IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 279

Originating Summons No 153 of 2016

In the matter of Section 210 of the Companies Act (Cap 50)

And

In the matter of Conchubar Aromatics Ltd

Conchubar Aromatics Ltd

… *Applicant*

Originating Summons No 154 of 2016

In the Matter of Section 210 of the Companies Act (Cap 50)

And

In the matter of UVM Investment Corporation

UVM Investment Corporation

… *Applicant*

GROUNDS OF DECISION

[Companies]—[Schemes of arrangement]

TABLE OF CONTENTS

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Re Conchubar Aromatics Ltd and another matter

[2016] SGHC 279

High Court — Originating Summons Nos 153 and 154 of 2016
Aedit Abdullah JC
29 August; 6 October 2016

20 December 2016

Aedit Abdullah JC:

Introduction

1 By way of Originating Summons No 153 and 154 of 2016, Conchubar Aromatics Ltd and UVM Investment Corporation ("Conchubar" and "UVM" respectively and "the Applicants" collectively) sought the court's leave for them to each convene a meeting of their respective creditors for the purpose of considering and approving a proposed scheme of arrangement (the "proposed Scheme"), pursuant to s 210 of the Companies Act (Cap 50, 2006 Rev Ed). I granted leave for the Applicants to convene the said meetings on 18 March 2016. The meetings took place on 19 May 2016. On 29 August 2016, the Applicants were again before me to seek the court's approval of the proposed Scheme, as required under s 210(3AB)*(c)* of the Companies Act. The applications were opposed by SK Engineering and Construction Co. Ltd ("SKEC"), a creditor of the Applicants.

Background

2 Conchubar was a company incorporated in the Cayman Islands on 20 August 2010. It had no underlying business and its primary asset was a six per cent shareholding in Jurong Aromatics Corporation Pte Ltd ("JAC") which it owned indirectly; Conchubar held 26.7 per cent of the shareholding in SK E&C Jurong Investment Pte Ltd ("SKECJI") which held 75 per cent of the shareholding in SK International Investment Singapore Pte Ltd ("SKIIS"), and SKIIS in turn held 30 per cent of the shareholding in JAC. UVM Investment Corporation was a company incorporated in the British Virgin Islands on 30 September 2009. Like Conchubar, UVM had no underlying business and its primary asset was a 5.1 per cent direct shareholding in JAC.

3 JAC was incorporated in Singapore on 30 May 2005 as a joint venture vehicle to own a project for the development, project financing, construction and operation of an integrated condensate splitter and aromatics complex on Jurong Island that would process condensate (a type of light crude oil) and produce aromatic products and oil products. Delays in the construction of the plant caused JAC substantial difficulties, and the company was put into receivership on 28 September 2015. However, construction of the plant had since completed and it was operational at the time of the hearing before me on 29 August 2016.

4 In late 2015, Jurong Energy International Pte Ltd ("JEI"), a special purpose vehicle incorporated on 13 July 2015 by the founding investors of JAC, UVM and Conchubar, submitted to the receivers and managers (“R&M”) of JAC a restructuring proposal (the "JEI Proposal"). Under this proposal, JEI would inject some US$550million into JAC in the form of equity, shareholder's loan and feedstock, in return for 60 per cent shareholding

in JAC. The aim was that the injection of funds would enable JAC to fully repay debts which it owed to a syndicate of secured finance parties ("the Senior Lenders"). The Senior Lenders held share charges over some 95 per cent of JAC's shares.

5 The Applicant's proposed Scheme was contingent upon the R&M's acceptance of the JEI Proposal. The key elements of the proposed Scheme were as follows:

> (a) If the R&M accepts the JEI Proposal, and subject to obtaining the appropriate waivers and consents, JEI will purchase the Applicants' shares in JAC. In return, the Applicants will receive JEI shares or JEI convertible bonds of the same or higher value as the Applicants' shares in JAC as will be determined by third-party valuation. The said JEI shares or JEI convertible bonds will then be distributed *pari passu* to the Applicants' creditors.
>
> (b) On the other hand, if the R&M does not accept the JEI Proposal or if one year has passed from the date of commencement of the proposed Scheme ("the trigger event"), whichever is earlier, a failsafe payment would kick in whereby UVM will pay US$300,000 and Conchubar will pay U$650,000 to their respective creditors on a *pari passu* basis. The sums are to be paid over 24 months, in four equal instalments every six months. The outstanding debt owed to the creditors will correspondingly be reduced by the amount of failsafe payments made. The failsafe payments will be guaranteed by Orient Time Capital Ltd, a company incorporated in the British Virgin Islands on 6 May 2010.

(c) Within 30 days of the trigger event, the Applicants will give notice to their respective creditors as to whether they intend to propose a new scheme. If the Applicants intend to propose a new scheme, they will have liberty to convene the respective creditors' meetings for the voting on the new scheme within 60 days. The new scheme, if successfully approved, will supersede the originally proposed scheme.

6 Conchubar and UVM each convened a meeting of their respective creditors to vote on the proposed Scheme on 19 May 2016 ("the Scheme Meetings"). The voting results were as follows:

(a) Creditors of Conchubar

Creditor	Total Proof of Debts (US$)	Vote For	Vote Against
Conchubar Chemicals Ltd ("Chemicals")	50,000,000.00	65.5%	
Universal Petrochem Corp. Ltd ("Universal")	10,599,174.00	13.9%	
Estanil Assets Ltd ("Estanil")	1,150,912.00	1.5%	
SKEC	14,527,732.33		19.0%
Total	**76,277,818.33**	**81.0%**	**19.0%**

(b) Creditors of UVM

Creditor	Total Proof of Debts (US$)	Vote For	Vote Against
MacNair Group Inc (“MacNair”)	28,000,000.00	86.8%	
Shefford Investment Holdings Ltd (“Shefford”)	317,651.00	-	
Emirates Resources Inc (“Emirates”)	136,462.00	0.4%	
SKEC	4,129,333.57		12.8%
Total	**32,583,446.57**	**87.2%**	**12.8%**

7 With respect to the creditors of Conchubar, the basis of Chemicals’ claim against the company was a Corporate Guarantee Agreement dated 25 August 2010 under which Conchubar guaranteed a loan of US$50 million made by Chemicals to SKECJI, which SKECJI used to subscribe to JAC shares (see [2] above). SKECJI defaulted on the loan and on 25 August 2015, Chemicals demanded Conchubar's immediate payment of the guaranteed sum. Universal and Estanil became creditors of Conchubar when on 30 April 2015, Chemicals separately assigned to them portions of its claim against Conchubar. The claim assigned to Universal was US$10,422,000 while that to Estanil was US$1,131,673. SKEC was a judgment creditor of Conchubar.

8 As for the creditors of UVM, the basis of MacNair's claim against the company was a loan of US$28 million which it granted to UVM for UVM's equity investment in JAC shares. In conjunction with this loan, MacNair, UVM and Bonquest Chemical Limited ("Bonquest") (sole shareholder of UVM) entered into a Convertible Bond Agreement ("CBA") dated 31 March 2011, for MacNair to subscribe for convertible bonds in UVM in the sum of US$28 million. This constituted approximately 99.82% of the issued share capital of UVM upon conversion. Further, Bonquest granted a charge to MacNair over all its rights, title and interest in Bonquest's shares in UVM. Emirates became a creditor of UVM when on 30 April 2015, MacNair assigned to it a portion (US$134,181.00) of its claim against UVM. SKEC was also a judgment creditor of UVM. The remaining creditor, Shefford, did not vote on the proposed Scheme since its proof of debts was submitted after the deadline set by the Scheme Manager, and the appointed liquidators of Shefford attended the meeting on 19 May 2016 only as an observer.

Relevant Parties' Positions

9 The Applicants urged the court to sanction the proposed Scheme as all the requirements had been met. No allegations had been made that the Scheme Meetings were improperly constituted or that the voting process was improper. The requisite statutory majority set out under s 210(3AB) of the Companies Act had been achieved, *ie* a majority in number representing 75 per cent in value of the creditors had voted in favour of the proposed Scheme in both cases with respect to Conchubar and UVM. The Applicants maintained that the creditors who had voted in favour of the proposed Scheme were not related to Conchubar or UVM, and that even if they were related, no discount ought to be applied to their votes. The proposed Scheme was also not a scheme which no reasonable creditor would agree to.

10 SKEC, on the other hand, argued that all the creditors that had voted in favour of the proposed Scheme at the Scheme Meetings were related to Conchubar or UVM; Chemicals was related to Conchubar, while MacNair was related to UVM. Universal, Estanil and Emirates were also related parties by virtue that their claims against Conchubar or UVM were assigned from Chemicals or MacNair. SKEC thus urged the court to completely disregard the votes of all of the said creditors, *ie* to apply a discount of 100 per cent to all of their votes. Further, SKEC contended that the proposed Scheme was bad for lack of certainty and that its intended outcomes were unattainable. SKEC also alleged that the Applicants had not acted *bona fide* and had acted dishonestly, in engineering the voting outcome by orchestrating the assignment of portions of the debts they owed to related creditors (Chemicals and MacNair) to friendly entities in order to secure the requisites statutory majority of 75 per cent in value and 50 per cent in number during the Scheme meetings.

11 The proposed Scheme Manager opined that it was possible that Chemicals might be related to Conchubar because they shared a common sole shareholder, Conchubar Infrastructure Fund ("Fund"), and also a common director, Mr Pardeep Dhir ("Pardeep"), who was also a director of the Fund.

12 The R&M of JAC indicated that the JEI Proposal, in its present terms, was not acceptable to them. They were, however, prepared to consider future proposals from JEI.

13 BNP Paribas (Singapore Branch) acted as the Security Agent of the Senior Lenders. The Security Agent noted that the proposed Scheme contemplated that the Applicants would sell their shares in JAC to JEI. However, the proposed Scheme did not specify how the sale was to be done; the Security Agent was of the view that the contemplated sale of the shares

would be in breach of the terms of the relevant share charges, which it was not prepared to waive. That said, the Security Agent noted that the Applicants had stated in affidavit that the JEI Proposal was an “ongoing process of negotiation between JEI and the R&M”, and they, like the R&M, were “prepared to consider further proposals from JEI”.

The Decision

14 Having considered the affidavits and arguments, I was of the view that sanction should be granted under s 210(3AB) of the Companies Act for the proposed Scheme.

15 The burden of proving that the proposed Scheme met the requisite statutory majority set out under s 210(3AB) of the Companies Act was on the Applicants. In the present case, the requirement was, on the face of the voting results (see [6]), met. SKEC argued that all creditors other than itself that had voted at the Scheme meetings were related. It was for SKEC to prove this; he who asserts a fact must prove it. This is a basic rule of evidence that is enshrined in s 105 of the Evidence Act (Cap 97, 1997 Rev Ed). I was, at the end, persuaded that Chemicals was indeed related to Conchubar, and MacNair and Emirates to UVM.

16 The question, however, was in determining what the appropriate discount that should be applied to take into account the relationship was. The difficulty in applying the guidance set out by the Court of Appeal in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd and another appeal* [2012] 2 SLR 213 (“*TT International*”) was that unlike in that case, here we were not faced with creditors that were wholly-owned subsidiaries of Conchubar or UVM, and no

valuation was given to MacNair's (and Emirates') interests in UVM's shareholding. In a situation like this, the court would need to adopt a broad brush approach in determining the appropriate discount, informed by the relationships in question and consider previous conduct of the parties. While an applicant bears the burden of proving that all statutory requirements for a proposed scheme have been met, in the face of an assertion by the applicant that no discount ought to be applied, the opposing party should bring into court evidence that supports its own case of what the appropriate discount ought to be and that rebuts the applicant's stand. In the present case, SKEC did refer me to several matters, but I was of the view that any discount to be applied was not to exceed 25 per cent of the value of the debt owed to the related creditors. Such a discount did not sufficiently tilt the balance. The requisite majority set out in s 210(3AB) of the Companies was still met in respect of the proposed Scheme for both Conchubar and UVM despite the discount.

17 I was mindful of the stance taken by the R&M of JAC and of the Security Agent. However, I was of the view that this alone did not, in the present case, called for the sanction to be denied. In coming to this conclusion, I took into account the stance conveyed by the R&M and the Security Agent that they appreciated that the JEI Proposal was an ongoing process of negotiation and were prepared to consider further proposals from JEI.

18 The proposed Scheme was contingent upon R&M's acceptance of JEI proposal. Neither authority nor reason dictate that a court must not sanction a proposed scheme simply because it was contingent on some events occurring or not occurring. There can be no blanket rule on when contingencies and conditions may render a scheme so uncertain or amorphous that it should not

be approved. Much depends on the structure of the proposed scheme and the circumstances. Here, I was satisfied that the existence of the provisions for the failsafe payments provided sufficient clarity as to what the proposed scheme, at its minimum, would be. Such a scheme would also not be the sort that could not obtain support from any reasonable creditor or voter.

19 As to the allegation that the Applicants had not acted *bona fide* and had acted dishonestly in engineering the voting outcome, I found that there was insufficient evidence pointing to such a conclusion.

Analysis

General principles

20 In *TT International*, the Court of Appeal (at [80]) set out the following three requirements that a court must be satisfied of before it can sanction a scheme under s 210 of the Companies Act:

> (a) The statutory provisions have been complied with. For example, the court must be satisfied that the resolution was 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) 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.

21 In the present case, no allegations were made that the Scheme Meetings were not duly constituted, that the voting process was improper, or that there was insufficient or unfair representation of the creditors involved. The dispute was mainly in whether the creditors that had voted in favour of the proposed Scheme at the Scheme Meetings were related to the Conchubar or UVM (as the case may be) such that their votes ought to be discounted, and whether with the discount, the requisite statutory majority was still met.

Votes from related creditors – the law

22 For voting purposes, s 210(3) requires the creditors to be divided into separate classes if "their rights are so dissimilar that they cannot sensibly consult together with a view to their common interest": *UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin* [2001] 3 HKLRD 634 ("*UDL Argos*") at [27], as cited by the Court of Appeal in *Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd* [2003] 3 SLR(R) 629 ("W*ah Yuen*") at [11]. However, related party creditors do not have to vote as a separate class simply because they are related creditors, as the test for classification of the creditors 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", such that "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": *Wah Yuen* at [13]; *UDL Argos* at [17] and [27].

23 However, this does not mean that any private interests that related creditors may have will be ignored by the court in its determination of whether or not to sanction a proposed scheme. Quite the contrary, as noted by the Court of Appeal in *TT International* (at [155]), 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".

24 The overarching consideration of a court asked to sanction a proposed scheme is whether the proposed scheme is a fair one: *Re Halley's Departmental Store Pte Ltd* [1996] 1 SLR(R) 81 at [16]. Fairness requires that creditors who will be affected by the proposed scheme in similar ways (at least in so far as the enforcement of their legal rights against the company is concerned) must be afforded a proper opportunity to be present at the meeting(s) at which the proposal is to be considered and to indicate their choice by casting their votes. This is the underlying rationale behind the requirement under s 210 of the Companies Act for creditors to vote in different classes. Unanimity within each class is, however, not required for approval of the scheme, so long as the requisite statutory majority is met. The law recognises that creditors are normally the best judges of what is in their commercial interests, and that it will not be fair for the intentions of the majority who have assessed a proposed scheme as best serving their interests to be frustrated by the views of a minority which may happen to have a different commercial sense. This assumes, however, that the majority, in casting their votes, exercised independent, objective judgment with their commercial interests as creditors of the class as their primary consideration, as otherwise, their vote cannot be said to be representative of the class. I respectfully agree with and adopt the following views of Lord Millet NPJ in *UDL Argos* (at [25]):

> Normally the Court…regards businessmen as much better judges of what is to their commercial advantage than the Court could be. But this assumes that they are voting in what they honestly believe to be the interests of the class of which they are members. But this may not be the case if they have some private interest of their own which is not shared by other members of the class. As Adam J explained in *Re Chevron (Sydney) Ltd* at p.255:
>
> > "The true position appears to be that where the members of a class have divergent interests because some have and others have not interests in a company other than as members of the class the Court may treat the result of the voting at the meeting of the class as not necessarily representing the views of the class as such, and thus should apply with more reserve in such a case the proposition that the members of the class are better judges of what is to their commercial advantage than the Court can be. In so far as members of a class have in fact voted for a scheme not because it benefits them as members of the class but because it gives them benefits in some other capacity, their votes would of course, in a sense, not reflect the view of the class as such although they are counted for the purposes of determining whether the statutory majority has been obtained at the meeting of the class."

25 Similar observations were made by the Supreme Court of New South Wales in *Re Landmark Corporation Ltd* [1968] 1 NSWR 759 ("*Re Landmark Corporation*"), where Street J stated (at 767) that:

> [Where] [I]t is difficult to attribute to the management of…associated Companies any motive which would differ from the motive of [the scheme company), 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…I cannot regard the votes of [these] 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.…

The above observations have been endorsed by the Court of Appeal in *TT International* (at [159]).

26 The court is thus mindful of the possibility that a "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", and it is for this reason that "courts have consistently attributed less weight to [their votes] when asked to exercise their discretion in favour of a scheme": *Wah Yuen* at [35]; *TT International* at [154]. The Court of Appeal did not state what "special interests" encompasses, and the Applicants in the present matter urged me to define it narrowly (see [33] below). In my view, considering the underlying reasons, as outlined above, for why courts have usually attributed less weight to the votes of related creditors, "special interests" is not a term of art and neither should it be construed narrowly; it simply means interests that a party may have that differ from that of ordinary, independent and objective creditors of the same class that may cause that party to exercise its vote in a manner that differs from that of ordinary, independent and objective creditors of the class.

Whether the creditors were related

Conchubar and Chemicals

27 It was not disputed that Conchubar and Chemicals shared a common sole shareholder, the Fund, and a common director, Pardeep, who was also a director of the Fund. On this basis, SKEC contended that Conchubar and Chemicals were related. Conchubar denied that it was related to Chemicals. Conchubar maintained that the Fund was a holding vehicle of multiple investment companies, and that it held these investment companies in trust for various ultimate beneficial owners ("UBOs"). The UBOs were the sole decision makers for each of the investment companies, and they make decisions independently of each other based on their own interests. Pardeep was merely a proxy director who took instructions from them. This was

supported by relevant declarations of trust and statutory declarations enclosed in the Scheme Manager's final report on the Proposed Scheme. SKEC alleged that these declarations were suspicious, but did not raise any evidence on how they were so.

28 Further, SKEC provided two examples which it said demonstrated that Conchubar and Chemicals acted as a single entity. The first example related to Conchubar's and Chemical's investments in SKECJI, a company established by SKEC and Conchubar for the purpose of investing in JAC through SKIIS. Two clauses in the SKECJI Shareholders' Agreement ("SKECJI SHA") were central to SKEC's argument. The recital of the SKECJI SHA had a clause (the "Convertible Bond Clause") which provided as follows:

> (D) [Chemicals] is contemplated to subscribe for US$90 million aggregate principle amount of convertible bonds (the "Convertible Bonds") convertible into Shares.

The other clause in the SKECJI SHA that was relevant was clause 9.1 ("Clause 9.1"), which stated that:

> In the event the Company is required, pursuant to and subject to the SKIIS Shareholders Agreement, to subscribe for additional ordinary shares of SKIIS or otherwise contribute additional capital to SKIIS, Conchubar and SKEC shall contribute to the funding requirement of the Company, up to the funding limits set forth in the SKIIS Shareholders Agreement, which are, as of the date hereof, set forth below, in proportion to their respective Investment Interest to enable to Company to comply with the requirements under the SKIIS Shareholders Agreement.

Name of Shareholder	Total funding limit
Conchubar	US$99,000,000
SKEC	US$24,750,000

29 SKEC argued that Clause 9.1 imposed on Conchubar an obligation to provide funding of up to US$99 million. However, Conchubar paid only US$9

million, and the remaining US$90 million was paid by Chemicals pursuant to the Convertible Bond Clause. SKEC submitted that it was not merely coincidental that the US$9 million that Conchubar paid and the value of bond subscription by Chemicals pursuant to the Convertible Bond Clause added up to exactly US$99 million, which was what Chonchubar was obliged to pay pursuant to Clause 9.1; the SKECJI was deliberately structured in this manner, with the intention that shortfalls in Conchubar's payment obligations would be made good by Chemicals by way of convertible bond subscription. This, SKEC concluded, showed that Chemicals had treated Conchubar's promised investment of US$90 million as constituting its own investment in SKECJI, and that the two companies were therefore acting as a single entity. Conchubar disagreed. Conchubar pointed out, rightly in my view, that under Clause 9.1, Conchubar was not obliged to contribute US$99 million; that amount was merely a funding *limit*. Chemicals had subscribed to the convertible bonds as a separate investor of SKECJI, and the US$90 million it contributed through the subscription was not related to Conchubar's funding obligation under Clause 9.1. There was no clear evidence that the amounts stated in the Convertible Bond Clause and Clause 9.1 were linked, and I was not persuaded that Chemicals' subscription to the convertible bonds, without more, showed that it had treated Conchubar's investment obligations as its own. However, I took the circumstances here into account in my overall assessment of whether Conchubar and Chemicals were related.

30 The second example of how, according to SKEC, Conchubar and Chemicals had acted as a single entity related to a deed (the "Deed") that SKEC and Conchubar entered into pursuant to the SKECJI SHA. Under the Convertible Bond Clause of the SKECJI SHA, it was contemplated that Chemicals would subscribe for US$90 million of convertible bonds.

According to SKEC, by the time that the Deed was entered into, Chemicals had only paid US$21.5 million of the US$90 million. SKEC said that under the Deed, SKEC agreed to pay Conchubar's portion of its funding obligations to SKECJI in exchange for Conchubar's assurance that Chemicals would diligently fulfil its remaining payment obligations to SKECJI, and that this showed that Conchubar and Chemicals had conducted themselves as a *de facto* single entity. Conchubar denied that it had ever made such assurances.

31 It was true that the Deed did not expressly state that Conchubar assured SKEC that Chemicals would diligently fulfil its payment obligations to SKECJI. But I found that the Deed did contain several provisions which stated that SKEC would fulfil certain payment obligations of Conchubar and/or waive its rights and remedies against Conchubar should Conchubar fail to satisfy its obligations under the SKECJI SHA, provided that Chemicals was not in default of its payment obligations to SKECJI. In other words, if Chemicals fulfils its obligations, Conchubar gets some benefits. Some of the provisions are reproduced below:

> 4. Provided always that [Chemicals] is not in default [its obligation to subscribe to the convertible bonds pursuant to the SKECJI SHA], SKEC undertakes that (a): SKEC shall not regard any non-satisfaction of the Payment Obligations on the part of Conchubar as a breach of the [SKECJI SHA] and SKEC waives all rights and remedies against Conchubar in all such respect…
>
> 5. The parties acknowledge that the Payment Obligations may require Conchubar to provide funding…towards the procurement and issuance of Acceptable Credit Support and that such Acceptable Credit Support may be provided in the form of a standby letter of credit ("Standby Letter of Credit"). SKEC shall be responsible for Conchubar's portion of the Standby letter of Credit provided that Conchubar Chemicals is not in default of [its obligation to subscribe to the convertible bonds pursuant to the SKECJI SHA]…

32 The inclusion of the above provisions in the Deed was reasonably expected to have been the result of a negotiated outcome between the parties. This, together with the other circumstances set out above (see [27] and [29] above), suggested to me that there was some kind of relationship between Conchubar and Chemicals.

33 Conchubar argued that even if the court accepted SKEC's allegations that Chemicals and Conchuar had a close relationship, this did not axiomatically mean that Chemicals was a related party creditor. An argument was made that although the Court of Appeal in *TT International* did not define the kind of "special interest" that a creditor must have in the scheme company in order to be considered a related party creditor, it ought to be limited to the specific situation where the creditor and the scheme company are related by way of shareholding. I rejected this argument, given my views as expressed in [26] above that the term "special interests" was not to be construed narrowly. I found that Chemicals was related to Conchubar and that accordingly, a discount ought to be applied to the votes casted by Chemicals at Conchubar's Scheme Meeting.

Conchubar and Universal, and Conchubar and Estanil

34 SKEC contended that as Chemicals was related to Conchubar, and since Chemicals had assigned portions of its claim against Conchubar to Universal and Estanil, both Universal and Estanil were also related creditors to Conchubar. I was not so persuaded. The bases on which SKEC argued that Chemicals was related to Conchubar were that (a) Chemicals and Conchubar shared a common sole shareholder and a common director; and (b) Chemicals and Conchubar had acted as a single entity on at least two occasions (see above). No allegations had been made that like Chemicals, Universal and

Estanil shared similar linkages with Conchubar. Such linkages were not established by the mere assignment of portions of Chemicals' claim against Conchubar (which arose from a separate Corporate Guarantee Agreement under which Conchubar guaranteed a loan made by Chemicals to SKECJI: see [7] above) to Universal and Estanil. I therefore found that there was insufficient evidence that Universal and Estanil were related to Conchubar.

UVM and MacNair

35 The basis of MacNair's claim against UVM was a loan of US$28 million (see [8] above). In conjunction with this loan, MacNair, UVM and Bonquest entered into the CBA under which MacNair may convert the debt owed to it by UVM into shares constituting 99.82 per cent of UVM's share capital. The sum was also secured by a share charge executed by Bonquest over its shares in UVM. SKEC submitted, and I accepted, that MacNair was a related creditor of UVM by virtue of the security in the form of the share charge that it held over shares in UVM. The present situation was similar to that in *TT International*. In that case, a shareholder of the scheme company, as well as a bank which had provided banking facilities to the scheme company secured by shares in the scheme company, were both considered by the Court of Appeal as related creditors.

UVM and Emirates

36 Emirates became a creditor of UVM when MacNair assigned to it a portion of its claim against UVM. To the extent of that assignment, Emirates, like MacNair (see above), might convert the debt owed to it by UVM into shares of UVM, and the debt was also covered by the share charge executed

by Bonquest over its UVM shares. By the same reasoning as above, Emirates, like MacNair, was also a related creditor of UVM.

The discount to be applied to the votes of the related creditors

37 Having determined that Chemicals, MacNair and Emirates were related creditors, the next question was whether and to what extent their votes at the Scheme Meetings should be discounted. The Applicants and SKEC chose to adopt extreme positions, with the Applicants maintaining that no discount at all ought to be applied and SKEC contending that a 100 per cent discount was appropriate. I was not persuaded by either argument.

38 In *TT International*, the Court of Appeal held that where a related creditor was a wholly-owned subsidiary of the scheme company, its votes ought to be wholly discounted, *ie* a 100 per cent discount was to be applied: see [158] of the judgment. Where a related creditor was a shareholder of the scheme company or held as security shares of the scheme company, then the votes of that creditor could be discounted by the value of the scheme company's shares that was owned or held as security by the related creditor, as ascertained on the date when the scheme documents were dispatched to the creditors (the "ascertainment date"): see [170] of judgment read with [17].

39 The difficulty in applying the guidance set out in *TT International* in this case was that here, we were not faced with creditors that were wholly-owned subsidiaries of Conchubar or UVM, and no valuation could be given to MacNair's and Emirates' interests in UVM's shareholding as at the ascertainment date. UVM said that as at the ascertainment date, it was insolvent. It had no underlying businesses and its primary asset was in the JAC shares which had been pledged to the Senior Lenders and thus could not be

unilaterally disposed of. Hence, UVM argued, that from the point of view of its shareholders, its shares must be of zero value. Accordingly, the value of the alleged interest of MacNair and Emirates in UVM would correspondingly be zero in value, and the discount on their votes would be zero as well. I was not convinced that the value of UVM's shares from the perspective of the shareholders (or of MacNair and Emirates) must be zero. As pointed out by SKEC, although JAC was in receivership, it had recently began operations and there was a prospect that it might become profitable. This would translate to an increase in value of UVM's shares. I acknowledged that valuation of UVM's shares might not be an easy task, but this certainly did not mean that a zero value should be attributed to the shares.

40 It was to me clear that Chemicals, MacNair and Emirates were related to the Applicants, and some discount had to be applied to their votes at the Scheme Meeting to take that into account, despite the difficulties in ascertaining the specific discount. In a situation such as the present, the court remained guided by general principles. At [26] above, it is stated that the reason why "courts have consistently attributed less weight" to the votes of related credits was because of the possibility that that a "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". Hence, in determining what the appropriate discount ought to be in a given case, the overarching question is to what extent a related creditor's voting decision was influenced by its relationship to the scheme company, such that it was not able to exercise its decision independently as an objective member of the class of creditors. In extreme cases where the related creditor was entirely controlled by the scheme company (such as where the creditor was a wholly-owned subsidiary of the scheme company), it would be clear that their interests would be wholly

aligned with that of the scheme company, such that their votes at the scheme meetings could not have any probative value in establishing the wishes of members of the class of creditors in respect of what was best to be done in the interests of that class, and accordingly must be wholly discounted: see *TT International* at [158] and *Re Landmark Corporation*, as cited at [25] above. But outside of these extreme cases, relationships between related creditors and the scheme companies may be complex and the court will not in these cases be able to determine with scientific precision what the appropriate discount ought to be. Instead, the court needs to adopt a broad-brushed approach, informed by the relationships in question and consider previous conduct of the parties. Such was the approach that had to be taken in the present case.

41 The applicant under s 210 of the Companies Act bears the burden of proving that all statutory requirements for a proposed scheme have been met. However, in the face of an assertion by an applicant that no discount ought to be applied, the party that asserts otherwise should bring into court evidence that supports its own case and that rebuts the applicant's stand. SKEC did refer me to several matters demonstrating the extent of the relationship between the creditors and the Applicants (see [27] – [36] above), but I was of the view that any discount to be applied was not to exceed 25 per cent of the value of the debt owed to the related creditors, in each case with respect to Conchubar and UVM. Such a discount did not sufficiently tilt the balance. The requisite majority set out in s 210(3AB) of the Companies was still met in respect of the proposed Scheme for both Conchubar and UVM despite the discount.

Whether the proposed Scheme was bad for being a contingent scheme or for uncertainty

42 SKEC argued that the intended outcomes of the proposed Scheme was unattainable as it was doomed for failure, because it was contingent upon the acceptance of the JEI Proposal by the R&M of JAC, and the R&M had already indicated that the JEI Proposal was not acceptable (see [12] above). Further, the proposed Scheme contemplated the transfer of the Applicants' interests in JAC to JEI, but the Security Agent had expressed the view that this would be in breach of the terms of relevant share charges, which it was not prepared to waive (see [13] above). SKEC then took issue with clause 2.3 ("Clause 2.3") of the proposed Scheme, which provided as follows:

> Within 30 days of the earlier of (i) one (1) year from the date of this Scheme and (ii) the date that the [Applicants] receives notice from JEI that the [JEI Proposal] had been rejected by the Receivers (the "Expiry Date"), the [Applicants] shall give notice to the Eligible Creditors as to whether it intends to propose a new Scheme. If the [Companies] intend to propose a new Scheme, it shall have the liberty to convene an Eligible Creditors Meeting for the Eligible Creditors to vote on the new Scheme within 60 days thereby superseding this Scheme if accepted.

SKEC submitted that the JEI Proposal had already been unequivocally rejected by the R&M, such that if this court should sanction the proposed Scheme, then the "Expiry Date" defined in Clause 2.3 would immediately take effect. Clause 2.3, SKEC argued, effectively allowed the Applicants to propose new schemes and circumvent the statutory procedure under s 210(1) of the Companies Act that would necessitate a fresh application to the Court for leave to convene creditors' meetings. Further, citing the judgment of Santow J in the New South Wales case of *Re NRMA Ltd* [2000] NSWSC 82 ("*Re NRMA*"), SKEC submitted that the Scheme was bad for lack of certainty, as it carried within itself machinery for variation of its own terms, and did not allow the creditors or the court to see at the time the scheme was proposed what they were being asked to accept or approve. The Applicants cited the same case in support of their position that the proposed Scheme was sufficiently certain.

43 I was mindful of the stance taken thus far by the R&M of JAC and of the Security Agent. However, I did not share the view of SKEC that the circumstances, as they presently appeared, pointed unequivocally to the intended outcomes of the proposed Scheme as being certainly unattainable and doomed for failure. The Applicants had stated in affidavit that the JEI Proposal was an "ongoing process of negotiation between JEI and the R&M", and both the R&M and the Security Agent had indicated that they were "prepared to consider further proposals from JEI" (see [12] and [13] above).

44 As for the allegation on uncertainty, the proposed Scheme was contingent upon the R&M's acceptance of JEI proposal. Counsel for the Applicants pointed out to me that no local authority had directly addressed whether or not a court may sanction contingent schemes, but referred me to several foreign cases which I found useful to the present analysis. I respectfully adopt the following passages of Santow J in *Re NRMA* (at [28] and [29]):

> 28. The use of conditions subsequent to bring about termination of a scheme of arrangement needs to be distinguished from a scheme containing machinery which could lead to variation of its terms. Courts will generally not approve schemes which carry within themselves machinery for variation of their own terms: see, for example, *Re R M Eastmond Pty Ltd* and the Companies Act (1972) 4 ACLR 801; *Re Telford Inns Pty Ltd* (1985) 3 ACLC 660; *Re Leamon Consolidated (Vic) Pty Ltd* (1985) 10 ACLR 263. The reason for that is stated in Leamon (at 265):

> > "In my opinion, a scheme ... ought not to be approved unless the creditors and the court can see very clearly at the time the scheme is proposed what it is that they are being asked to accept, and, in the case of the court, what it is that it is being asked to approve".
>
> 29. Clarity and certainty are thus the touchstones. Provided that clarity and certainty are present on the face of the scheme and no new decision making process intrudes after court approval, it does not matter that different results may emerge in different (but clearly identified) eventualities. A key question is whether the scheme is, according to its own terms, self-executing in the sense that certain results follow in certain defined events.

45 Similarly, in *Re Homemaker Retail Management* [2001] NSWSC 1058, Barrett J said (at [17]):

> Even if the possibility of alteration has been sufficiently identified and explained, there is still a clear and firm predisposition of the court not to favour provisions allowing schemes to be changed after they have received court approval. The point was made in stark terms by Street J (as he then was) in *Re R M Eastmond Pty Ltd* (1972) 4 ACLR 801 at 804 :
>
> > ... No scheme compulsorily imposed under the authority of the court under s 181 should be capable of amendment by machinery internal to the scheme itself.

46 The position is the same in the UK. In *Re Lombard Medical Technologies Plc* [2014] EWHC 2457 (Ch), Henderson J stated (at [26]):

> I can see no objection in principle to the court sanctioning a scheme which is conditional in one or more respects, provided always that the court considers it appropriate to do so in the exercise of its discretion. Examples of the kind of condition which the court may be willing to sanction, even if they are unsatisfied at the date of the hearing, are outstanding requirements for foreign regulatory approval which there is no reason to suppose will not be granted. Further, the terms of the scheme itself may provide that it will cease to have effect in certain circumstances, for example if the steps contemplated are not taken before a specified long-stop date. By contrast, the court would be most unlikely to sanction a scheme if the outstanding condition was one which in effect

> conferred on a third party the right to decide whether, or when, the scheme should come into operation, or which enabled the terms of the scheme to be varied in some material respect. The objection then would be that the court was not truly in a position to consider the merits of the scheme, so it could not properly exercise the jurisdiction conferred on it by Parliament to approve the scheme on behalf of all members of the relevant class or classes of shareholders.

47 In my view, there was neither authority nor reason that a court must never sanction a scheme simply because it was contingent on some events occurring or not occurring. The focus of the analysis ought to be whether the scheme was sufficiently clear and certain so as to allow creditors to make an informed choice when exercising their votes: see *Wah Yuen* at [42], where it was stated that "it is an independent principle of law that the creditors must be put in a position to make an informed choice". There was no blanket rule on when contingencies and conditions may render a scheme so uncertain or amorphous that it should not be approved. Much would depend on the structure of the proposed scheme and on the specific circumstances. That said, several common principles could be distilled from the authorities cited above and they provide general guidance:

(a) A scheme ought not to be approved unless the creditors and the court can see very clearly at the time the scheme is proposed what it is that they are being asked to accept or approve.

(b) A scheme containing machinery which could lead to variation of its terms is to be distinguished from the use of conditions subsequent to bring about termination of a scheme of arrangement.

(i) In the former case, courts will generally not approve schemes which carry within themselves machinery for their own terms to be changed after they have received court approval.

(ii) In the latter case, however, a scheme may provide for different results (including termination of the scheme) to emerge from different eventualities. This alone is no reason for a court to refuse to sanction the scheme, provided that the scheme clearly sets out what kind of results would follow on the occurrence of certain clearly defined events.

48 In the present case, I was of the view that the proposed Scheme was sufficiently clear and certain. In particular, the proposed Scheme provided for failsafe payments in the event that the R&M did not accept the JEI Proposal, or on the expiry of one year from the date of commencement of the proposed Scheme. There was thus sufficient clarity and certainty as to what the proposed Scheme, at its minimum, would be. As for Clause 2.3, it was not to be construed as providing a machinery for a third party to change the terms of the scheme; it merely provided that the Applicants might propose a new scheme and might convene a creditors' meeting to vote on that new scheme. The creditors must still accept the newly proposed scheme before it could take effect.

Whether the proposed Scheme was one which a reasonable creditor would approve

49 I was further of the view that the proposed Scheme was not one that would not obtain any support from any reasonable creditor or voter. I noted that if the proposed Scheme did not succeed, the alternative course for the creditors would be to commence liquidation proceedings against the Applicants, in which case it would be uncertain as to how much of their debts

they would be able to recover. This was because the Applicants had no underlying businesses and their primary asset was their shares in JAC which were pledged to the Senior Lenders and thus could not be unilaterally disposed of. In any event, JAC had been put under receivership and the value of its shares was difficult to ascertain (see [39] above). On the other hand, under the proposed Scheme, the Applicants' creditors were, at the minimum, guaranteed the failsafe payments.

Other allegations

50 There was insufficient evidence that the Applicants had acted dishonestly in engineering the voting outcome or had not acted *bona fide* in making the applications.

Orders made

51 In light of the above, I granted the sanction for the proposed Scheme pursuant to s 210(3AB) of the Companies Act. Further, I ordered that:

> (a) Pursuant to section 210(10) of the Companies Act, all pending, contingent or fresh suits, actions or proceedings against the Applicants or any enforcement or execution against any of their assets shall be restrained for one year unless otherwise ordered by the court, but such restraint does not in any event bind or affect the interests of the R&M of JAC or the Security Agent;
>
> (b) The Applicants shall send to the court and the scheme creditors, by way of letter every two months, a status update on the progress of the approved scheme of arrangement; and

(c) The Applicants, SKEC and any interested party shall return to Court for a status conference approximately three months from the date of the order, on a date to be fixed by the Registry.

52 I made no order as to costs.

Leave to appeal

53 On 7 September 2016, SKEC applied, via Summons No. 4396 of 2016, for leave to appeal against my orders set out at [51] above ("the Orders"). I heard the parties on 6 October 2016. The situation was a unique one because it was SKEC, the intended appellant, who took the position that leave was required for it to file an appeal, while the Applicants, as the prospective respondents, were of the view that leave was not required. SKEC took the view that leave was required for it to file an appeal, pursuant to s 34(2)*(d)* of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA"), as it regarded the Orders as interlocutory orders made at the hearing of an interlocutory application. The Applicants was of the view that the Orders were not interlocutory orders and they were not made at a hearing of an interlocutory application.

54 In *The "Nasco Gem"* [2014] 2 SLR 63 ("*Nasco Gem*"), the Court of Appeal held (at [14]) that an interlocutory application, in the context of the SCJA, meant "an application [that] is peripheral to the main hearing determining the outcome of the case, or [that] occurs during the course of proceedings between the initiation of the action and the final determination". As for the question of whether an order made at the hearing of an interlocutory application was an "interlocutory order", an order that "finally disposes of the

rights of the parties" was not an "interlocutory order": *Nasco Gem* at [13] – [14].

55 I was of the view that leave to appeal was not required in the present case, as the Applicants' applications were not interlocutory applications and, in any event, the Orders were not interlocutory orders. The applications were not interlocutory in nature as they were not "peripheral" to any "main hearing determining the outcome of the case". The outcome sought by Conchubar and UVM was the court's sanction of the proposed Scheme with the accompanying moratoriums for the proposed Scheme to take effect. The applications were made to determine that very outcome. Once the applications were determined, the entire subject matter of Originating Summons No 153 and 154 of 2016 was spent and there was nothing more to proceed on. The Orders were also not interlocutory orders as they finally disposed of the rights of the parties; the Orders were made pursuant to s 210(3AB) of the Companies Act and under s 210, a court-sanctioned scheme was binding on the creditors (including SKEC), unless there was a successful appeal against the court's order sanctioning the scheme.

56 While I was of the view that leave to appeal was not required in the present case, I would have granted leave if that was required. The decision in Originating Summons 153 and 154 of 2016 engaged unsettled questions of law such as to what extent related creditors votes ought to be discounted in determining whether the requisite statutory majority set out in s 210(3AB) of the Companies Act was met, for which further arguments and a decision by the Court of Appeal would be of public importance.

57 As any appeal by SKEC against the Orders were now out of time, SKEC had filed an application to the Court of Appeal for an extension of time to file a notice of appeal.

Aedit Abdullah
Judicial Commissioner

Andy Lem, Chia Tze Yung Justin, Jaclyn Leong and Kok Yee Keong (Harry Elias Partnership LLP for the applicants;
Debby Lim and Jamal Siddique (Shook Lin & Bok LLP) for SK Engineering & Construction Co Ltd