IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 209

Originating Summons No 429 of 2021

In the matter of Section 71 of the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018)

DSG Asia Holdings Pte Ltd

… *Applicant*

GROUNDS OF DECISION

[Companies] — [Schemes of arrangement] — [Section 71 of the Insolvency, Restructuring and Dissolution Act 2018]
[Companies] — [Schemes of arrangement] — [Disclosure]
[Companies] — [Schemes of arrangement] — [Classification of scheme creditors]
[Companies] — [Schemes of arrangement] — [Deed poll structure]

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Re DSG Asia Holdings Pte Ltd

[2021] SGHC 209

General Division of the High Court — Originating Summons No 429 of 2021
Aedit Abdullah J
27 May, 23 July, 13 August 2021

13 September 2021

Aedit Abdullah J:

Introduction

1 Companies seeking to implement schemes of arrangement with creditors may use the procedure set out in s 210 of the Companies Act (Cap 50, 2006 Rev Ed). Or they may prefer the pre-packaged scheme procedure now set out in s 71 of the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) ("IRDA"). The group of companies to which DSG Asia Holdings Pte Ltd (the "Applicant") belongs started with the former procedure. After encountering opposition from some creditors, it used the Applicant to switch to the latter. The question in this case was whether, given the roles of one creditor and the non-disclosure of information regarding that creditor, it was appropriate to approve the pre-packaged scheme.

2 I dismissed the application, and the Applicant has filed an appeal. I now set out my reasons in full.

Background

3 Design Studio Group Ltd ("DSGL") is the ultimate holding company of a group of companies ("DSG Group") that provides joinery manufacturing and interior fit-out solutions.[1] DSG Group has six companies incorporated in Singapore (collectively, the "Original Singapore Debtors"): DSGL itself, the Applicant, DSG Projects Singapore Pte Ltd ("DSGP"), DSG Manufacturing Singapore Pte Ltd ("DSGM"), Design Studio (China) Pte Ltd and Design Studio Asia Pte Ltd.[2] DSG Group also has three companies incorporated in Malaysia (collectively, the "Original Malaysia Debtors"): DSG Projects Malaysia Sdn Bhd, DSG Manufacturing Malaysia Sdn Bhd and DS Project Management Sdn Bhd.[3] I will refer to the nine companies collectively as the "Original Debtors".

4 The pre-packaged scheme that the Applicant proposed in this application was not the DSG Group's first attempt at a scheme of arrangement to address its financial difficulties. In October 2020, the DSG Group promoted to their creditors six schemes for the six Original Singapore Debtors (the "Original Singapore Scheme") and three schemes for the three Original Malaysia Debtors (the "Original Malaysia Scheme").[4] The nine schemes (collectively, the "Original Schemes") were inter-conditional.[5] They contemplated pooling the assets of the Original Singapore Debtors and the Original Malaysia Debtors for the restructuring and distribution to creditors.[6] In

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1 Luke Furler's 1st Affidavit filed in HC/OS 429/2021 ("Furler's 1st OS 429 Affidavit") at para 8.

2 Furler's 1st OS 429 Affidavit at p 762.

3 Furler's 1st OS 429 Affidavit at p 762.

4 Furler's 1st OS 429 Affidavit at Tabs 8 and 9.

5 Furler's 1st OS 429 Affidavit at para 27(d).

6 Furler's 1st OS 429 Affidavit at para 27(a).

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HC/OS 917/2020 to HC/OS 922/2020, I granted the Original Singapore Debtors liberty to convene creditors' meetings to consider the Original Singapore Scheme under s 210 of the Companies Act.[7] The Malaysian courts similarly granted the Original Malaysia Debtors liberty to convene creditors' meetings to consider the Original Malaysia Schemes.[8]

5 It was undisputed that Oversea-Chinese Banking Corp Ltd ("OCBC") was a creditor of DSGL, DSGM and DSGP.[9] In December 2020, the scheme chairman adjudicated OCBC's proofs of debt for the purpose of voting at the creditors' meetings for the Original Singapore Scheme (the "Original Singapore Scheme Meetings"). He rejected most of OCBC's claims.[10] Upon OCBC objecting to the adjudication results, an independent assessor was appointed to adjudicate the claims.[11]

6 Before the independent assessor rendered his decision, the DSG Group convened the Original Singapore Scheme Meetings on 4 January 2021.[12] Based on the voting amount of the creditors' claims as adjudicated by the chairman (the "Original Adjudicated Voting Amounts"), the creditors who voted for the Original Singapore Scheme satisfied the statutory majority requirements in s 210(3AB) of the Companies Act.[13] The creditors who voted for the Original

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7 HC/ORC 5664/2020, 5665/2020, 5666/2020, 5667/2020, 5668/2020, 5670/2020.

8 Furler's 1st OS 429 Affidavit at para 29.

9 Foo Jee Kee's 1st Affidavit filed in HC/OS 73/2020 to HC/OS 78/2020 ("Foo's 1st OS 73 Affidavit") at para 6; Foo Jee Kee's 1st Affidavit filed in HC/OS 429/2021 ("Foo's 1st OS 429 Affidavit") at para 6; Furler's 1st OS 429 Affidavit at para 32.

10 Foo's 1st OS 73 Affidavit at para 11.

11 Foo's 1st OS 73 Affidavit at paras 12–13.

12 Foo's 1st OS 73 Affidavit at paras 15, 17 and 18.

13 Furler's 1st OS 429 Affidavit at para 31; Furler's 5th Affidavit filed in HC/OS 73/2020 ("Furler's 5th OS 73 Affidavit") at para 28.

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Malaysia Schemes similarly satisfied the Malaysian statutory majority requirements.[14]

7 Two weeks later, the independent assessor issued his decisions on the claims of OCBC and another disputing creditor. He admitted the majority of OCBC's claims against DSGL and DSGP.[15] Based on his adjudication results, the Original Singapore Scheme of DSGP would not have been approved by the requisite statutory majorities.[16]

8 In late February 2021, OCBC was notified that the Applicant had executed a deed poll (the "Deed Poll") to become a primary co-obligor in respect of all claims against the Original Debtors that were to be the subject of the present scheme (the "New Scheme").[17] OCBC was also notified that the DSG Group would propose the New Scheme through the Applicant using the pre-packaged scheme process under s 71 of the IRDA.[18]

9 In early March 2021, the Applicant began the vote solicitation for the New Scheme.[19] The scheme manager accepted ballot forms until late April 2021.[20] Of the creditors who voted, 91.57% in number representing 87.33% in

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14 Furler's 1st OS 429 Affidavit at para 31; Furler's 5th OS 73 Affidavit at para 36.

15 Foo's 1st OS 73 Affidavit at para 20.

16 Furler's 1st OS 429 Affidavit at paras 32 and 34.

17 Furler's 1st OS 429 Affidavit at para 42; OCBC's Written Submissions dated 24 May 2021 ("OCBC's Submissions") at para 21.

18 OCBC's Submissions at para 21.

19 Furler's 1st OS 429 Affidavit at para 59.

20 Furler's 1st OS 429 Affidavit at para 67.

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value of the Original Adjudicated Voting Amounts of the voting creditors voted in favour of the New Scheme.[21]

10 OCBC had raised questions as to the inclusion of related creditors' votes in the Original Singapore Scheme Meetings and the vote solicitation for the New Scheme.[22] In April 2021, the DSG Group informed OCBC that voting by related creditors was no longer a live issue because the related creditors' claims had been assigned to a "Potential White Knight".[23] I will refer to the assignment as the "Debt Sale". The DSG Group also informed OCBC that it had entered into a non-binding term sheet with the potential white knight.[24] Later that month, the DSG Group disclosed to OCBC that the potential white knight was Allington Advisory Pte Ltd ("Allington").[25]

11 In June 2021, the Applicant entered into a binding term sheet dated 22 June 2021 (the "Term Sheet") with Allington.[26] The Term Sheet set out two transactions.[27] First, Allington agreed to invest and acquire a majority stake in DSGL.[28] Second, it agreed to provide an emergency working capital facility to several companies in the DSG Group including the Applicant. The facility was to be secured by various assets of the DSG Group.[29]

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21 Furler's 1st OS 429 Affidavit at para 69.

22 Foo's 1st OS 73 Affidavit at paras 36–37; Foo's 1st OS 429 Affidavit at paras 7–8.

23 Furler's 1st OS 429 Affidavit at p 1136, paras 10–12.

24 Furler's 1st OS 429 Affidavit at p 1136, para 8–9.

25 Furler's 1st OS 429 Affidavit at p 1140, para 6.

26 Furler's 3rd Affidavit filed in HC/OS 429/2021 ("Furler's 3rd Affidavit") at para 12.

27 Furler's 3rd Affidavit at pp 18–19.

28 Furler's 3rd Affidavit at p 18.

29 Furler's 3rd Affidavit at p 19.

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12 A month earlier, the Applicant had filed the originating summons that is the subject of this decision. It sought the court's approval of the New Scheme under s 71 of the IRDA. While OCBC and three other creditors – CSM Works Pte Ltd, Yong Yuan Construction Pte Ltd, East Tech Glass Services & Construction Pte Ltd and Jurong Contractor Pte Ltd (the "VLC Creditors") – opposed the application, the other creditors at the hearing either supported the application or took no position.[30] As the VLC Creditors associated themselves with OCBC,[31] these grounds of decision will focus on OCBC's submissions.

Summary of the Applicant's arguments

13 The Applicant submitted that the court should exercise its discretion to sanction the New Scheme because all the requirements in s 71(3) of the IRDA were satisfied and because the Scheme was one that a man of business or an intelligent and honest man would reasonably approve.[32] In particular, to determine whether the statutory majority requirements were satisfied, Allington was to be placed in the same class as all the other creditors in the New Scheme, even though Allington might have different interests as a potential investor and a rescue financier holding security.[33] Further, the Debt Sale was an arm's length transaction that was not entered into to manipulate the creditors' votes.[34] The Applicant could not disclose the purchase price that Allington paid under the Debt Sale, but that information did not affect the *bona fides* of the Debt Sale or

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30 Notes of Evidence ("NEs"), 27 May 2021, at p 2, lines 6–14.

31 NEs, 27 May 2021, at p 6, line 7.

32 Applicant's Skeletal Submissions dated 24 May 2021 ("Applicant's Submissions") at para 2.

33 Applicant's Supplemental Submissions dated 19 July 2021 ("Applicant's Supplemental Submissions") at paras 5, 10 and 12.

34 Applicant's Supplemental Submissions at para 17.

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the classification of Allington.[35] In addition, the use of the deed poll structure to have the Applicant assume the Original Debtors' liabilities was appropriate.[36]

Summary of OCBC's arguments

14 OCBC submitted that the New Scheme should not be sanctioned.[37] Because the DSG Group did not disclose the purchase price of the Debt Sale before the vote solicitation, the voting process was not a fully informed one.[38] Additionally, because Allington was the assignee of the related creditors' claims, a secured creditor and a potential investor, it should not be placed in the same class as other unsecured creditors for the vote solicitation.[39] Further, the DSG Group did not establish good grounds for pooling the liabilities of companies in the group into one entity and asking their creditors to vote in one scheme.[40]

Decision

15 The application turned on two issues: the adequacy of the Applicant's disclosure and the classification of Allington for the purpose of the voting requirements.

16 The purchase price at which Allington acquired the related creditors' rights and became a creditor was information necessary to enable creditors to

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35 Applicant's Supplemental Submissions at paras 19–20.

36 Applicant's Supplemental Submissions at paras 28–30.

37 OCBC's Submissions at para 61.

38 OCBC's Submissions at para 62.

39 OCBC's Written Submissions dated 19 July 2021 ("OCBC's Supplemental Submissions") at para 2(a).

40 OCBC's Supplemental Submissions at paras 57 and 59.

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make an informed decision whether to agree to the New Scheme. Because the Applicant did not disclose the purchase price, the other unsecured creditors could not assess whether the New Scheme treated them fairly in comparison to Allington.

17 As for the classification of the creditors, Allington was classed separately from all the other creditors in the New Scheme. Allington's rights that it would receive as an investor in the ultimate holding company in the DSG Group gave it an additional non-private interest to vote for the New Scheme. Thus, the notional voting outcomes did not satisfy the statutory majority requirements.

Analysis

The statutory provision

18 Two essential elements were in play in this application. First, under s 71(3)(*a*) of the IRDA, each creditor must be provided with all information necessary to enable the creditor to make an informed decision whether to agree to the compromise or arrangement. Second, under s 71(3)(*d*), the court must be satisfied that, had a creditors' meeting been summoned to approve the compromise or arrangement, the voting requirements in s 210(3AB)(*a*)–(*b*) of the Companies Act would have been met.

The text

19 Section 71 of the IRDA provides as follows:

> **Power of Court to approve compromise or arrangement without meeting of creditors**
>
> **71.**—(1) Despite section 210 of the Companies Act but subject to this section, where a compromise or an arrangement is

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proposed between a company and its creditors or any class of those creditors, the Court may, on an application made by the company, make an order approving the compromise or arrangement, even though no meeting of the creditors or class of creditors has been ordered under section 210(1) of that Act or held.

(2) Subject to subsection (10), if the compromise or arrangement is approved by order of the Court under subsection (1), the compromise or arrangement is binding on the company and the creditors or class of creditors meant to be bound by the compromise or arrangement.

(3) The Court must not approve a compromise or an arrangement under subsection (1) unless —

(*a*) the company has provided each creditor meant to be bound by the compromise or arrangement with a statement that complies with subsection (6) and contains the following information:

(i) information concerning the company's property, assets, business activities, financial condition and prospects;

(ii) information on the manner in which the terms of the compromise or arrangement will, if it takes effect, affect the rights of the creditor;

(iii) such other information as is necessary to enable the creditor to make an informed decision whether to agree to the compromise or arrangement;

(*b*) the company has published a notice of the application under subsection (1) in the *Gazette* and in at least one English local daily newspaper, and has sent a copy of the notice published in the *Gazette* to the Registrar of Companies;

(*c*) the company has sent a notice and a copy of the application under subsection (1) to each creditor meant to be bound by the compromise or arrangement; and

(*d*) the Court is satisfied that had a meeting of the creditors or class of creditors been summoned, the conditions in section 210(3AB)(*a*) and (*b*) of the

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> Companies Act (insofar as they relate to the creditors or class of creditors) would have been satisfied.
>
> …

The object of the statute

20 The legislative purpose or object of a statute is important to interpreting a provision in the statute. The purpose may be discerned from two types of sources: (a) the text of the provision and its statutory context; and (b) extrinsic material, including the second reading speech for the bill containing the provision, in accordance with s 9A(2)–(4) of the Interpretation Act (Cap 1, 2002 Rev Ed): *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [42]–[45].

21 Regarding the statutory context, s 71 is contained in Part 5 of the IRDA, which deals with schemes of arrangement. Section 71 is one of the three provisions in Part 5 that derogate from ss 210 and 211 of the Companies Act: s 63(2) of the IRDA. The other two provisions deal with the power of the court to order a re-vote and to cram down a scheme. Given that s 71 of the IRDA is a derogation from s 210 of the Companies Act, the case law regarding s 210 of the Companies Act should apply except where s 71 requires otherwise.

22 The purpose of the derogation in s 71 may be gleaned from extrinsic material on its predecessor, s 211I of the Companies Act. In 2016, the Committee to Strengthen Singapore as an International Centre for Debt Restructuring (the "Committee") recommended introducing a pre-pack mechanism in its report. The Committee described a pre-pack as a pre-negotiated and agreed plan involving the major creditors, allowing the court to approve the plan fairly, quickly and efficiently: *Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring* (20 April 2016) ("*Report*") at para 3.32. As the Committee noted, the speed of

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the pre-pack process is both one of its main advantages and the source of concerns that creditors who are not directly involved in the negotiations may not understand the plan when they vote: at paras 3.33 and 3.38. The Committee therefore recommended adopting a pre-pack mechanism with safeguards including requirements to give adequate disclosure to all creditors and to satisfy the court that the votes solicited from creditors exceed the majority required to approve the scheme: at para 3.41.

23 The Committee's understanding of the pre-pack scheme was reflected in the second reading speech introducing s 211I of the Companies Act. The Senior Minister of State described the pre-pack mechanism in s 211I as allowing pre-negotiated restructurings between the company and its key creditors. Section 211I was to facilitate the court's approval of pre-packs by allowing the court to dispense with calling creditors' meetings if certain safeguards were met: *Singapore Parliamentary Debates, Official Report* (10 March 2017) vol 94 (Indranee Rajah, Senior Minister of State for Finance).

24 As the Senior Minister of State explained, Singapore's pre-pack process is adapted from the US mechanism in Chapter 11 of the Bankruptcy Code 11 USC (US) (1978) (the "US Bankruptcy Code"): *Singapore Parliamentary Debates, Official Report* (10 March 2017) vol 94 (Indranee Rajah, Senior Minister of State for Finance). Pre-packs under the US Bankruptcy Code are typically used for "simple balance sheet restructuring" where there is no need to impair ordinary trade claims: Ben Larkin and Joseph Smolinsky, "Restructuring Through US Chapter 11 and UK Prepack Administration" in *The Law and Practice of Restructuring in the UK and US* (Christopher Mallon and Shai Y Waisman eds) (Oxford University Press, 2011) ch 8 at para 8.50.

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25 To be clear, although Singapore adapted the scheme of arrangement from the English and Australian companies legislations (see *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2008] 3 SLR(R) 121 ("*Oriental Insurance*") at [33]), Singapore's pre-pack process differs significantly from the UK practice of a pre-packaged insolvency sale. In a UK pre-pack, the debtor company is placed into administration after the restructuring plan is negotiated, and the administrator implements the plan by selling the company's business to a new entity: *Report* at para 3.37. Unlike a Singapore pre-pack, which requires the court's approval, a UK pre-pack mainly uses out-of-court procedures: see *Report* at 3.40.

26 In summary, an application under s 71 of the IRDA is an application for sanction of a scheme on an expedited basis. Actual meetings are avoided. The two-stage process under s 210 of the Companies Act of obtaining leave to convene meetings and obtaining sanction after the meetings is compressed into one stage of obtaining sanction.

27 So the expedition and procedural simplicity granted by the s 71 framework should generally be used only for clear cases of agreement to pre-arranged schemes. Where a major creditor objects or the scheme company has difficulty providing information, that is a strong signal that the s 71 process should not be utilised and is probably unavailable. In that situation, the company should use the normal procedure in s 210 of the Companies Act and have matters resolved through actual meetings and voting by creditors.

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Elements

28 It is evident then that the following are essential to obtaining the court's approval under s 71 of the IRDA:

(a) disclosure of information; and

(b) satisfaction of the statutory majority requirements in the notional counting of votes.

29 It is implicit in the latter requirement that the creditors be properly classified, albeit for the notional counting of votes since there is no actual voting in a creditors' meeting. Without proper classification, the statutory object of providing an efficient yet fair process would not be achieved.

The requirements

30 As the objective of the s 71 process is to provide an expedited process, the *quid pro quo* is satisfactory fulfilment of the requirements in s 71. Neither the IRDA nor the extrinsic materials indicate that a strict standard should be applied to determine whether the requirements are satisfied.

31 I am prepared in this case to interpret s 71 as requiring only that a clear case of agreement to the scheme be established. A stricter approach may be unduly narrow, as the statutory framework is intended to expedite matters rather than create a mine field for applicants. However, the threshold cannot be so low as to effectively allow applicants to circumvent the statutory requirements. A clear case standard strikes an appropriate balance: the applicant must show a clear case that there has been proper disclosure, as well as fulfilment of the voting requirements, which in turn entails proper classification of creditors.

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Disclosure of information

32 The Applicant submitted that it had provided creditors with all information necessary to enable them to make an informed decision whether to vote for the New Scheme.[41] In contrast, OCBC submitted that DSG Group had failed to provide full and frank disclosure of all material information by failing to disclose fully, to the court and to creditors, the terms of the Debt Sale and of Allington's proposed investment.[42]

33 On several occasions in April and May 2021, OCBC asked the DSG Group to disclose the purchase price that Allington had paid in the Debt Sale.[43] With Allington's consent, the Applicant eventually disclosed the sale and purchase agreement in the course of these proceedings. But the Applicant did not disclose the pricing letter, which set out the purchase price. That was because Allington withheld its consent on the ground that the purchase price was commercially sensitive information.[44]

34 The disclosure requirement in s 71(3)(*a*) of the IRDA reflects the principle, set out in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd and another appeal* [2012] 4 SLR 1182 at [23], that a scheme company must disclose all material information to the scheme creditors to enable them to make informed decisions on whether to support the scheme.

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41 Applicant's Submissions at para 2(a).

42 OCBC's Submissions at paras 32–33.

43 Furler's 1st OS 429 Affidavit at p 1144, para 5; p 1148, para 4; Foo's 1st OS 429 Affidavit at p 22, para 5(a).

44 Furler's 2nd Affidavit filed in HC/OS 429/2021 at para 13.

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35 OCBC submitted that the purchase price was material information necessary for creditors to understand how creditors would be treated so that they could reach an informed view on whether the Scheme was fair.[45] In particular, the purchase price was relevant for creditors to ascertain the *bona fides* of the Debt Sale. If Allington paid a nominal purchase price, there would be grounds to conclude that the Debt Sale was an assignment that was not at arm's length and was contrived to circumvent the voting requirements for the New Scheme.[46]

36 The Applicant accepted that the purchase price was relevant to whether the Debt Sale was *bona fide*.[47] It argued, however, that the price was immaterial to this issue.[48] That was because the information that the Applicant did disclose – including the sale and purchase agreement,[49] the valuation methodology on which the purchase price was based,[50] and the scheme manager's independent assessment that the Debt Sale was a genuine transaction at arm's length[51] – was sufficient to show creditors (and the court) that the Debt Sale was *bona fide*.

37 The Applicant's argument amounted to an argument that the information it provided was sufficient to show *bona fides*, not that the information it withheld was immaterial to *bona fides*. A piece of information is immaterial to a question if, regardless of what that information is, it would make no difference

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45 OCBC's Submissions at para 46; OCBC's Supplemental Submissions at paras 22–23; NEs, 27 May 2021, at p 4, lines 17–18.

46 OCBC's Submissions at para 41.

47 Applicant's letter dated 30 July 2021 at para 18.

48 NEs, 23 July 2021, at p 9, line 24.

49 NEs, 23 July 2021, at p 2, lines 15–17.

50 NEs, 23 July 2021, at p 2, line 19.

51 Furler's 1st OS 429 Affidavit at paras 82–83; Applicant's Supplemental Submissions at para 20.

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to the determination of the question. It would, however, make a difference to the question of *bona fides* if the purchase price that Allington paid turned out to be nominal.

38 I found that the purchase price was information necessary to enable creditors to make an informed decision whether to agree to the New Scheme. For creditors to be able to make an informed decision whether to agree to a scheme, they need information that enables them to assess whether the allocation of loss and the division of benefits is fair and in their commercial interests: see *In re Sunbird Business Services Ltd* [2020] Bus LR 2371 at [62]; *Re Virgin Atlantic Airways Ltd* [2020] EWHC 2376 (Ch) ("*Re Virgin Atlantic Airways*") at [63]. For example, where creditors who would rank *pari passu* in a liquidation are treated differently under or excluded from the scheme, this should be fully disclosed and explained: *Re Virgin Atlantic Airways* at [63].

39 The Applicant should have disclosed the purchase price so that creditors could assess the Debt Sale and Allington's resulting participation in the New Scheme for themselves. It would be reasonable for any of the creditors to consider whether the treatment of Allington under the New Scheme would, in light of the purchase price that Allington paid, be fair in comparison to the treatment of that creditor. It is true that, as the Applicant argued, whether Allington had made a good or bad bargain would make no difference financially or economically to each creditor's position.[52] But that did not render the purchase price unnecessary to an informed decision. It was for each creditor to decide what it considered to be fair and in its commercial interests and to vote on the New Scheme on that basis. Some might be indifferent to the treatment that Allington would receive, but others might not. The Applicant should have

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52 NEs, 23 July 2021, at p 9.

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disclosed the information so that each creditor could make its own informed assessment of the New Scheme.

40 The Applicant avowed that it had tried, unsuccessfully, to obtain Allington's consent to disclose the information.[53] It also said that the confidentiality provisions in the sale and purchase agreement prevented the Applicant from unilaterally disclosing the information.[54] It submitted that the non-disclosure should therefore not be held against it.[55]

41 But, as OCBC submitted,[56] Allington's non-disclosure of relevant information was enough to disqualify the application from the expedited process under s 71 of the IRDA. It was incumbent on the Applicant to secure, from the beginning, such material information. The Applicant therefore did not show a clear case of adequate disclosure as required by s 71(3)(*a*).

42 In addition to OCBC's argument on the Applicant's failure to disclose the purchase price, the VLC Creditors argued that the Applicant had made inadequate disclosure of its financial condition in two financial years.[57] For those years, the Applicant had disclosed the DSG Group's management accounts watermarked "DRAFT", rather than audited financial statements.[58] Given my holding on the Applicant's failure to disclose the purchase price that Allington paid, it was not necessary to address this argument.

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53 Applicant's Supplemental Submissions at para 19.

54 Applicant's Supplemental Submissions at para 19.

55 NEs, 23 July 2021, at p 2, lines 8–9.

56 OCBC's Supplemental Submissions at para 35.

57 VLC Creditors' Written Submissions dated 25 May 2021 ("VLC Creditors' Submissions") at paras 79–80.

58 Furler's 1st OS 429 Affidavit at pp 600–603.

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43 The Applicant's inadequate disclosure provided sufficient reason to dismiss the application. The failure to fulfil the voting requirements provided another reason.

Fulfilment of voting requirements

44 The determination whether the statutory majority requirements were met turned on classification. The requirements for proper classification are carried over from the case law on s 210 of the Companies Act. It was common ground that, in determining whether the votes in a hypothetical creditors' meeting would have satisfied the statutory majority requirements, the court considers how the creditors would have been classified, since classification affects how the votes would have been tallied.

45 Like each of the Original Schemes,[59] the New Scheme had one class of creditors: the unsecured creditors of the Original Debtors, whose claims the Applicant had assumed under the Deed Poll.[60] Like the Original Schemes, the New Scheme excluded Hongkong and Shanghai Banking Corporation Ltd ("HSBC") – which was the only secured creditor of the Original Debtors, HSBC and Depa United Group PJSC in their capacity as rescue financiers, and certain creditors who provided essential goods, supplies and services.[61]

46 OCBC submitted that Allington should be placed in a separate class for the purpose of the notional voting.[62] If Allington was placed in a separate class, the statutory majority requirements would not be met: only about 64% in value

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59 Furler's 1st Affidavit filed in HC/OS 917/2020 at paras 28, 30 and 32.

60 Furler's 1st OS 429 Affidavit at para 50; p 62, para 11; p 73.

61 Furler's 1st OS 429 Affidavit at paras 48–49; p 59, para 4.2; p 77.

62 OCBC's Submissions at paras 56–59; OCBC's Supplemental Submissions at para 7.

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of the other unsecured creditors voted in the vote solicitation in favour of the New Scheme.[63]

47 The hypothetical creditors' meeting(s) would have been summoned according to the classification test set out 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 (No 1)*") at [131]: 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. If the scheme alters their rights relative to one another, in comparison to the appropriate comparator, the creditors will have an additional non-private interest derived from their rights under the scheme to vote for or against the scheme, as the case may be: *TT International (No 1)* at [138] and [140]. They should therefore be classed separately: *TT International (No 1)* at [138]. But if a creditor merely has a private interest arising out of that creditor's unique circumstances, that private interest does not warrant creating a separate class: *TT International (No 1)* at [140].

48 OCBC submitted that Allington and the other unsecured creditors could not have sensibly consulted together with a view to their common interest.[64] Allington had a unique role, interests and rights as the assignee of the related creditors' claims for an undisclosed consideration; as a creditor holding security in various assets of the DSG Group to secure the emergency working capital facility; and as an investor whose investment was effectively conditional on the court approving the New Scheme.[65]

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63 Foo's 1st OS 429 Affidavit at para 28(a)–(f).

64 OCBC's letter dated 27 July 2021 at paras 12 and 16.

65 OCBC's letter dated 27 July 2021 at para 12.

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49 The Applicant submitted that OCBC's argument conflated creditors' rights with creditors' interests.[66] Allington's rights were not so dissimilar from other unsecured creditors that they could not have sensibly consulted together with a view to their common interest.[67] Allington's rights in an insolvent liquidation of the Original Debtors, which was the appropriate comparator,[68] would be the same as those of any other unsecured creditor.[69] Its rights under the Scheme also would be the same as those of any other unsecured creditor.[70]

50 So the classification of Allington raised two issues:

(a) To what extent should the analytical framework for creditors' rights and interests in schemes under s 210 of the Companies Act be transposed to schemes under s 71 of the IRDA?

(b) Did any of Allington's roles as assignee, secured creditor or potential investor render Allington's rights so dissimilar from other unsecured creditors that they could not have sensibly consulted together with a view to their common interest?

(1) Analytical framework for classification of creditors

51 As the Applicant noted,[71] private interests are not relevant to classification at the leave stage in the s 210 process (see *TT International (No 1)* at [140]). Rather, they are relevant at the sanction stage to whether the views of

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66 Applicant's letter dated 30 July 2021 at para 6.

67 Applicant's Supplemental Submissions at para 4.

68 Applicant's Submissions at para 56(a).

69 Applicant's Supplemental Submissions at para 4.

70 Applicant's Supplemental Submissions at para 4.

71 NEs, 23 July 2021, at p 3, lines 17–18; Applicant's Submissions at paras 62–63.

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creditors holding those private interests can be regarded as fairly representative of their class. For example, the private interests of related party creditors do not warrant placing them in a separate class but generally warrant attributing less weight to their votes: *TT International (No 1)* at [152]–[155], citing *UDL Argos Engineering & Heavy Industries Co Ltd & Others and Li Oi Lin & Others* (2001) 4 HKCFAR 358 ("*UDL Argos*") at [27(6)] and *Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd* [2003] 3 SLR(R) 629 at [13] and [35].

52 The clear distinction in s 210 cases between the leave stage and the sanction stage is not applicable to a s 71 application. Because the pre-pack regime in s 71 bypasses the creditors' meeting, creditors lack the opportunity to ask questions, to make their views known and to vote at the meeting. The s 71 process also has no distinct sanction stage, which in a s 210 process serves to ensure the integrity of voting outcomes and the objective fairness of the scheme: see *TT International (No 1)* at [70]. Thus, in deciding in one shot whether to approve a s 71 scheme, the court's scrutiny has to be directed to both the rights and the private interests of creditors, as the Applicant accepted.[72]

53 This does not mean that both rights and private interests are relevant to classification. The analytical framework established for s 210 schemes should apply with the necessary adaptations (see [21] above):

> (a) In classifying the creditors to determine whether the notional voting outcomes would have satisfied the statutory majority requirements in s 210(3AB)(*a*)–(*b*) of the Companies Act, the court considers the creditors' rights.

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[72] NEs, 23 July 2021, at p 4, lines 26–30; Applicant's letter dated 30 July 2021 at para 14.

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(b) If the statutory majority requirements would have been satisfied, the court in deciding whether to approve the scheme must be satisfied, among other things, that the creditors whose votes were solicited for the purpose of the notional voting outcomes were fairly representative of the class of creditors to which they belong: see *Oriental Insurance* at [43(b)]. As with s 210 schemes, the creditors' private interests are relevant to this inquiry.

(2) Allington's roles

54 The Applicant's overarching argument was that the New Scheme treated all the scheme creditors identically.[73] Allington's interests as a potential investor[74] and as a secured creditor for rescue financing[75] were irrelevant to its classification because they existed outside the New Scheme.

55 But a creditor's interest to support or oppose a scheme may arise out of a right that, though not conferred under the scheme itself, is part of the same restructuring transaction as a matter of commercial reality. Such an interest is a non-private interest relevant to classification. That is the effect of the line of English authorities which includes *Re Codere Finance 2 (UK) Ltd* [2020] EWHC 2441 (Ch) ("*Re Codere*"), a case cited by the Applicant.[76]

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73 Applicant's letter dated 30 July 2021 at para 15.

74 Applicant's Supplemental Submissions at para 10; Applicant's letter dated 30 July 2021 at para 14(c).

75 Furler's 4th Affidavit filed in HC/OS 429/2021 at para 11(a); Applicant's Supplemental Submissions at para 12; Applicant's letter dated 30 July 2021 at para 14(b).

76 Applicant's Supplemental Submissions at paras 7–11 and 13–14.

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56 The question of classification essentially asks whether the scheme should be regarded as a single arrangement or a number of linked arrangements with distinct classes: *Re Codere* at [49], citing *Re Hawk Insurance Co Ltd* [2001] 2 BCLC 480 at [26] (*per* Chadwick LJ). As Lord Millett NPJ explained in *UDL Argos*, where different groups have different rights against a company, the company can be regarded as entering into separate but linked arrangements with those groups. But the company cannot sensibly be regarded as entering into a separate arrangement with every person or group who has different private interests not derived from their rights against the company: at [26] and [27(3)]. That is one reason for distinguishing rights from private interests when classifying creditors: at [26].

57 It is true that Lord Millett NPJ spoke of linked arrangements forming a scheme, not of arrangements outside a scheme but linked to it. That said, the classification test focuses on the ability of creditors to consult together with a view to their common interest; it focuses on the nature of the arrangement and the decision-making process relating to it: *Re Codere* at [49]. As a matter of commercial reality, creditors decide whether to support a scheme by reference to the whole package of rights received for releasing or varying their existing rights: *Re Codere* at [49].

58 Thus, in determining the classification of creditors, the court looks at the scheme not in isolation but in the context of the restructuring as a whole. The court considers any rights conferred or to be conferred in other agreements that are provided for under the terms of the scheme or are conditional on the scheme: *Re Sunbird Business Services Ltd* [2020] EWHC 2860 (Ch) at [23]; *Re Stemcor Trade Finance Ltd* [2016] BCC 194 at [17]–[18]. In contrast, the court does not consider rights that are genuinely independent of the scheme and restructuring in a realistic commercial sense: *Re Codere* at [53]–[54], citing *Re Noble Group*

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Ltd (No 1) [2019] 2 BCLC 505 ("*Re Noble Group*") at [131]–[132] and *Re Telewest Communications plc (No 1)* [2005] 1 BCLC 752 at [54]. If the rights are technically not conditional on the scheme being implemented, but they are commercially part of the same transaction and are highly unlikely to be conferred unless the scheme is implemented, they are relevant to classification: *Re Codere* at [52]. Creditors would otherwise be able to enter into agreements that confer preferential rights without being classed separately, simply by making those agreements technically not conditional on the scheme being implemented: *Re Codere* at [52].

59 Turning first to Allington's interest as a potential investor, I found that its rights under the Term Sheet affected its classification. Although the Term Sheet did not specifically stipulate that Allington's investment was conditional on the New Scheme being implemented, it explained that the investment "[was] being negotiated in order to rescue [DSGL's] business *which is currently being restructured pursuant to the scheme of arrangement* proposed by [the Applicant] under section 71 of the [Act]" [emphasis added].[77] Further, as DSGL was listed on the Singapore Exchange Securities Trading Ltd ("SGX-ST"), the Term Sheet provided that payment would be subject to the removal of DSGL from the watchlist of the SGX-ST.[78]

60 As OCBC argued,[79] the envisaged investment – Allington's acquisition of DSGL as a clean shell listed on the mainboard of the SGX-ST – was effectively conditional on the New Scheme being approved and implemented. The investment was highly unlikely to proceed otherwise. Thus, Allington's

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77 Furler's 3rd OS 429 Affidavit at p 18.

78 Furler's 3rd OS 429 Affidavit at p 20.

79 NEs, 23 July 2021, at p 7, lines 17–18.

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interest as a potential investor was relevant to classification. It was also significant enough to render Allington unable to consult with the other unsecured creditors with a view to their common interest.

61 For completeness, I accepted the Applicant's argument that its role as a rescue financier was irrelevant to its classification. The Applicant argued that not only was its claim as a rescue financier excluded from the New Scheme (see [54] above), but also it received the security in exchange for new money it extended to companies in the DSG Group.[80]

62 Allington's interest in respect of its rescue financing did not arise out of the terms of the New Scheme. Further, in contrast to OCBC's arguments on Allington's potential investment, OCBC did not suggest that the rescue financing was dependent on the New Scheme. OCBC only said that it was not clear that Allington would receive the security if the New Scheme was not approved.[81]

63 OCBC argued that a scheme financier, or more generally a creditor who has both a claim under a scheme as an unsecured creditor and a claim excluded from the scheme, should generally be classed separately from other unsecured creditors.[82] OCBC cited *Re Noble Group* for this proposition.[83] But, as OCBC itself noted,[84] the "excluded claim" of the relevant creditor in *Re Noble Group*, Deutsche Bank, was in fact a claim under the scheme: at [92]. For that reason

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80 Applicant's letter dated 30 July 2021 at para 14(b).

81 NEs, 23 July 2021, at p 7, lines 16–17.

82 OCBC's Submissions at para 58; OCBC's Supplemental Submissions at para 12.

83 OCBC's Submissions at para 58; OCBC's Supplemental Submissions at para 13.

84 OCBC's Supplemental Submissions at para 13.

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the English High Court agreed with the scheme company that Deutsche Bank should be in a class of its own: at [92] and [94]. The scheme conferred different rights upon Deutsche Bank for the "excluded claim", making it impossible for Deutsche Bank to discuss with the other creditors their common interest on the company's proposal to compromise Deutsche Bank's claim: at [93]. The fact that Deutsche Bank would also receive a fee for its rescue financing (at [92]) did not form part of the court's reasons for classing Deutsche Bank separately.

64 OCBC did not argue that Allington's interest as a potential investor, a secured creditor for rescue financing or an assignee prevented Allington from being fairly representative of the class of unsecured creditors. I thus made no finding on that issue. It was also not necessary to decide whether, in light of the Applicant's failure to disclose the purchase price of the assignment, Allington's interest as an assignee affected its classification.

Bona fides *and abuse of process*

65 The *bona fides* of the application was also relevant. The Original Singapore Scheme was not put forward to the court for sanction because of the independent assessor's adjudication of the value of OCBC's claims (see [7] above) and because of OCBC's opposition to the Original Singapore Scheme.[85] So the Applicant's pre-pack application naturally attracted the question whether it was an attempt to sidestep OCBC's opposition. OCBC did not feel apparently that it could impugn the *bona fides* of the application at this point. The VLC Creditors took some issue with *bona fides*, asserting that the voting outcome

[85] Furler's 1st OS 429 Affidavit at paras 36–40.

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was engineered to obtain the court's sanction.[86] But I did not consider that there was sufficient evidence of this. I thus made no finding of any lack of *bona fides*.

66 I note that, as a matter of general principle, it is an implied requirement that the application be clearly made *bona fide*, and not to skirt around opposition. That is why, before sanctioning a scheme under s 210 of the Companies Act, the court should be satisfied that any assignment of debts in the time leading up to the company's financial difficulties was genuine and made at arm's length: *SK Engineering & Construction Co Ltd v Conchubar Aromatics Ltd and another appeal* [2017] 2 SLR 898 at [82]. The same applies to the court's approval under s 71 of the IRDA and to an assignment that occurs during the company's restructuring efforts.

67 It would also be an abuse of process to invoke the court's powers where the applicant must have known that its application was unfounded or not in fulfilment of the statutory requirements. But on the evidence before me, I emphasise that I made no such finding against the Applicant.

Use of the deed poll

68 As for the use of the Deed Poll, the Applicant's evidence was that it executed the Deed Poll to enable the DSG Group to consolidate and implement a compromise for the claims against the Original Debtors through the New Scheme.[87] The use of the Deed Poll was pushing the envelope, but I was of the view that it would at least have passed muster if agreement to the New Scheme had in fact been obtained.

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86 VLC Creditors' Submissions at para 34.

87 Furler's 1st OS 429 Affidavit at para 42.

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69 According to OCBC, the Applicant failed to show that the liabilities of the companies in the DSG Group should be consolidated or pooled into one entity.[88] Citing US cases on substantive consolidation and Australian cases on the pooling of assets and liabilities, OCBC distilled several conditions to be met before the court will consolidate or pool assets or liabilities of companies in a corporate group in an insolvency or debt restructuring process.[89]

70 None of the cases cited by OCBC concerned a scheme of arrangement. *Re Ansett Australia Ltd (ACN 004 209 410) and Others* [2006] 56 ACSR 718 concerned a deed of compromise in an administration; *Re ACN 004 987 866 Pty Ltd (formerly Hilton's Stores Pty Ltd)* (2003) 21 ACLC 1474, deeds of company arrangement in an administration; and *In re Owens Corning* 419 F 3d 195 (3rd Cir, 2005), reorganisation under Chapter 11 of the US Bankruptcy Code.

71 In contrast, the authorities cited by the Applicant were more on point as they concerned deed polls in schemes of arrangement, albeit at the leave stage rather than the sanction stage of the scheme process. In *Re Gategroup Guarantee Ltd* [2021] EWHC 304 (Ch) ("*Re Gategroup*"), the group of companies caused the scheme company to be incorporated. The scheme company then executed a deed poll to create a co-obligor structure. Noting that the artificiality of the structure was relevant to the court exercising its discretion to sanction the scheme (at [171]), the English High Court contrasted two possible situations. First, the structure would be objectionable where it "unfairly overrode legitimate interests of creditors pursuant to the contracts governing their relationship with the primary obligor companies" or under the system of law applicable to their relationship: at [171]. Second, the artificiality of the

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88 OCBC's Supplemental Submissions at para 57.

89 OCBC's Supplemental Submissions at para 47.

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structure would not deprive the court of jurisdiction to sanction the scheme "where the artificial structure is the only solution to enable a restructuring to be effected, all other possible alternatives having been explored and rejected for one or other reason of law or practicability; where the alternative is a value-destructive liquidation; and where the terms of the restructuring demonstrably benefit the affected creditors": at [174] and [176]. Similarly, in the earlier case of *Re AI Scheme Ltd* [2015] EWHC 1233 (Ch) ("*Re AI*"), the court was satisfied that it had jurisdiction. The structure had not been created as a matter of mere artifice but rather was grounded in commercial necessity: at [26].

72 The Applicant's use of the Deed Poll was less artificial than the structures in *Re Gategroup* and *Re AI*, where the scheme companies were incorporated for the purpose of becoming co-obligors. As the Applicant pointed out,[90] it was itself an Original Debtor.

73 More importantly, similar to *Re Gategroup*, the scheme manager had explored alternatives to the New Scheme, including refinancing and sale of the DSG Group's business, and found them "practicably unachievable and not feasible".[91] Further, an insolvent liquidation of the Original Debtors would, according to the scheme manager's analysis, result in the creditors recovering between 0.0 cents and 1.54 cents on the dollar, in contrast to the average expected recovery under the New Scheme of 4.90 cents on the dollar.[92] I therefore accepted the Applicant's submission[93] that the DSG Group's use of

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90 Applicant's Supplemental Submissions at para 32.

91 Furler's 1st OS 429 Affidavit at para 54.

92 Furler's 1st OS 429 Affidavit at para 51.

93 Applicant's Supplemental Submissions at para 30.

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the deed poll structure was not in itself a basis for declining to approve the New Scheme.

Conclusion

74 Because the Applicant did not disclose the purchase price that Allington paid under the Debt Sale, and because the statutory majority requirements were not satisfied upon classifying the creditors properly, the application was dismissed.

Aedit Abdullah
Judge of the High Court

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Smitha Menon and Lorraine Koh (WongPartnership LLP) for the non-party Hongkong & Shanghai Banking Corp Ltd;
Sancia Ng (Tito Isaac & Co LLP) for the non-party Edgar Ramani (watching brief);
Kenneth Lim (Helmsman LLC) for the non-party MQ Communications Pte Ltd (watching brief).

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