of 10 Toh Guan Road to the Respondent's subsidiary, Tradepark. [note: 100] The bulk of the claim of $53.8m arose from future rents and was admitted in full. The breakdown of Ascendas' claim against the Company is set out as follows: [note: 101]

Item	Amount admitted (S$)
Future rent for the remaining term of the lease from 1 August 2009 to 4 March 2014	35,887,594
Future land rent and sublet fees payable	3,727,777
Future property tax payable	3,270,680
Other amounts payable for property maintenance, insurance, utilities, *etc*.	10,916,935
Total	**53,802,986**

121 Again, it was within Ascendas' control to terminate the lease once Tradepark defaulted on any payments. We doubted that Ascendas was bound to lease 10 Toh Guan Road to Tradepark up till 4 March 2014, regardless of its receipt of dues under the lease. It seemed to us that if Ascendas intended for the future rents to be admitted as claims under the Scheme, Ascendas had to be bound to lease 10 Toh Guan Road to Tradepark up to 4 March 2014, accepting as sufficient payment whatever monies were accorded to it under the Scheme. It would have been commercially unthinkable for Ascendas to have been content with that and, in fairness to counsel for the Respondent, we ought to state that there was no suggestion that this was the case.

122 In our view, it would also not have been fair to allow Ascendas to vote based on contingent claims (founded on the future lease payments) which it could later unilaterally ensure would never crystallise (by terminating the lease). Therefore, we ordered that only the amounts of the lease payments which Tradepark owed Ascendas (as of the Ascertainment Date) should be admitted by the proposed Scheme Manager as claims. However, we also ordered that that amount be reduced by the amount of the security deposit provided by First Capital which had been utilised (as of the Ascertainment Date). We explain why below.

First Capital

123 First Capital provided Ascendas a security deposit of $6.86m in respect of the lease of 10 Toh Guan Road to Tradepark. In return, the Respondent entered into an indemnity agreement with First Capital. [note: 102] First Capital's claim of $6.86m was fully admitted by the Respondent. [note: 103] OCBC and Ho Lee submitted that that would have been double counting if Ascendas' $53.8m claim had not already factored in the $6.86m deposit. [note: 104]

124 In other words, OCBC and Ho Lee submitted that if the security deposit of $6.86m had been applied to Ascendas' $53.8m claim so that First Capital's claim could have been rightly admitted as a contingent claim, then Ascendas' claim should have been reduced by $6.86m to give $46.94m. On the other hand, if First Capital's $6.86m deposit had not been utilised, then it did not have a valid contingent claim of $6.86m against the Respondent.

125 On this issue, we ought to refer to the English Divisional Court decision of *In re Sass* [1896] 2 QB 12 ("*In re Sass*"), where Vaughan Williams J ("Williams J") held (at 14–15) that a surety for part of a debt must ordinarily pay that *entire* part before he can stand in the shoes of the principal creditor and prove against the principal debtor for that part of the debt. On that view, if only $3m of First Capital's $6.86m deposit had been utilised, First Capital would not have been able to prove a $3m contingent claim against the Respondent (and Ascendas would not have had to reduce its proof

by the same amount). First Capital would only have been able to prove any claim at all against the Respondent if the entire $6.86m deposit had been utilised. The rule propounded by Williams J above might seem odd but its rationale is explained in *Goode on Legal Problems of Credit and Security* (Louise Gullifer ed) (Sweet & Maxwell, 4th Ed, 2008) ("*Goode*") as follows (at para 8-18):

> At first sight it seems surprising that, if the surety pays part of the debt the creditor should not have to give credit at least for sums received from the surety prior to the bankruptcy. But the rule has a sound policy base. *It is a well settled principle of equity that until the creditor has received payment of the guaranteed debt in full the surety cannot prove in the insolvent debtor's estate for a sum paid by him to the creditor, the reason being that he has, expressly or by implication, undertaken to be responsible for the full sum guaranteed, including whatever remains due to the creditor after receipt of dividends by him out of the bankrupt's estate, and thus has no equity to prove for his right of reimbursement in competition with the creditor. If the creditor were required to give credit for a pre-bankruptcy part payment by the surety, neither of them could prove for the amount of such payment and the general body of creditors would thus be unjustly enriched.* [emphasis added]

126 What is crucial to note is that Goode recognises that an exception exists in the context of a landlord and tenant situation: see *Milverton Group Ltd v Warner World Ltd* [1995] 2 EGLR 28 ("*Milverton Group*"). In that case, the English Court of Appeal decided that the payment of rent by a surety discharged the lessee's obligation to pay the same rent. The reason for this was that both the tenant and the guarantor owed "a single set of obligations" to pay the rent and perform the covenants (*per* Hoffman LJ, at 31). In the same vein, Glidewell LJ stated (at 30B):

> If a lessor is entitled to be paid a sum by way of rent for a particular period, and the original lessee, an assignee and a surety have all covenanted to pay that rent, the lessor may recover it from any one of them (in the case of the surety, if the assignee has defaulted). *If the lessor does however recover that sum from any one of the three, the rent has then been paid. The other two persons who were liable cease to be liable to pay that rent though of course they are still liable for any future rent under their respective covenants.* [emphasis added]

127 Therefore, since the lessee's obligation to pay the rent is discharged, the lessor may not prove against the lessee (or its guarantor) and this leaves the surety to prove against the lessee (or its guarantor) (*ie*, without contravening the rule against double proof, since the surety does not prove in competition with the lessor). To restate that in the context of the present case, since Tradepark's obligation to pay the rent is discharged, Ascendas may not prove against Tradepark's guarantor (the Respondent) and this leaves First Capital to prove against the Respondent (presumably, First Capital would have been able to prove against the Respondent as Tradepark's guarantor of the lease payments, but as it happened, First Capital proved against the Respondent on the indemnity which the Respondent also provided).

128 Accordingly, in respect of First Capital's claim, we ordered that only the amount of the security deposit (provided for Ascendas' claim) which had been utilised as at the Ascertainment Date should be admitted.

129 Finally, we should add that OCBC and Ho Lee both submitted that the claims of St George Bank, Ascendas and First Capital were contingent and should have been classified differently for that reason. We deal with these submissions below at [142]–[144].

When should scheme creditors be classified differently for voting purposes in a s 210 scheme of arrangement?

The law on the classification of creditors

130 The classification of creditors has always been problematic in this area of the law. In the oft-cited Hong Kong Court of Final Appeal decision of *UDL Argos* (above, at [58]) at [27], Lord Millett NPJ comprehensively distilled from a long line of authorities a set of principles regarding the law on the classification of creditors. The principles most relevant to the present case are reproduced here:

> (2) *Persons whose rights are so dissimilar that they cannot sensibly consult together with a view to their common interest must be given separate meetings.* Persons whose rights are sufficiently similar that they can consult together with a view to their common interest should be summoned to a single meeting.
>
> (3) *The test is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights.* The fact that individuals may hold divergent views based on their private interests not derived from their legal rights against the company is not a ground for calling separate meetings.
>
> [emphasis added]

131 The starting principle is simple enough: those creditors whose rights are so dissimilar to each other's that they cannot sensibly consult together with a view to their common interest must vote in different classes ("the dissimilarity principle"). However, in considering whether the legal rights of creditors against the company are similar or dissimilar, exactly which legal rights are to be compared and in what situations? The law has been further elaborated upon in three other cases: *Re Telewest* (above at [45]), *Re Hawk Insurance* (above, at [55]) and *Wah Yuen* (above, at [77]).

132 *Re Telewest* concerned two applications under the UK s 425(1) for leave to convene creditors' meetings. The proposed scheme in *Re Telewest* provided that sterling claims were to be converted into US dollars in accordance with a formula known as the average exchange rate. A subsequent decline in the value of the US dollar against sterling caused sterling bondholders to be concerned that the "average exchange rate", as against a spot rate on the date on which scheme claims were valued, produced seriously unfavourable treatment of the sterling bondholders as against the US dollar bondholders. They submitted that if the scheme were permitted to proceed in its present form, the sterling bondholders of Telewest Communications plc ("Telewest") should vote in a separate class. In coming to his decision, David Richards J ("Richards J") stated the following principles (at [28]–[30]):

> 28 ... ***The purpose of most schemes of arrangement with creditors is to produce an arrangement which differs from an insolvent liquidation. If the differences apply equally to all creditors, no question of separate classes arises.*** So, for example, in this case, the cancellation of the bonds for equity in the new holding company is radically different from the result of a liquidation which would involve a realisation and distribution of Telewest's assets, but it applies to all bondholders and raises no class issue. *However, it is submitted that if the difference from the template of rights in a liquidation produces a result which differs in its impact on one group of creditors as against another, then subject to questions of materiality they will form separate classes for the purposes of the scheme. …*
>
> 29 There is no dispute that, in the circumstances of a case like the present, *the relevant rights of creditors to be compared against the terms of the scheme are those which arise in an insolvent liquidation. …*
>
> 30 The working of this principle is illustrated by two cases. In *Re Richards & Co*

(1879) LR 11 Ch D 676 *the court refused to sanction a scheme because it treated a creditor with preferential rights in a liquidation as an ordinary unsecured creditor.* ... The same principle underlies the decision of the Court of Appeal in [*Re Hawk Insurance*]. Policyholders with present, future and contingent claims were combined in one class. *Outside a liquidation their rights were different, but in a liquidation they enjoyed the same right to participate* pari passu *in the distribution of the company's assets, with a just estimate being made of the future and contingent liabilities. Because their rights were to be judged against their position in an insolvent liquidation and because the scheme gave effect to those rights, they were correctly included in a single class.* See in particular paragraphs 34 and 40–44 of the judgment of Chadwick LJ.

[emphasis added in italics and bold italics]

133 Thus, the relevant comparison in *Re Telewest* was between the relative rights of creditors (among each other) under the scheme and their relative rights (among each other) in the alternative scenario that faced the company, liquidation. To be clear, creditors will not be considered dissimilar just because they are treated differently by the scheme. Indeed, schemes may prefer certain creditors just as liquidation outcomes might. However, if the scheme favours or prejudices a group of creditors (against other creditors) differently from how they would be favoured or prejudiced in a liquidation, such as to give them an additional non-private interest to vote for or against the scheme (which would make it impossible for them to consult the other creditors with a view to their common interest), then that group of creditors should be classed separately.

134 Applying the aforesaid principles, Richards J held (at [40]) that there was a great deal more which united the bondholders of Telewest than divided them; and that the scheme appeared to be a single arrangement with all bondholders rather than separate but linked arrangements with the sterling and US dollar bondholders. Richards J also noted (at [47]) that the consensus arrived by the bondholders committee (comprising members with diverse holdings of dollar and sterling bonds) suggested "that the dissimilarity in their positions [wa]s not so great as to require separate class meetings." He accordingly rejected (at [48]) the sterling bondholders' submission that that the sterling and US dollar bondholders constitute separate classes for the purpose of the Telewest scheme.

135 In *Re Telewest Communications plc*, the English Court of Appeal refused the sterling bondholders' application for permission to appeal against Richard J's decision on the basis that the appeal did not have any real prospect of success (at [15]). It further affirmed Richards J's decision on the basis that he had applied the correct principles (at [15]):

I am satisfied from the passages which I have quoted from the judgment that there was no misdirection or error of law on the part of David Richards J. *He applied the correct principles in deciding whether or not there should be a single meeting of scheme creditors or two separate meetings.* It is a decision with which this court should not lightly interfere. *It is made by a judge who has very great experience of this kind of application. It is also made on the basis of, in my view, very convincing reasoning as to the law laid down in the* Practice Statement *and in the authorities (principally [Re Hawk Insurance]), and on the material before him.* I would not interfere with a judgment on such an issue unless I was satisfied that there had been an error of principle. *There has been no error of principle.* [emphasis added]

136 Next, in *Re Hawk Insurance*, the scheme had a special formula for claims arising from insurance and re-insurance contracts. Payments to the creditors were to be calculated by reference to 100% of the proportion of the claim attributable to unsettled paid claims, 75% of the proportion attributable to outstanding losses and 50% of the proportion attributable to losses incurred but not reported

("IBNR"). The scheme was an alternative to winding up, in which a just estimate would be made in respect of the claims for outstanding losses and IBNR claims which had elements of contingency and futurity and were of uncertain quantum (see *Re Hawk Insurance* at [47]–[48] and [50]. Notably, the scheme provided for the different percentages mentioned above to make a corresponding "rough and ready" just estimate of those claims see *Re Hawk Insurance* at [50].

137 In his analysis, Chadwick LJ explained why the rights of the non-contingent creditors (on the one hand) and the contingent creditors (on the other hand) were the same (at [44]):

> It follows that (but for any special rules applicable to the valuation of claims under insurance policies) *the rights of non-insurance creditors, insurance creditors with unsettled paid claims, insurance creditors with outstanding losses and insurance creditors with IBNR losses are the same in this respect: that in the context of a winding up of the company they will all be entitled to submit claims in the winding up and to have those claims admitted or rejected.* ***The difference between the position of non-insurance creditors and insurance creditors with unsettled paid claims (on the one hand) and insurance creditors with outstanding losses or IBNR losses (on the other hand) is that , in the case of the latter, their claims are in respect of debts which by reason their 'being subject to any contingency or for any other reason' do not bear a certain value and so must be the subject of an estimate. But that does not lead to the conclusion that the rights of, say, non-insurance creditors and insurance creditors with IBNR losses are different. They have the same rights in a winding up.*** It is simply that, in order to give effect to the rights of the creditors with IBNR losses, it is necessary to estimate their value. [emphasis added in italics and bold italics]

138 In other words, the scheme provided for estimation formulae which sought to mirror the relative rights of the creditors as they stood in a winding up. The scheme did not alter the relative rights of the contingent and non-contingent creditors so that the contingent creditors would be better or worse off than they would be (relative to the non-contingent creditors) if a winding up occurred. If, to the contrary, the relative rights (among creditors) of the contingent creditors were better according to the scheme than in a winding up situation, the contingent creditors would have an additional interest to vote for the scheme. This additional non-private interest derived from their rights under the scheme would make it impossible for them to consult the non-contingent creditors with a view to their common interest. On the other hand, if the relative rights (among creditors) of the contingent creditors were worse according to the scheme than in a winding up situation, their additional non-private interest to vote against the scheme would also make it impossible for them to consult the non-contingent creditors. In both situations, the contingent creditors should therefore be classed separately.

139 In *Re Hawk Insurance*, however, the scheme crystallised the claims of the contingent creditors in a way that sought (*via* "rough and ready" just estimates) to pay the contingent creditors according to what they would have received in a winding up. Thus, the contingent creditors had no additional non-private interests (over non-contingent creditors) pursuant to the scheme to vote for or against the scheme. Hence, the English Court of Appeal held that no separate classification was necessary.

140 Therefore, the dissimilarity principle (see above at [131]) means that if a creditor's (or a group of creditors') position will improve or decline to such a different extent *vis-à-vis* other creditors simply because of the terms of the scheme (and not because of its own unique circumstances, *ie*, its "private interests") assessed against the most likely scenario in the absence of scheme approval ("the appropriate comparator"), then it should be placed in a different voting class from the other creditors. We should highlight here that the appropriate comparator depends on the facts of each case and is not necessarily an insolvent liquidation. For example, in *Re The British Aviation Insurance Co Ltd*

[2006] 1 BCLC 665 ("*British Aviation*"), the company proposing the scheme was solvent and therefore the appropriate comparator there was a continuing solvent run-off (see [88] of *British Aviation*). Another interesting example is found in the case of *Re T&N and others (No 3)* [2007] 1 All ER 851 ("*T&N Limited*"), where the proposed scheme arose from settlement discussions in the context of disputed asbestos-related claims against employers' liability insurers (see *T&N Limited* at [6]–[7]). There, the appropriate comparator was continued litigation regarding the disputed claims and the uncertainty accompanying it (see *T&N Limited* at [88] and [99]).

141 Ultimately, the classification of creditors for the purposes of voting is protective of minority creditors whose rights might be crammed down upon if they are outvoted. By allowing them to vote separately from creditors whose rights are so different from them such that the latter have additional non-private interests in voting for the scheme, these minority creditors are less likely to be overwhelmed and their votes are given the appropriate significance. The application of the dissimilarity principle to complex transactions and situations where there are different levels of secured and unsecured creditors, as well as intra-creditor relationships, is not without its difficulties. Defining a "legal right" in these contexts can be thorny. *The courts have therefore to take a broad, practical and objective approach in analysing creditor relationships and ensure that the application of this principle does not lead to an impractical mushrooming of classes that could potentially result in the creation of unjustified minority vetoes.* An overly legalistic approach might inhibit the usage of schemes as a practical alternative to other insolvency measures with more extreme consequences for creditors as a whole.

The contingent claims

142 As stated above at [129], OCBC and Ho Lee submitted that the claims of St George Bank, Ascendas and First Capital were contingent claims and ought to have been classified separately. In the present case, the appropriate comparator was an insolvent liquidation. Without the Scheme, the liquidator would distribute the contingent claimants a portion of the Respondent's assets (on a *pari passu* basis) based on the "just estimate" (see s 327(1) of the Act) of their contingent claims. Under the Scheme, the contingent claimants would be able to claim under the terms of the Scheme (see [13]–[16] above) if their claims crystallised within five years of the Scheme's effective date. It appeared to us that if St George Bank's, Ascendas' and First Capital's contingent claims on the Respondent's guarantees or indemnities were to crystallise, there was no reason why they would not crystallise within five years of the Scheme's effective date.

143 Put another way, the creditors would receive in an insolvent liquidation an amount based on the "just estimate" of a claim that would crystallise later under the Scheme (provided the claim crystallised within five years, which did not appear unlikely). In our view, the contingent creditors' legal rights as against the Respondent (and relative to the other creditors) were the same under the Scheme as they were in an insolvent liquidation. Therefore, it seemed to us that these contingent creditors would assess the Scheme primarily based on its effectiveness in preserving the Respondent's economic value (so as to satisfy their claims), as the rest of the creditors in the general class of unsecured creditors would. In that light, we saw no reason to classify those contingent creditors separately. It cannot be overlooked that the separate classification of any group of creditors allows that group a minority veto and courts must be careful not to allow the test for classification to become "an instrument of oppression by a minority" (see *Re Hawk Insurance* at [33]). Nevertheless, there appeared to be good reason to discount the votes of the contingent creditors in this case, which we elaborate on at [172]–[178] below.

144 At this point, we wish to express our doubts regarding one of the cases cited to us by OCBC and Ho Lee, *ie*, *Re Econ Corp Ltd* [2004] 1 SLR(R) 273, where the High Court took the view (at [82])

that the contingent creditors in that case should have been separately classed for voting purposes. The court's brief reasoning merely stated that the rights of the contingent creditors would not arise until calls were made on the performance bonds issued by them. This seemed to merely restate the contingent nature of the said creditors' claims. In our view, the proper approach would have been to compare the contingent creditors' rights under the proposed scheme against the appropriate comparator, as discussed above.

The subordinated claims

145 There were a number of admitted claims by substantial shareholders which pertained to unpaid dividends declared by the Respondent on 30 October 2008. [note: 105] These amounted to around $0.72m. [note: 106] Pursuant to s 250(1)(*g*) of the Act, these claims constituted deferred debts in the order of distribution of assets in the course of liquidation. The Judge held that s 250(1)(*g*) was not relevant as the company was not being wound up (see the Judgment at [53]). The Judge also distinguished the case of *Soden v British & Commonwealth Holdings Plc* [1998] AC 298 at 324 on the basis that "[t]he features of the Scheme on the present facts made it clear that the [Respondent's] assets were not to be distributed on the same basis as if the company was in liquidation." (See the Judgment at [52]) With respect to the Judge, it was precisely the fact that the Respondent's assets were to be distributed on a different basis under the scheme in contrast to a liquidation which should have prompted scrutiny to determine whether the different basis would call for the differential classification of certain creditors.

146 In our view, the Judge erred in holding that s 250(1)(*g*) was not relevant as the company was not being wound up. The rights of the creditors in a winding up (as subordinated under s 250(1)(*g*)) are certainly relevant notwithstanding that the Respondent is not being wound up now. In particular, they are relevant because as in *Re Telewest* (see above at [132]–[135]), insolvent liquidation appears to be the only realistic alternative to the Scheme (see *Re The British Aviation Insurance Co Ltd* [2006] BCC 14 at [88]). This is evidenced by the comparison of the projected returns to creditors under the Scheme to that in a liquidation scenario in the "Recommendations" section of the Explanatory Statement to the Scheme, which recommended the Scheme as a better alternative. [note: 107]

147 The cases of *Re Telewest*, *Re Hawk Insurance* and *Wah Yuen* discussed above (at [132]–[138]) lend support to our view that the classification of creditors requires the consideration of whether the scheme altered the relative rights of the different creditors so that the creditors in question would be better or worse off (relative to other creditors) under the scheme than they would be (relative to other creditors) in a winding up situation in this matter. Here, although the substantial shareholders' claims would be subordinated in a liquidation pursuant to s 250(1)(*g*), their claims would not be subordinated (and thus, more advantageously dealt with) under the Scheme. Their rights were thus so dissimilar from those of the general class of unsecured Scheme Creditors (due to this additional non-private interest to vote for the Scheme) that it was plainly necessary for them to be classified separately for the purposes of voting. We so ordered.

The Rights of First Refusal

148 Under the Scheme, Mr Sng and Ms Tong are granted ROFRs to the RCBs and the shares they are converted into. [note: 108] According to the Explanatory Statement, Mr Sng and Ms Tong play a critical role in the Group's businesses and operations. [note: 109] Their continued involvement in the Respondent was said to be significant in ensuring the support of the Group's key creditors for the Scheme and the Scheme's success. [note: 110] The ROFRs were thus granted to address the concern

that if a significant part of the Non-Sustainable Debt were converted to equity under the Scheme, Mr Sng and Ms Tong's interests in the Respondent would be significantly diluted, in turn causing creditors and investors to lose confidence in the Respondent. [note: 111]

149 The ROFRs mean that before a Scheme Creditor can sell its RCBs or the shares converted from the RCBs, it must first offer them to Mr Sng and Ms Tong. In particular, the shares have to be offered to Mr Sng and Ms Tong at prices arrived at through formulae which prefer their interests. These ROFRs, non-existent in a liquidation scenario but unique to Mr Sng and Ms Tong under the Scheme, improved their position relative to other Scheme Creditors *vis-à-vis* a liquidation scenario. With respect to the Judge, the ROFRs did not merely give Mr Sng and Ms Tong "an additional private interest in supporting the vote" (see the Judgment at [48]). In our view, the ROFRs were additional legal rights under the Scheme which gave them non-private interests in supporting the vote. We also do not think it mattered that "that interest [wa]s not derived from their legal rights as shareholders claiming unpaid dividends from the Respondent"; neither did it matter that Sng and Tong had voluntarily waived 50% of the dividends due and payable to them (see the Judgment at [48]).

150 Therefore, we held that the ROFRs gave Mr Sng and Ms Tong additional non-private interests to vote for the Scheme. Mr Sng's and Ms Tong's rights against the Respondent were thus so dissimilar from those of the other Scheme Creditors that they had to be classified differently for the purposes of voting.

151 However, we made clear to the parties that Ms Tong was free to vote as a related creditor (see [170]–[171] below) if she relinquished her ROFRs, save that any claim of hers which fell within the preceding category of subordinated claims was to be excluded (see above at [16]). Mr Sng, on the other hand, had to be excluded from the general class of unsecured Scheme Creditors even if he relinquished his ROFRs because his entire claim fell within the preceding category of subordinated claims.

When scheme creditors should have their votes discounted

Related creditors

152 In *UDL Argos* at [27] (see above at [58] and [130]), Lord Millett NPJ set out a key overriding principle regarding the treatment of votes by related party creditors. It is as follows:

> (6) The Court will decline to sanction a Scheme unless it is satisfied, not only that the meetings were properly constituted and that the proposals were approved by the requisite majorities, but that the result of each meeting fairly reflected the views of the creditors concerned. *To this end it may discount or disregard altogether the votes of those who, though entitled to vote at a meeting as a member of the class concerned, have such personal or special interests in supporting the proposals that their views cannot be regarded as fairly representative of the class in question.*
>
> [emphasis added]

153 In *Wah Yuen*, this court adopted Lord Millett NPJ's view (at [27(3)] of *UDL Argos*, see [130] above) that related party creditors do not have to vote as a separate class simply because they are related creditors. This court held (*Wah Yuen* at [13]):

> *Counsel for Wah Yuen correctly submitted that related party creditors did not constitute a separate class of creditors for voting purposes simply because they were related parties.* This is

because "the test is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights. The fact that individuals may hold divergent views based on their private interests not derived from their legal rights against the company is not a ground for calling separate meetings": *UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin*. [emphasis added]

154 However, this court went on to observe (at [35]):

> Although related party votes are counted for purposes of determining whether the statutory majority has been reached, ***the courts have consistently attributed less weight to such votes when asked to exercise their discretion in favour of a scheme*** *. This is because the related party may have been motivated by personal or special interests to disregard the interests of the class as such and vote in a self-centred manner.* In the present case, we found no reason to abandon our traditional reserve because Wah Yuen's continued reticence on the related party debts prevented the court from making a competent assessment of the bona fides of the related party votes. [emphasis added in italics and bold italics]

155 Taken together, the authorities say with one voice that it is the norm for the votes of related party creditors to be discounted in light of their special interests to support a proposed scheme by virtue of their relationship to the company. The Judge in fact noted at [47] of her Judgment that she was "entitled to attach less weight to [the related parties'] views in [her] overall decision whether to approve the Scheme because of their special interest in the [Respondent] and the Scheme", but she did not do this in making her final decision. In our view, she erred here as there was no reason to depart from the norm.

Wholly owned subsidiaries

156 The ensuing question, then, was the extent to which each related party creditor's vote should be discounted. This was the list of related party creditors which the Judge had set out at [43] of her Judgment.

Scheme Creditor	**Admitted claim (S$ million)**
KBC Bank NV Singapore Branch	24.61
Julia Tong	6.17
Aki Habara Electric Corporation Japan, Ltd	0.02
Akira Corporation Pte Ltd	86.97
E&E Wholesale Pte Ltd	0.76
International Tradelogistics Pte Ltd	0.79
IT-Kauppa Oy	0.04
Poya Communication Pte Ltd	0.36
Tainahong Trading Ltd	4.95
TT International (Aus) Pty Ltd	0.05
TT International Tradepark Pte Ltd	4.70

TT Middleeast FZE	0.67
Substantial shareholders	0.52
Total	**130.61**

157 From the Respondent's annual report for the financial year ending 2009, we noted that most of the related party creditors were in fact wholly owned subsidiaries. [note: 112] In fact, on the list in the preceding paragraph, only KBC Bank NV Singapore Branch ("KBC Bank"), Ms Tong and the substantial shareholders (referring to creditors with subordinated claims under s 250(1)(*g*) of the Act which we dealt with earlier at [145]–[147] above) were not wholly owned subsidiaries.

158 In our view, the votes of wholly owned subsidiaries should be discounted to zero. Wholly owned subsidiaries are entirely controlled by their parent company *ie*, the Respondent in this case. Indeed, we view the Respondent's wholly owned subsidiaries as extensions of the Respondent itself. If the Respondent were to wind up any of its wholly owned subsidiary creditors, the debts owing to those wholly owned subsidiary creditors (save for those debts owed by the wholly owned subsidiary creditors to genuine third party creditors) would be extinguished and the assets of the wholly owned subsidiary creditors would be the Respondent's. Significantly, the votes of the wholly owned subsidiary creditors at creditors' meetings are undoubtedly entirely controlled by the Respondent.

159 Our view in assessing the proofs of wholly owned subsidiary companies is in line with the approach adopted in the Supreme Court of New South Wales decision of *Re Landmark Corporation Ltd* [1968] 1 NSWR 759. [note: 113] In that case, Street J was faced with a petition to approve a scheme of arrangement for a company called Landmark Corporation Ltd ("Landmark"). At the court-convened meeting, votes in favour of the scheme were cast by creditors to whom Landmark owed AUD$2,506,984, but this amount included AUD$1,526,097 which was owed to seven of Landmark's wholly-owned subsidiaries or sub-subsidiaries.

160 Street J held (at 766) that these creditors were correctly admitted to vote in the class of unsecured creditors and that the statutory majority was obtained so that he had jurisdiction to approve the scheme. However, he had remarked (at 765) that "[t]heir votes accordingly must be regarded as cast with due deference to the wishes of [Landmark]." He went on to elaborate (at 767) as follows:

> The associated companies whose claims amount to [AUD]$1,526,097 were, as I have already stated, voting in favour of the scheme at a point of time when their affairs were wholly controlled by their parent company, there being no receiver or liquidator or external control in any of these associated companies. *It is difficult to attribute to the management of these associated companies any motive which would differ from the motive of [Landmark] itself.* ***I am of the view that their votes could have little, if any, weight when using the voting at the meeting as having probative force in establishing what is best in the interests of the class of ordinary unsecured creditors.*** *It would be rare in circumstances such as these for a wholly-owned subsidiary, whilst still entirely within the control of its parent, to be permitted to have any significant weight attached to its vote at a meeting under s. 181.* Whilst in law the entities are separate, ***when it comes to exercising discretion under s. 181 the Court is concerned with the reality of the situation, and I cannot regard the votes of the associated companies as indicative of the wishes of members of the class of unsecured creditors in respect of what is best to be done in the interests of that class. These claims totalling [AUD]$1,526,097 will carry little weight.*** [emphasis added in italics and bold italics]

161 Street J went on to consider that of the external creditors who voted, those who voted against the scheme were owed AUD$456,000 while those who supported the scheme were owed only AUD$93,000 (which he arrived at after deducting, for other reasons, certain other sums from the difference between AUD$2,506,984 and AUD$1,526,097). He noted (at 767) that he had to "be slow to differ from so clear a guide as to what the external creditors themselves regard as best in the interests of their class." In the prevailing circumstances, Street J decided not to approve the scheme.

162 Street J effectively weighted the votes of Landmark's wholly owned subsidiaries and sub-subsidiaries to zero. We think that this was right. In this matter, we likewise considered it correct to exclude the Respondent's wholly owned subsidiaries from the general class of unsecured Scheme Creditors and directed that they vote with the Scheme Creditors whose claims would be subordinated in a liquidation pursuant to s 250(1)(*g*) of the Act (see above at [147]). We were of the view that this was a clearer and fairer treatment of the wholly owned subsidiaries, notwithstanding that technically, they did not appear to have different legal rights as against the Respondent than those enjoyed by the general class of unsecured Scheme Creditors (*cf* the test for the classification of creditors at [130]–[131] above).

163 We are aware that this might not be the approach invariably adopted in England. In that regard, it is worthwhile to begin by considering the case of *In re Hellenic & General Trust Ltd* [1976] 1 WLR 123 ("*re Hellenic*"), where a scheme of arrangement was used to effect a take-over. The scheme provided that the intending acquirer ("H"), would pay 48 pence per share to the company's former shareholders for their shares to be cancelled, and that fully paid shares would be issued to H. A wholly-owned subsidiary of H ("M"), already owned more than 50% of the company's shares. The Scheme was approved at a single meeting of members by the requisite majority, with the help of M's votes. Templeman J refused to sanction the scheme, holding that the court had no jurisdiction to sanction the scheme because M constituted a different class from the remaining shareholders. Our approach in the present case is much akin to Templeman J's, notwithstanding that the wholly owned subsidiaries in the present case are those of the Respondent (the company), while M in *re Hellenic* was a wholly owned subsidiary of an intending acquirer. In both cases, the subsidiaries were wholly owned by the proponent of the respective schemes.

164 Crucially, it must be noted that the legal rights of M and the remaining shareholders were identical as against the company, while the test for the differential classification of creditors is based on different legal rights as against the company (see [130]–[131] above). In *Re BTR Plc* [1999] 2 BCLC 675 at 682, to reconcile *re Hellenic*, Jonathan Parker J ("Parker J") has suggested that the true *ratio* of that case was that M's views were effectively discounted since, in substance, the scheme only affected the shares which did not belong to M (see *Re BTR Plc* [1999] 2 BCLC 675 at 682). We note that in denying leave to appeal against Parker J's decision, the Court of Appeal's decision in *Re BTR Plc* [2000] 1 BCLC 740 was consistent with Parker J's suggestion.

165 Therefore, it seems that the English courts might be inclined towards keeping to Street J's method of discounting entirely the votes of wholly owned subsidiaries (if only in order to keep true to the principle that creditors may be classified differently solely on the basis of different legal rights as against the company). However, we are of the view that our approach of simply classifying wholly owned subsidiaries separately is defensible as a worthwhile exception to the general rule as it commends itself as more straightforward. We also note that in *UDL Argos*, Lord Millett NPJ rationalised *re Hellenic* on the basis that, in the commercial circumstances which obtained, M's legal rights were *commercially* so dissimilar from those of the other shareholders that it was impossible for M to consult with them (at [22]–[23]):

> 22. The case was relied on by the present appellants as showing that separate meetings

should have been held because the shareholders had conflicting interests rather than different rights, *and it is true that Templeman J consistently referred to the parties' respective "interests" rather than their "rights". But it is important not to be distracted by mere terminology.* Judges frequently use imprecise language when precision is not material to the question to be decided, and in many contexts the words "interests" and "rights" are interchangeable. *The key to the decision is that M was effectively identified with H. It would plainly have been inappropriate to include M in the same class as the other shareholders if it had been buying their shares; it should not make a difference that the purchaser was its parent company.*

23. But this was not because M and the other shareholders had conflicting interests, nor because they had different rights to start with. *M's legal rights at the outset were the same as those of the other shareholders. What put M into a different category from the other shareholders was the different treatment it was to receive under the Scheme.* The other shareholders were being bought out. ***In commercial terms M was transferring its shares to its own parent company and obtaining for its parent company the right to acquire the remainder of the shares from the other shareholders. The rights proposed to be conferred by the Scheme on M and the other shareholders were commercially so dissimilar as to make it impossible for M and the other shareholders to consult together with a view to their common interest, for they had none.***

[emphasis added in italics and bold italics]

166 Finally, we should add that our decision in the present case on this point is limited to the treatment of wholly owned subsidiaries. The treatment of partially owned subsidiaries also raises difficult issues, but we leave them to be addressed in a more appropriate case.

Akira Pte Ltd

167 There was one wholly owned subsidiary, however, which we did not allow any voting rights at all. This was Akira Pte Ltd. The debt which the Respondent owed to Akira Pte Ltd increased remarkably from $5.155m as at 31 March 2009 to $86.97m as at the Ascertainment Date. [note: 114] $75.73m of Akira Pte Ltd's $86.97m claim was based on license and distribution agreements with the Respondent [note: 115] which, in our view, were suspicious. This revised amount did not tally with the Respondent's audited and unaudited financial statements before and after the Ascertainment Date. [note: 116] We therefore ordered that Akira Pte Ltd be excluded altogether from voting. At the same time, we ordered the Respondent to authorise its auditors, KPMG LLP ("KPMG"), to enquire into the basis of Akira Pte Ltd's proof of debt (see Annexure I at [12]–[13]).

168 Two weeks after the said order (and two weeks before the last day for the Respondent to hold the Further Meetings – see above at [1]), KPMG reported that according to the senior management of the Respondent, the license and distribution agreements were made between the Respondent and Akira Pte Ltd in conjunction with the Group's strategy to spin off the AKIRA business into Akira Pte Ltd. [note: 117] Akira Pte Ltd, in turn, was intended to be injected into a listed company by way of a Reverse Take Over ("RTO"). [note: 118] The license and distribution agreements were executed in order to ensure that all such transactions between the company and its subsidiaries were conducted at arm's length. [note: 119] The RTO did not materialise [note: 120] but the license and distribution agreements remained in place.

169 We noted that there were never any billings by Akira Pte Ltd to the Respondent under the

license and distribution agreements (and consequently no indication in the Respondent's financial statements of the existence of these agreements) up till the filing of Akira Pte Ltd's proof of debt. This caused us to doubt that the Respondent intended for the license and distribution agreements to bind itself, which in turn cast doubt on the admissibility of claims founded on those agreements. It seemed to us that these agreements did not reflect an arm's length relationship between Akira and the Respondent. On a cynical view, which might not be far from the truth, they appear to have been dug up and dusted off purely to strengthen the Respondent's hand in the proposed Scheme.

Ms Tong and KBC Bank

170 Ms Tong was a related party creditor in respect of her shareholder's loan to the Respondent as she was a shareholder of the Respondent (see above at [16] and [151]). KBC Bank was a related party creditor because the banking facilities which it provided to the Respondent were secured by shares in the Respondent. [note: 121] In our view, the sensible approach was to allow Ms Tong (if she chose to relinquish her ROFRs – see [151] above) and KBC Bank to vote in the general class of unsecured Scheme Creditors but discount their respective votes by the value of the Respondent's shares that was owned (in Ms Tong's case) or that was used to secure the claim (in KBC Bank's case) as of the Ascertainment Date.

171 Therefore, we made the following order (with accompanying footnotes) (see Annexure I at [5]):

> If Ms Tong chooses to vote as a related creditor, her vote should be discounted by the value (as of 31 July 2009) of the shareholding she has in the Respondent.[17] Similarly, KBC Bank NV's vote should be discounted by the value (as of 31 July 2009) of the Respondent's shareholding that secures the banking facilities which KBC Bank NV has provided.[18]
>
> [17] For example, if Ms Tong has an admitted claim of $10 (none of which is a "Subordinated claim" as above) but holds shares in the Respondent worth at the Ascertainment Date $6, then she should only be allowed to vote $4 of her claim.
>
> [18] For example, if KBC Bank NV has an admitted claim of $10 but its banking facilities provided to the Respondent are secured by the Respondent's shares worth at the Ascertainment Date $6, then KBC Bank NV should only be allowed to vote $4 of its claim.

Contingent creditors

172 Although we did not order that the votes of the contingent creditors be discounted for the Further Meeting of the general body of unsecured creditors, on hindsight, we should perhaps have done so. In our view, a contingent creditor should not be allowed to vote the full amount of his contingent claim as if it had actually been proven. Generally speaking, a creditor with a contingent claim of $10m (with a 80% chance of crystallisation within five years of the scheme's effective date) should only be allowed to vote with 80% of the voting weight given to a creditor with an actual claim of $10m that had crystallised by the ascertainment date.

173 We agree with the approach taken in *Re Hawk Insurance* on this issue. There, the proposed scheme admitted the three different categories of claims in full but paid out only proportions of the fully admitted claims according to just estimates of their values in a winding up (see above at [138]–[139]). Notably, Chadwick LJ expressed his view (at [51]) that he:

> ... would have thought it more appropriate for the scheme to provide for the differential weighting of claims *at the stage of valuation and admission*–rather than in the course of distribution ... [emphasis added]

While Chadwick LJ did not insist upon that view given that it would have made no practical difference in that case (see *Re Hawk Insurance* at [51]), we think that it is an important principle to be stated here for application in future cases.

174 We should add our opinion that it makes no difference that the scheme in *Re Hawk Insurance* was a cut-off scheme which crystallised contingent claims upon its sanction, while the present Scheme allows contingent claims to crystallise within five years. The point is that contingent claimants should generally vote according to the likelihood of their claims crystallising. In this regard, we note also that in Australia, admitted contingent claims are valued before they are counted (see *Brash Holdings Ltd (Administrator appointed) and others v Katile Pty Ltd and another* [1996] 1 VR 24 at 33, line 40). The statutory basis for this is found in Reg 5.6.23(2) of the Australian Corporations Regulations 2001 (Cth), made applicable by Reg 5.6.11(2).

175 Finally, we state for the record that given that the Respondent was insolvent in this case, we do not think that the votes of the contingent creditors would have been discounted by any large extent that would have affected the outcome of the Further Meeting held for the general body of unsecured creditors.

Concluding remarks

176 In concluding, it is appropriate to recall the oft-cited passage of Bowen LJ in *Sovereign Life Assurance Company v Dodd* [1892] 2 QB 573 at 582 to 583, referring to s 2 of the Joint Stock Companies Arrangement Act 1870 (c 104) (33 & 34 Vict) (a statutory predecessor of the UK s 425)

> What is the proper construction of that statute? It makes the majority of the creditors or of a class of creditors bind the minority; it exercises a most formidable compulsion upon dissentient, or would-be dissentient, creditors; and it therefore requires to be construed with care, so as not to place in the hands of some of the creditors the means and opportunity of forcing dissentients to do that which it is unreasonable to require them to do, or of making a mere jest of the interests of the minority.

177 The importance of maintaining the integrity of the process in which proofs of debt are properly admitted or rejected for the purpose of voting for or against a scheme of arrangement cannot be overstated. Indeed, it is the only mechanism which protects minority dissenting creditors from having an unhappy compromise that severely prejudices their rights foisted upon them. Section 210 is silent on this mechanism but it is clear from its subtext that a scheme must be grounded on the principles of transparency and objectivity, implemented by an independent and impartial proposed scheme manager. In the present case, the manner in which the proposed Scheme Manager conducted this process, and the Scheme Meeting in particular, left much to be desired.

Conclusion

178 In the result, it was clear that the Scheme did not have the approval of the requisite majority of creditors voting at meetings properly constituted. Therefore, the Judge had no jurisdiction to sanction it. We thus allowed the appeals, set aside the sanction of the Scheme and ordered the Further Meetings to be called for the same Scheme to be put to a revote, subject to the directions as explained above.

Post-script

179 Pursuant to our directions, the Further Meetings were held on 24 September 2010. We heard the parties again on 5 October 2010 and gave our decision on 13 October 2010. At the Further Meeting for the general class of unsecured creditors, 51 of the Scheme Creditors voted in favour of the Scheme, seven voted against the Scheme, and three abstained. [note: 122] Pursuant to our directions regarding its claim for loss of profits (see [113] above), Ho Lee submitted a proof that was based on the application of the average *expected* percentage profit calculated from three contracts for uncompleted projects. In our view, Ho Lee did not comply with our directions. Therefore, its proof in that regard was rightly disregarded by the Scheme Manager, who reported that a majority in number representing 76.34% in value of the Scheme Creditors in the general class of unsecured creditors had voted for the Scheme; [note: 123] and that all of the Scheme Creditors in the other class of creditors (comprising the subordinated and related creditors) had also voted in favour of the Scheme. [note: 124]

180 Accordingly, we sanctioned the Scheme, but subject to certain alterations made pursuant to our powers under s 210(4) of the Act. These are set out at [8] of the brief grounds of decision we issued on 13 October 2010 (see Annexure II). We highlight the more significant alterations here.

181 First, several of the alterations pertained to the Monitoring Committee ("MC"), which was provided for under clause 6.42 of the Scheme. That clause stipulated that immediately after the Scheme Meeting approving the Scheme, the Scheme Creditors were to form an MC whose roles and responsibilities were set out in Schedule D. [note: 125] At the hearing on 5 October 2010, we were informed by Counsel for the Respondent of the composition of the MC in place. We were alarmed to note that Akira Pte Ltd was on the MC. To ensure an appropriate level of representation of the different creditors, we directed that three of the existing members of the MC (including Akira Pte Ltd) be replaced with three new members (two of whom were OCBC and Ho Lee) (see Annexure II at para 8(a)). We also broadened the MC's powers of oversight considerably so as to better enable the MC to ensure accountability in the Scheme's implementation (see Annexure II at para 8(b), (c), (d) and (h)).

182 Second, while clause 8.6 of the Scheme provided that the Scheme Creditors had the power by Ordinary Resolution in a general meeting to vary the terms of the Scheme, we altered the Scheme so that procedural and substantive amendments had to be approved respectively by a majority and 75% in value of the existing Scheme Creditors present and voting at a meeting (see Annexure II at para 8(f)). Third, to address OCBC's and Ho Lee's concerns regarding the ROFRs enjoyed by Mr Sng and Ms Tong (relating, *inter alia*, to restrictions on the price at which the subject assets were to be offered to Mr Sng and Ms Tong, as well as the time which Mr Sng and Ms Tong had to consider the offers and pay for the assets in the event of their acceptance), we stipulated the manner in which the ROFRs should be exercised (see Annexure II at para 8(g)).

183 Finally, while we awarded OCBC all of its costs on its appeal and below; we awarded Ho Lee only 50% of its costs on its appeal and below (see Annexure II at para 9) as a number of its arguments were not ultimately accepted. However, we ordered that both sets of costs be paid by the Respondent as priority debts which were not subject to the Scheme.

Annexure I: Orders/Directions of 27 August 2010

27 August 2010

Orders/Directions of the Court:

1 The sanction of the Scheme of Arrangement by the High Court is set aside. A new meeting ("Further Meeting") is to be called for the same Scheme to be put to a re-vote, subject to the directions set out below.

2 Costs of appeal and the hearing below to both appellants. This will be subject to the Scheme if it is sanctioned at the next hearing.

3 The following directions are given on the basis of certain principles applicable to schemes of arrangement which will be elaborated upon in our Grounds of Decision to be given later.

Directions on voting rights of creditors

Subordinated claims

4 This class refers to creditors whose claims pertain to unpaid dividends and are therefore subordinated in liquidation pursuant to s 250(1)(*g*) of the Companies Act 2006. This class of creditors is to be excluded from the general class of unsecured creditors. They will vote in a separate class.

Rights of first refusal

5 Mr Sng Sze Hiang ("Mr Sng") and Ms Julia Tong ("Ms Tong"), who have been accorded rights of first refusal under the Scheme, are to be excluded from the general class of unsecured creditors. Ms Tong is free to vote as a related creditor (see the next category) if she relinquishes her rights of first refusal, save that any claim of hers which falls within the preceding category is to be excluded. Mr Sng has to be excluded even if he relinquishes those rights because his entire claim falls within the preceding category.

Related creditors

6 Except for Akira Corporation Pte Ltd ("Akira") (which is to be excluded altogether from voting), all other wholly owned subsidiaries as set out in Annex A, are to vote in the same class as the creditors described under the "Subordinated claims" heading above. If Ms Tong chooses to vote as a related creditor, her vote should be discounted by the value (as of 31 July 2009) of the shareholding she has in the Respondent. [note: 126] Similarly, KBC Bank NV's vote should be discounted by the value (as of 31 July 2009) of the Respondent's shareholding that secures the banking facilities which KBC Bank NV has provided. [note: 127]

Directions on specifically disputed debts [note: 128]

St George Bank Limited ("St George Bank")

7 For St George Bank's claim, only the amounts drawn down (as of 31 July 2009) in respect of the banking facilities it provided to TEAC Australia Pty Ltd should be admitted.

Ascendas Real Estate Investment Trust ("Ascendas")

8 For Ascendas' claim, the Scheme Manager should determine how much TT International Tradepark Pte Ltd owed to Ascendas (as of 31 July 2009) and reduce that by the amount of the

security deposit provided by First Capital Insurance Limited which had been utilised (as of 31 July 2009). The outcome of that calculation is the amount of Ascendas' claim which should be admitted.

First Capital Insurance Limited ("First Capital")

9 The amount of First Capital's claim that should be admitted is the same as the amount of the security deposit (which it provided for Ascendas' claim above) that had been utilised as of 31 July 2009.

Ho Lee Construction Pte Ltd ("Ho Lee")

10 Ho Lee's claim for loss of profits suffered due to termination should be admitted in the amount calculated in this manner:

(a) Take the average of Ho Lee's profits (on a percentage basis) in three of its largest contracts over the last two years preceding the date of its Proof; and then

(b) Apply that average percentage profit to the value of Ho Lee's contract with the Respondent.

(a) (This claim should then be certified by Ho Lee's auditors and submitted to the Scheme Manager within 14 days from the date hereof.)

Direction concerning Scheme Manager

11 To avoid any conflict of interest, the Scheme Manager should elect either to continue as Scheme Manager only or as nominee for Mr Sng and Ms Tong in their proposed individual voluntary arrangements only.

Direction concerning a Report on the Akira Proof by KPMG LLP ("KPMG")

12 The Respondent shall forthwith authorise their auditors KPMG to enquire into the circumstances and basis for the filing of the proof of debt in the sum of $86.97m by Akira. In particular, KPMG is to ascertain:

(a) why all the financial information provided by the Respondent to the creditors and the public both prior to and subsequent to the filing of this proof of debt disclosed substantially smaller amounts as due from the Respondent to Akira;

(b) why the claim was "reasonably" admitted as a proof having regard to the latest audited accounts and other financial information that the Respondent made available to the Stock Exchange of Singapore and the public; and

(c) who in fact are the creditors of Akira and the nature of the transactions that have created such liabilities.

13 The Respondent's directors and the Scheme Manager are to assist KPMG and to ensure that all relevant documents are made available to KPMG. KPMG is to submit a report of their findings ("the Akira Report") to this Court within two weeks from the date hereof.

Direction for Further Meeting

14 The Further Meeting is to be held within four weeks from today, subject to any extension of time to be given by this Court. Only creditors who filed their proofs of debt as of 16 October 2009 will be entitled to vote at that Meeting. At least 14 clear days notice of the Further Meeting shall be given to these creditors by way of notice served by registered post and be advertised once in the Straits Times. Other than as stated above, these creditors shall be entitled to vote on the basis of the admitted value of their claims as stated in the Scheme Manager's Report dated 17 December 2009.

15 The Scheme Manager will report the outcome of the Further Meeting to this Court within two working days of the Meeting. This Court will consider the Akira Report and any objections from opposing creditors before deciding whether the Scheme ought to be sanctioned.

16 In the meantime, the parties have liberty to apply.

Annex A

S/No	Scheme Creditor	Admitted claim (S$ million)
1.	Aki Habara Electric Corporation Japan, Ltd	0.02
2.	E&E Wholesale Pte Ltd	0.76
3.	International Tradelogistics Pte Ltd	0.79
4.	IT-Kauppa Oy	0.04
5.	Poya Communication Pte Ltd	0.36
6.	Tainahong Trading Ltd	4.95
7.	TT International (Aus) Pty Ltd	0.05
8.	TT International Tradepark Pte Ltd	4.70
9.	TT Middleeast FZE	0.67

Annexure II: Brief Grounds of Decision of 13 October 2010

13 October 2010

...

The Statutory Vote

2 On 27 August 2010, we directed Ho Lee Construction Pte Ltd ("Ho Lee") at [10] of our Orders/Directions of Court ("the direction") to calculate its claim for loss of profits arising from the termination of the subject Building Contract in this manner:

(a)

Take the average of Ho Lee's profits (on a percentage basis) in three of its largest contracts

over the last two years preceding the date of its Proof; and then

(b)

Apply that average percentage profit to the value of Ho Lee's contract with the Respondent.

(This claim should then be certified by Ho Lee's auditors and submitted to the Scheme Manager within 14 days from the date hereof.)

3 In purported compliance, Ho Lee submitted a proof for $32,950,800 that was based on the application of the average *expected* percentage profit calculated from three contracts for projects that were as yet uncompleted. The average *expected* percentage profit was derived substantially from estimates by Ho Lee itself that could not be verified by Ho Lee's auditors. These estimates included, *inter alia*, the expected duration of and the quantities of materials required for the uncompleted projects.

4 In our view, Ho Lee's approach did not comply with the direction. Plainly, the objective of the direction was to reduce the degree of uncertainty with respect to the quantum of Ho Lee's claim for loss of profits to be admitted for the limited purpose of voting as an unsecured creditor at the Further Meeting called pursuant to [14] of our Orders/Directions of Court dated 27 August 2010. Ho Lee was therefore expected to rely on verifiable audited figures in relation to profits determined from completed contracts for which accounts had been finalised during the stated period. Instead, Ho Lee preferred to rely on profit estimates for contracts that are still in progress even though, as its counsel admitted before us, it did have the requisite contracts which it could have relied on to compute its claim for loss of profits. These profit estimates would necessarily embrace an indeterminate number of imponderables and cannot be relied upon to vote for or against the Scheme without the risk of giving too much weightage to them. Accordingly, we rule that the Scheme Manager acted correctly in disregarding Ho Lee's proof in the sum of $32,950,800 for the purposes of assessing the value of claims owed to creditors, present and voting, who opposed the Scheme. We also wish to point out that if Ho Lee genuinely entertained any doubts as to what the direction meant, it ought to have sought clarification from this court.

5 In the result, we declare that the Scheme has met the requisite statutory threshold for creditors' approval pursuant to s 210(3) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act").

Alterations to the Scheme

6 Having considered Oversea-Chinese Banking Corporation Limited ("OCBC")'s and Ho Lee's concerns about the unfairness of some features of the Scheme and its implementation, we hold that some alteration to the Scheme is required. In particular, there is a lack of clarity in the milestones to be met in the implementation of the Scheme and the methodology to be employed for assessing its ongoing viability. Also, legitimate concerns have been voiced by the objecting creditors about the quantum of professional fees and expenses incurred by the Respondent up to date in relation to the Scheme.

7 In addition, we note that while the Scheme provides for a Monitoring Committee ("MC") to oversee the implementation of the Scheme, its powers of oversight are unduly limited. Further, Akira Corporation Pte Ltd, being a wholly owned subsidiary of the Respondent, should not be a member of the MC.

8 To address these shortcomings in the Scheme as well as other concerns, we have decided to

approve the Scheme, subject to the following alterations which we make pursuant to our powers under s 210(4) of the Act:

(a) The MC should have the following creditors as members:

(i) DBS Bank Ltd;

(ii) DZ Bank AG, Deutsche Zentral-Genossenschaftsbank, Frankfurt Am Main, Singapore Branch;

(iii) Habib Bank Limited, Singapore;

(iv) Ho Lee; and

(v) OCBC.

(a) Any change to the composition of the MC shall be subject to the approval of a majority of the other members of the MC; and in the event of a deadlock, to the approval of this court.

(b) The Respondent shall provide, at the request of the MC, any information pertaining to the Respondent's operations and finances in connection with the implementation of the Scheme.

(c) The Budget for the Respondent's operations shall be subject to the MC's approval. For the avoidance of doubt, this will include all operating expenses and professional fees.

(d) The Scheme Manager shall report to the MC every six months, commencing from 1 November 2010; and shall provide the MC with a statement that in his professional judgment, the Respondent is in a position to meet its obligations and objectives under the Scheme. In the event he is unable to provide such a statement or a statement acceptable to the MC, the Scheme Manager shall seek directions from this court as to whether the Scheme should be terminated and if so on what terms.

(e) Decisions of the MC shall be effective if made by a simple majority.

(f) Clause 8.6 of the Scheme shall be replaced with the following text:

8.6.1 All procedural amendments, including any extension or abridgment of time in connection with anything to be done under the Scheme, shall be approved by a majority in value of existing Scheme Creditors present and voting.

8.6.2 All substantive amendments to and decisions to be taken regarding the Scheme shall be approved by at least 75% in value of existing Scheme Creditors present and voting.

8.6.3 The preceding two provisions shall apply generally and supersede other Scheme provisions which require voting by Scheme Creditors. These latter provisions include, *inter alia*:

(i) Clause 6.13.1 regarding the discharge of the fixed and floating charge; and

(ii) Paragraph 11(d) of Schedule A regarding the Respondent's undertaking not to reduce its share capital.

(b) For the avoidance of doubt, any voting at general meetings of Scheme Creditors shall be conducted in the separate classes which this court set out in our Orders/Directions of Court dated 27 August 2010.

(g) To address OCBC's and Ho Lee's pricing concerns regarding the Rights of First Refusal ("the ROFRs") pertaining to the Redeemable Convertible Bonds ("the RCBs"), Dilution Shares and Conversion Shares granted pursuant to paragraphs 5, 8 and 11 respectively of Schedule B to the Scheme document, the said ROFRs shall be exercised in this manner:

(i) The Scheme Creditor will first offer the subject assets of the ROFRs (*ie*, the RCBs, Dilution Shares or Conversion Shares) to Mr Sng Sze Hiang ("Mr Sng") and/or Ms Julia Tong ("Ms Tong") at a price which it proposes ("the proposed price").

(ii) Mr Sng and Ms Tong will then have two business days to consider whether to exercise their ROFRs to purchase the subject assets.

(iii) If Mr Sng and Ms Tong decide to exercise their ROFRs, they have 14 days from their acceptance of the offer to pay for the subject assets.

(iv) If Mr Sng and Ms Tong decide not to exercise their ROFRs, the offering Scheme Creditor will have 30 days from the rejection of the offer to sell the subject assets in the open market or in an off-market sale at the proposed price or higher. If the offering Scheme Creditor fails to sell the subject assets within 30 days, it can only sell the subject assets by starting this process from step (i) above again.

(c) For the avoidance of doubt, any terms of the Scheme pertaining to the ROFRs which do not conflict with our directions given here remain valid.

(h) Substantial transactions with subsidiaries and/or related parties in excess of $100,000 should not be undertaken without the consent of the MC.

(i) The claims of creditors related to the Respondent ("the related party creditors") shall rank after the claims of third party creditors and be satisfied in that order, unless the claims are owed by the related party creditors to third party creditors. Such claims must be properly verified by the relevant auditors.

(j) All professional costs (and disbursements) of the Scheme Manager's and the Respondent's professional advisors incurred after 27 August 2010 shall be taxed by the High Court.

Costs orders

9 Having regard to these decisions, we make the following costs orders in this appeal and the proceedings below. (For the avoidance of doubt, these costs orders will supersede our earlier costs order made on 27 August 2010.) OCBC is entitled to costs here and below. Ho Lee is entitled to 50% of its costs here and below. Both OCBC's and Ho Lee's costs shall be paid as priority debts (*ie*, not subject to the Scheme) by the Respondent. If OCBC's and Ho Lee's costs cannot be agreed, they shall be taxed by the High Court. The usual consequential orders are to follow.

10 Parties have liberty to apply.

[note: 1] Voting Results of Scheme Meeting, Appendix 2 p 2 (RA Vol 3 H p 2208).

[note: 2] Voting Results of Scheme Meeting, Appendix 2 p 2 (RA Vol 3 H p 2208).

[note: 3] Voting Results of Scheme Meeting, Appendix 2 p 3 (RA Vol 3 H p 2209).

[note: 4] CA 47 AC para 11.

[note: 5] CA 47 AC para 13.

[note: 6] CA 47 AC paras 14-15.

[note: 7] Voting Results of Scheme Meeting, Appendix 2 p 1 (RA Vol 3 H p 2207).

[note: 8] Voting Results of Scheme Meeting, Appendix 2 p 1 (RA Vol 3 H p 2207).

[note: 9] Explanatory Statement para 3.1 (RA Vol 3 G p 1963).

[note: 10] Explanatory Statement para 3.1 (RA Vol 3 G p 1963).

[note: 11] Explanatory Statement para 3.2 (RA Vol 3 G p 1963).

[note: 12] Explanatory Statement para 3.2 (RA Vol 3 G p 1963).

[note: 13] "KPMG Report" (pursuant to [12]-[13] of Orders/Directions of 27 August 2011 – see Annexure I) at para 4.3.1.

[note: 14] KPMG Report at 4.3(1).

[note: 15] KPMG Report at 4.3(1).

[note: 16] Explanatory Statement para 3.2 (RA Vol 3 G pp 1963-1964).

[note: 17] Explanatory Statement para 4.1 (RA Vol 3 G p 1964).

[note: 18] Explanatory Statement para 4.1 (RA Vol 3 G p 1964).

[note: 19] Explanatory Statement para 4.1 (RA Vol 3 G p 1964).

[note: 20] Explanatory Statement para 4.1 (RA Vol 3 G p 1964).

[note: 21] Explanatory Statement para 4.1 (RA Vol 3 G p 1964).

[note: 22] Explanatory Statement para 4.1 (RA Vol 3 G p 1964).

[note: 23] Explanatory Statement para 4.1 (RA Vol 3 G p 1964).

[note: 24] Explanatory Statement para 4.2 (RA Vol 3 G p 1964).

[note: 25] Explanatory Statement para 4.2 (RA Vol 3 G pp 1964-1965).

[note: 26] Tong's affidavit dated 12 February 2010, para 33 (RA Vol 3 K p 3209).

[note: 27] Explanatory Statement para 4.3 (RA Vol 3 G p 1964).

[note: 28] CA 44 AC para 13.

[note: 29] CA 44 AC para 14.

[note: 30] CA 44 AC para 13.

[note: 31] Tong's affidavit dated 20 January 2009, para 67 (RA Vol 3 A p 172).

[note: 32] CA 44 AC para 13.

[note: 33] CA 44 AC para 15.

[note: 34] CA 44 AC para 15.

[note: 35] CA 44 AC para 15.

[note: 36] Explanatory Statement para 6.3.2 (RA Vol 3 G p 1968).

[note: 37] Definition of "RDA fund" in Scheme (RA Vol 3 G p 1979).

[note: 38] Letter from WongP dated 18 October 2010; Letter from Allen & Gledhill LLP (Counsel for nTan) dated 4 October 2010.

[note: 39] Cl 6.25 of Scheme (RA Vol 3 G p 1991).

[note: 40] Letter from Allen & Gledhill LLP (Counsel for nTan) dated 4 October 2010.

[note: 41] Minute Sheet for 18 August 2010 hearing.

[note: 42] CA 44 AC para 18; Schedule A of Scheme (RA Vol 3 G pp 2001-2005).

[note: 43] CA 44 AC para 19.

[note: 44] Schedule B of Scheme, para 9 (RA Vol 3 G p 2011).

[note: 45] Schedule B of Scheme, para 12(a) (RA Vol 3 G p 2015).

[note: 46] Explanatory Statement para 8.3 (RA Vol 3 G p 1971).

[note: 47] Schedule B of Scheme at paras 8 and 11 (RA Vol 3 G pp 2010 and 2013)

[note: 48] Respondent's Annual Report 2009, "Profile of Directors and Key Management Personnel" (RA Vol 3 G p 2097).

[note: 49] Respondent's Annual Report 2009, "Statistics of Shareholdings" (RA Vol 3 G p 2162).

[note: 50] Respondent's Annual Report 2009, "Director's Report" (RA Vol 3 G p 2098).

[note: 51] Respondent's Annual Report 2009, "Profile of Directors and Key Management Personnel" (RA Vol 3 G p 2097).

[note: 52] Respondent's Annual Report 2009, "Statistics of Shareholdings" (RA Vol 3 G p 2162).

[note: 53] Voting Results of Scheme Meeting, Appendix 2 p 3 (RA Vol 3 H p 2209).

[note: 54] PwC Report, Appendix 2, Category A (RAVol 3 K p 3365).

[note: 55] PwC Report, Appendix 2, Category C7 (RA Vol 3 K p 3382).

[note: 56] CA 44 AC para 24.

[note: 57] Explanatory Statement, "Important Dates and Time" (RA Vol 3 G p 1960).

[note: 58] Tong's affidavit dated 17 December 2009 at para 8 (RA Vol 3 G p 1948). See "TJP-1" (RA Vol 3 G pp 1956-2188).

[note: 59] RA Vol 3 H p 2195.

[note: 60] Addendum at para 1(a) (RA Vol 3 H p 2197).

[note: 61] Chairman's letter dated 17 December 2009 (RA Vol 3 H pp 2205-2209).

[note: 62] CA 44 AC para 26.

[note: 63] Minutes of Scheme Meeting on 16 October 2009, "Outcome of the Voting" (RA Vol 3 H p 2212).

[note: 64] Minutes of Scheme Meeting on 16 October 2009, "Outcome of the Voting" (RA Vol 3 H p 2212).

[note: 65] SUM 5467/2009, prayers 1 and 2 (RA Vol 3 F p 1615).

[note: 66] CA 44 AC para 30; Tong's Affidavit dated 26 October 2009 at para 20 (RA Vol 3 F p 1625).

[note: 67] Order of Court dated 3 November 2009, para 1 (RA Vol 3 G p 1937).

[note: 68] RA Vol 3 H p 2206.

[note: 69] RA Vol 3 H p 2206.

[note: 70] RA Vol 3 K pp 3316-3318.

[note: 71] RA Vol 3 K pp 3322-3324.

[note: 72] CA 44 AC para 31.

[note: 73] Tong's affidavit dated 12 February 2010, para 32 (RA Vol 3 K p 3209).

[note: 74] RA Vol 3 K p 3340

[note: 75] PwC Report at para 4 (RA Vol 3 K p 3362).

[note: 76] PwC Report at paras 6-7 (RA Vol 3 K p 3363).

[note: 77] CA 44 AC paras 78-85.

[note: 78] CA 44 AC paras 86-93.

[note: 79] CA 44 AC paras 94-100.

[note: 80] CA 44 AC paras 144-152.

[note: 81] CA 44 AC paras 153-167.

[note: 82] CA 44 AC paras 170-174.

[note: 83] CA 44 AC paras 175-179.

[note: 84] CA 44 AC paras 101-139.

[note: 85] See for *eg*, CA 47 AC paras 150, 167, 186, 187, 189.

[note: 86] CA 47 AC paras 119-122.

[note: 87] CA 44 AC para 8

[note: 88] RA Vol 3 L p 3455

[note: 89] CA 44 AC at para 76

[note: 90] CA 44 AC at para 83

[note: 91] CA 44 AC para 25; Affidavit of Adeline Ong Kim Hua dated 2 November 2009 at para 12(a) (RA Vol 3 G p 1904).

[note: 92] CA 47 AC para 93.

[note: 93] CA 47 AC para 137.

[note: 94] CA 47 AC para 178

[note: 95] RA Vol 3 G p 1985

[note: 96] PwC Report, Appendix 2, Category B4 (RA Vol 3 K pp 3370-3371).

[note: 97] PwC Report, Appendix 2, Category B4 (RA Vol 3 K pp 3370-3371).

[note: 98] CA 44 AC para 113.

[note: 99] CA 44 AC para 116.

[note: 100] PwC Report, Appendix 2, Category B2 (RA Vol 3 K pp 3369-3370).

[note: 101] PwC Report, Appendix 2, Category B2 (RA Vol 3 K pp 3369-3370).

[note: 102] PwC Report, Appendix 2, Category B1 (RA Vol 3 K pp 3368-3369).

[note: 103] PwC Report, Appendix 2, Category B1 (RA Vol 3 K pp 3368-3369).

[note: 104] CA 44 AC para 134; CA 47 AC para 287.

[note: 105] PwC Report, Appendix 2, Category A (RAVol 3 K p 3366).

[note: 106] CA 44 AC para 153

[note: 107] Explanatory Statement at para 9 (RA Vol 3 G p 1972).

[note: 108] Explanatory statement at para 8.3 (RA Vol 3 G pp 1971-1972).

[note: 109] *Ibid*.

[note: 110] *Ibid*.

[note: 111] *Ibid*.

[note: 112] Annual Report 2009, "Notes to the Financial Statements" at para 6 (RA Vol 3 G pp 2128-

2136).

[note: 113] CA 44 RBA Tab 14.

[note: 114] CA 44 AC para 123(a).

[note: 115] PwC Report, Appendix 2, Category B5 (RAVol 3 K pp 3371-3374).

[note: 116] CA 44 AC para 123

[note: 117] KPMG Report at para 4.3.2

[note: 118] *Ibid.*

[note: 119] *Ibid.*

[note: 120] *Ibid.*

[note: 121] CA 44 AC para 178.

[note: 122] Report of the Scheme Manager in respect of the Further Meeting at para 10 (see also the Court's letter dated 26 October 2010, responding to paras 7 & 8 of letter from Ho Lee's counsel dated 20 October 2010).

[note: 123] Report of the Scheme Manager in respect of the Further Meeting at para 12.

[note: 124] Report of the Scheme Manager in respect of the Further Meeting at para 3(c).

[note: 125] RA Vol 3 G pp 1993, 2031-2033.

[note: 126] For example, if Ms Tong has an admitted claim of $10 (none of which is a "Subordinated claim" as above) but holds shares in the Respondent worth at the Ascertainment Date $6, then she should only be allowed to vote $4 of her claim.

[note: 127] For example, if KBC Bank NV has an admitted claim of $10 but its banking facilities provided to the Respondent are secured by the Respondent's shares worth at the Ascertainment Date $6, then KBC Bank NV should only be allowed to vote $4 of its claim.

[note: 128] The Court will only address the Disputed Proofs addressed in the Appellants' Cases. The Bank of East Asia Proof is not addressed here as the Court does not agree with the objections made to it.