The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd
[2008] SGCA 18

Case Number : CA 136/2007

Decision Date : 21 April 2008

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : N Sreenivasan and Palaniappan Sundararaj (Straits Law Practice LLC) for the appellant; Balakrishnan Ashok Kumar, Kevin Kwek and Margaret Ling (Allen & Gledhill LLP) for the respondent

Parties : The Oriental Insurance Co Ltd — Reliance National Asia Re Pte Ltd

Civil Procedure – Extension of time – Failure to file proof of debt in time – Creditor's claim deemed zero – Factors that court considers in deciding whether to grant extension of time – Whether court having jurisdiction to grant extension of time under O 3 r 4 Rules of Court (Cap 322, R 5, 2006 Rev Ed) to creditor to file its proof of debt after court sanctioned scheme – Whether extension of time should be granted to creditor to file proof of debt

Companies – Schemes of arrangement – Nature of schemes of arrangement – Legislative history and purpose of s 210 Companies Act (Cap 50, 2006 Rev Ed) – Established principles governing schemes of arrangement – Extension of time for filing proof of debt in relation to schemes of arrangement – Factors that court considers in deciding whether to grant extension of time – Failure to file proof of debt in time – Creditor's claim deemed zero – Whether court having jurisdiction to grant extension of time under O 3 r 4 Rules of Court (Cap 322, R 5, 2006 Rev Ed) or s 392(4)(d) Companies Act (Cap 50, 2006 Rev Ed) to creditor to file proof of debt after court sanctioned scheme – Whether scheme of arrangement operating as statutory contract or order of court – Whether extension of time to file proof of debt a matter of procedure or material alteration of scheme – Whether extension of time should be granted to creditor to file proof of debt – Whether prejudice caused to company, other parties to scheme or creditor seeking extension of time – Whether creditor seeking extension of time to be blamed for failure to file proof of debt in time

21 April 2008

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

Introduction

1 This appeal raised an interesting but rather narrow point of law, *viz*, whether the court retains a residual jurisdiction to extend the time for a creditor to file its proof of debt *after* the court has approved a scheme of arrangement pursuant to s 210 of the Companies Act (Cap 50, 2006 Rev Ed). The judge in the court below ("the Judge") answered this question in the negative (see *Re Reliance National Asia Re Pte Ltd* [2008] 1 SLR 569 ("the GD") at [2]). She then dismissed the application of the appellant, Oriental Insurance Co Ltd ("Oriental"), for a three-week extension of time to file its proof of debt pursuant to the scheme of compromise and arrangement entered into between the respondent, Reliance National Asia Re Pte Ltd ("Reliance"), and its creditors including Oriental ("the Scheme").

2 The Judge's decision effectively meant that Oriental was prevented from recovering any portion of its outstanding claim of approximately US$20m from Reliance. Oriental appealed against the Judge's decision. We allowed Oriental's appeal and now give the detailed reasons for our decision.

The facts

Events leading up to the Scheme

3 Reliance was incorporated locally in July 1996 and was in the business of undertaking general insurance. At its inception, Reliance was a fully-owned subsidiary of Reliance Insurance Company ("RIC"), a company incorporated in the US. RIC ran into financial difficulties in 2000, and its financial frailty affected Reliance's operations, rendering it no longer feasible for Reliance to continue business. As a consequence, Reliance's management decided that the best commercial option would be to enter into a voluntary run-off of the company. This was initiated in April 2001 (see the GD at [3]).

4 Subsequently, Whittington Investment Guernsey Ltd ("WIG") acquired the entire share capital of Reliance sometime in 2004. As the run-off proved to be both costly and time-consuming, Reliance, under its new ownership, decided that the most efficient and effective method of settlement with its creditors would be the implementation of a solvent scheme of arrangement (in the form of the Scheme) under s 210 of the Companies Act. Whittington Asia Pacific Pte Ltd, a company alleged by Oriental (and which appears) to be a wholly-owned subsidiary of WIG, was duty appointed as the scheme manager having conduct of the Scheme ("the Scheme Manager"). It appears from para 1.7 of the explanatory statement to the Scheme ("the Explanatory Statement"), which is reproduced at [7] below, that the acquisition of Reliance by WIG in 2004 was motivated by business considerations, namely, an expedient conclusion of the run-off by means of the Scheme. According to Reliance, the Scheme would have the advantage of concluding the run-off of Reliance's business much earlier than would be the case if the run-off were to continue until all claims from Reliance's creditors (referred to as "Scheme Creditors" in these grounds of decision) had materialised and had been agreed to and paid in the normal course of business (see the GD at [4]).

5 To implement the Scheme, Reliance sent a letter dated 18 November 2005 to all the Scheme Creditors, including Oriental (an insurance company incorporated in India and wholly-owned by the Indian government), informing them about and seeking their support of the Scheme. The letter was sent to Oriental's general address at A-25/27, Asaf Ali Road, New Delhi 110002, India ("the General Address").

6 Pursuant to s 210(1) of the Companies Act, Reliance applied on 19 May 2006 to the High Court for permission to convene a creditors' meeting. By an order of court dated 2 June 2006, a meeting of the Scheme Creditors ("the Court Meeting") was ordered to be convened to consider whether the Scheme should be approved. On 16 June 2006, Reliance sent the notice of the Court Meeting (which was to be held on 26 September 2006), the Explanatory Statement and the documents setting out the terms and conditions of the Scheme ("the Scheme of Compromise and Arrangement") to Oriental at the General Address. The proxy form, voting form and a specimen proof of debt form were also bound together with the above documents (collectively, all the documents sent to the Scheme Creditors, including Oriental, will be referred to as "the Scheme Documents"). It was not disputed that Oriental received the Scheme Documents (see the GD at [7]).

Key provisions of the Scheme Documents

7 For the purposes of this appeal, we think it would be helpful to set out some of the salient provisions of the Scheme Documents, particularly those relating to the purpose of the Scheme, the filing of proofs of debt by Scheme Creditors and the payment of Scheme Creditors' claims ("Scheme Claims"). Paragraph 1.7 of the Explanatory Statement explained that the objectives of the Scheme were to *conclude the run-off of Reliance's business earlier* than would be the case if the run-off were to continue until all Scheme Claims had materialised and had been agreed to and paid, as well as to make *full payment* to all the Scheme Creditors:

1.7 REASONS FOR SCHEME AND FOR SCHEME CREDITORS TO APPROVE THE SCHEME

…

The Company [*ie*, Reliance] does not expect the run-off of the Company's business to be completed for many years and as a result believes that a Scheme of Arrangement should be the most efficient and effective method of making *full payments* to Scheme Creditors in the shortest practicable time. *A Scheme will have the effect of concluding the run-off of the Company's business earlier than would be the case if it were to continue until all claims had materialised and had been agreed and paid in the normal course*.

The aim of the acquisition of the Company by WIG was for WIG to conclude the run-off by use of a *solvent scheme of arrangement, which is intended to cover all creditors of the Company*. If the Company were unable to promote the Scheme, the costs of maintaining the run-off would be disproportionate and it is likely that the Company would explore other alternative methods of putting a close to the Company's business, such as by a solvent liquidation.

[emphasis added]

Similarly, cl 2.1 of the Scheme of Compromise and Arrangement emphasised:

The primary purpose of the Scheme is to *conclude the run-off of the Company's business earlier than it would have been [concluded] in the normal course* by accelerating where necessary and providing a mechanism for payment of *all* Scheme Claims. To achieve such purpose, the Scheme establishes mechanisms by which all Scheme Claims (present and future) shall be ascertained and thereupon *paid in full*. [emphasis added]

8 In relation to the Scheme's objective of paying all the Scheme Creditors in full, para 1.6 of the Explanatory Statement set out the financial position of Reliance and explained that, based on the company's audited accounts as at 31 December 2005, Reliance had sufficient assets to meet all the Scheme Claims:

1.6 FINANCIAL POSITION OF THE COMPANY

1.6.1 The audited balance sheet of the Company for the year ended 31 December 2005 shows the Company to be *solvent with assets of S$36,861,203 and liabilities of S$28,062,270, with a net asset value of S$8,798,933*. ...

1.6.2 The net asset value as at 31 December 2004 was S$11,390,701, while the net asset value as at 31 December 2005 was S$8,798,933. *There has been no material change in the financial position of the Company since 31 December 2005*.

1.6.3 Out of the total assets of S$36,861,203 (for the year ended 31 December 2005), the Company has cash and investments of S$27,208,416, and insurance and reinsurance assets worth S$8,361,398.

1.6.4 Out of the total liabilities of S$28,062,270 (for the year ended 31 December 2005), the Company estimates that S$730,595 are non Scheme Liabilities. *The Scheme Liabilities as at 31 December 2005 amount to S$27,331,675*, of which, S$3,423,465 represents outstanding claims (agreed but as yet unpaid), S$16,061,000 represents loss reserves and Incurred But Not Reported ("IBNR") claims, and S$7,847,210 represents amounts owing to retrocessionaires.

[emphasis added]

As Reliance (as at 31 December 2005) had assets of $36,861,203 and liabilities of $28,062,270, of which an estimated $27,331,675 consisted of "Scheme Liabilities", the Scheme was (and remains) a *solvent* scheme of arrangement whereby all the Scheme Creditors would be paid in full. In fact, para 1.7 of the Explanatory Statement (see [7] above) unequivocally described the Scheme as "a *solvent* scheme of arrangement, which [was] intended to cover *all* creditors of the Company" [emphasis added].

9 As for how and when payments under the Scheme were to be effected, para 2.2.1 of the Explanatory Statement provided as follows:

> **2.2.1 Payment under the Scheme**
>
> (a) The Company shall pay or procure to be paid to each Scheme Creditor, *who has delivered a Proof of Debt to the Scheme Manager at the Specified Address on or before 14 May 2007*, an amount in the Reference Currency equal to [its] Approved Scheme Claim. Payment to the Scheme Creditors in respect of their Approved Scheme Claims shall only be made by the Company after all Scheme Claims have been determined by the Scheme Manager and all Disputed Claims have been adjudicated by the Independent Adjudicator. …
>
> (b) *In the event that any Scheme Creditor fails to submit a Proof of Debt to the Scheme Manager at the Specified Address by the Claims Cut-Off [D]ate, that Scheme Creditor shall not be entitled to any payment of his Scheme Claim with effect from the Claims Cut-Off Date, and:*
>
> (i) *the Company shall be completely and absolutely released and discharged from all claims, obligations and liabilities* (whether actual, contingent or otherwise) *and indebtedness* (whether as principal debtor or surety) *of the Company to that Scheme Creditor* whatsoever and howsoever arising out of or in connection with any and all agreements, transactions, dealings and matters effected or entered into or occurring at any time prior to the Court Meeting Date (including but not limited to the Scheme Claims of such Scheme Creditor);
>
> (ii) that Scheme Creditor shall, if called upon so to do, execute and deliver to the Company such forms of release and discharge thereof on such terms as the Company may reasonably require; and
>
> (iii) that Scheme Creditor shall forthwith, and in any event at the request of the Company discontinue and terminate, without any order as to costs, any and all legal proceedings commenced by it against the Company in any jurisdiction for or in this connection.

[emphasis added]

Thus, in order to receive payment under the Scheme, the Scheme Creditors had to file their proofs of debt on or before the claims cut-off date ("the Claims Cut-Off Date"), which was stated to be 14 May 2007 in the table of "Key Dates and Expected Timetable" in the Explanatory Statement. Paragraph 3.3.2 of the Explanatory Statement further explained that the effect of lodging a proof of debt after the Claims Cut-Off Date was that the particular Scheme Creditor's claim would be *deemed to be zero in value*:

> **3.3.2 Lodgement After Claims Cut-Off Date**

Any Proofs of Debt received by the Scheme Manager after the Claims Cut-Off Date *shall not be admitted by the Scheme Manager* for the purpose of the Scheme.

If any Scheme Creditor fails to submit [its] Proof of Debt by the Claims Cut-Off Date, that Scheme Creditor's Scheme Claim *will be valued at zero*.

[emphasis added]

10 Similarly, cl 3 of the Scheme of Compromise and Arrangement reiterated:

3. Proof of Debt and Barring of Claims

3.1 For the purpose of seeking payment in respect of a Scheme Claim, each Scheme Creditor of the Company shall, *no later than the Claims Cut-Off Date*, submit to the Scheme Manager at the Specified Address, a Proof of Debt relating to that Scheme Creditor's Scheme Claims.

3.2 The value of all Scheme Claims of any Scheme Creditor who fails to submit a Proof of Debt on or before the Claims Cut-Off Date *shall be deemed to be zero*. For the avoidance of doubt, and as an independent stipulation, in such a situation, the relevant Scheme Creditor shall be bound by the terms of the Scheme.

[emphasis added]

In the Scheme of Compromise and Arrangement, the Claims Cut-Off Date was likewise defined in cl 1 as 14 May 2007.

Events after Oriental received the Scheme Documents

11 After receiving the Scheme Documents, Oriental completed the voting form and the proxy form and sent them to Reliance on 15 September 2006, requesting that the latter attend the Court Meeting on its behalf. Oriental voted in favour of the Scheme and appointed the chairman of the Court Meeting as its proxy.

12 At the Court Meeting (which was held on 26 September 2006), a majority in number and a majority of three-fourths in value of the Scheme Creditors, voting either in person or by proxy, voted in favour of the Scheme. Reliance then applied to the High Court on 17 October 2006 for the Scheme to be sanctioned.

13 Subsequently, Reliance sent a letter dated 18 October 2006 to Oriental at the General Address, addressed to Mr S L Mohan ("Mr Mohan"), who was known to Reliance as a senior executive of Oriental. This letter notified Oriental that Reliance had applied to the High Court for the Scheme to be sanctioned. A copy of the notice of hearing for that application, which was to be heard on 7 November 2006 at 10.00am, was also enclosed with the letter.

14 On 7 November 2006, the High Court sanctioned the Scheme. Reliance subsequently wrote to Oriental on 14 November 2006 and informed it of this development. The letter was again sent to the General Address and addressed to Mr Mohan. The letter further informed Oriental that the Scheme was now effective and reminded Oriental to file its proof of debt by 14 May 2007 (*ie*, the Claims Cut-Off Date):

[T]he High Court of the Republic of Singapore ha[s] at the hearing this morning sanctioned the

Scheme under Section 210 of the Companies Act (Chapter 50).

Accordingly, the Scheme is now effective and applies to all Scheme Creditors regardless of whether and how they voted at the Court Meeting. Steps will now be taken to implement the terms of the Scheme.

You should note that, under the terms of the Scheme, all Scheme Creditors will have to file their Proofs of Debt to the Scheme [Manager], namely Whittington Asia Pacific Pte Ltd at the Specified Address (i.e. 1 George Street, #16-03 One George Street, Singapore 049145) by the Claims Cut-Off Date, ie. by **14 May 2007**. A copy of the Proof of Debt form is enclosed for your necessary action.

[emphasis in bold in original]

The proof of debt form mentioned in the above quotation contained specific instructions on how the form was to be completed. The instructions specifically stated, *inter alia*, that:

The deadline for submitting completed Proof of Debt Forms is the Claims Cut-Off Date, being 12.00 midnight Singapore time on **14 May 2007** ... Returned Proof of Debt Forms must reach the Scheme Manager on or before this date. If a Scheme Creditor does not complete and return a Proof of Debt Form to the Scheme Manager by the Claims Cut-Off Date, that Scheme Creditor's Scheme Claims shall be deemed to be zero.

[underlining and emphasis in bold in original]

15 Oriental alleged that it did not receive both the letter of 18 October 2006 and that of 14 November 2006. It contended that:

(a) The letters had not been sent to the address provided in its completed voting form and completed proxy form.

(b) The letters were addressed to Mr Mohan, who had retired from Oriental in February 2005. In this regard, Oriental pointed out that as it had a very large workforce of some 16,000 employees and 1,000 offices all over India, letters that were not addressed to the correct individuals might go missing.

16 After November 2006, Reliance sent a further six e-mails to Oriental to remind the latter to submit its proof of debt before the Claims Cut-Off Date. These e-mails were sent to two different e-mail addresses, as follows:

(a) The first three e-mails were sent to the e-mail address "oic@oriental.nic.in" on 11 January 2007, 13 February 2007 and 13 March 2007 respectively, and a copy of the proof of debt form was attached to each of the e-mails. Reliance had apparently obtained this email address from what it described as "the Insurance Directory of Asia 2004/2005"[note: 1]. Oriental contended that it had not received these e-mails as the e-mail address "oic@oriental.nic.in" had been terminated as early as 1 April 2005.

(b) The later three e-mails were addressed specifically to Mr M K Jindal ("Mr Jindal"), who had been identified in Oriental's completed voting form as Oriental's "Dy. General Manager (Technical)". These e-mails were sent on 11 April 2007, 2 May 2007 and 10 May 2007 respectively to the e-mail address "mkjindal@orientalinsurance.co.in", which was likewise

obtained from Oriental's completed voting form. Once again, a copy of the proof of debt form was attached to each of the e-mails. Oriental maintained that Mr Jindal had not received those e-mails.

17 Reliance also alleged that it had tried to contact Oriental on 11 May 2007 twice via the fax number listed in Oriental's letter dated 15 September 2006 enclosing Oriental's completed proxy form and completed voting form. Both attempts were, however, unsuccessful.

18 Sometime in July 2007, Oriental was informed by the Indian Insurance Regulatory Authority (which had earlier been notified by the Monetary Authority of Singapore) that it had failed to file its proof of debt in time. On being apprised of this, Oriental immediately sent a letter on 16 July 2007 to Reliance seeking confirmation of the status of its monetary claim. Reliance replied on 18 July 2007 stating that as Oriental had failed to submit its proof of debt by the Claims Cut-Off Date, its claim of US$19,031,656 had been deemed to be of zero value (see the GD at [19]).

19 Oriental then applied on 4 September 2007, under O 3 r 4 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), for a three-week extension of time to file its proof of debt under the Scheme (see the GD at [20]). Order 3 r 4 provides as follows:

> **Extension, etc., of time (O. 3, r. 4)**
>
> **4.**—(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these Rules or by any judgment, *order* or direction, to do *any act* in *any proceedings*.
>
> (2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.
>
> (3) The period within which a person is required by these Rules, or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose, unless the Court specifies otherwise.
>
> (4) In this Rule, references to the Court shall be construed as including references to the Court of Appeal.
>
> (5) Paragraph (3) shall not apply to the period within which any action or matter is required to be set down for trial or hearing or within which any notice of appeal is required to be filed.
>
> [emphasis added]

The decision below

20 Oriental's application for an extension of time was dismissed by the Judge. The Judge held that the sole issue before her was whether the court had jurisdiction to extend the time for a creditor to file its proof of debt after the court had approved a scheme of arrangement (see the GD at [2]), and she was of the view that, although this issue was a relatively narrowly-defined one, it had to be analysed "within the entire framework of principles and procedures that govern[ed] compromises and schemes of arrangements" (*id* at [22]). The Judge observed that the answer to the question turned on the nature of schemes of arrangement, and that there was "some controversy as to whether a scheme of arrangement derived its efficacy from an order of court, or from the statute" (*id* at [27]),

given that the two jurisdictions from which s 210 of the Companies Act was derived (namely, the UK and Australia) had adopted radically different solutions to the same conundrum (*id* at [28]–[31]).

21 The English approach (which will be considered in greater detail at [48]–[52] below), as embodied in the Privy Council decision of *Kempe v Ambassador Insurance Co* [1998] 1 WLR 271 ("*Kempe*"), takes the position that a scheme of arrangement which has been approved by the requisite majority of the company's creditors derives its efficacy purely from statute and therefore operates as a statutory contract. Thus, save in cases of obvious mistakes in the documents setting out the scheme or fraud (where the court has inherent jurisdiction to make amendments to the scheme), once a scheme of arrangement has been approved by the necessary majority and sanctioned by the court, the court has no jurisdiction to make any substantive alterations to the scheme, including extending the time for creditors to file their proofs of debt pursuant to the scheme. In contrast, the Australian approach (considered at [53]–[56] below) takes the position that a scheme of arrangement derives its efficacy from the order of court approving the scheme and in fact operates as an order of court. A court has inherent jurisdiction to vary its own orders. In any case, in our local context, O 3 r 4(1) of the Rules of Court (reproduced at [19] above), which provides that the court may by order "extend … the period within which a person is required or authorised by … any … *order* … to do *any act* in *any proceedings*" [emphasis added], would permit the court (after it has approved a scheme of arrangement) to grant a creditor an extension of time to file its proof of debt.

22 After assessing both approaches, the Judge regarded the English approach as the more persuasive one and accordingly adopted it. She held (see the GD at [32]):

> ***In my view, the English position is more persuasive than the Australian one and I therefore adopted it in this case. At the very core of every sanctioned scheme lies a statutory contract of compromise that fully-informed creditors have agreed to***. The statutory provision exists primarily to overcome the impossibility of obtaining the individual consent of each and every member. Theoretically speaking, it is not impossible for such a scheme to be effective even *without* the court's sanction if the company and *all* its creditors agreed to the proposal, *ie*, there were no dissentients. The scheme then operates purely by way of contract. Of course, in reality, this is rarely achievable (especially in big companies), but ***the point is that the sanction of the court adds no magic to the scheme, other than to bind dissentient members to a scheme which the court accepts as fair and reasonable***. … [W]here the statutory requirements have been satisfied, the discretion of the court in deciding whether to sanction the scheme is limited. ***In this sense, one can view the source of efficacy of the scheme as the statutory provisions, and not, strictly speaking, the court order sanctioning the scheme***. This is, of course, not to detract from the fact that the court retains an ***inherent jurisdiction*** to correct any obvious errors in the scheme ... [emphasis added in bold italics].

23 The Judge then considered the limited circumstances where a scheme of arrangement *which had already been approved by the court* ("court-approved scheme") could be amended through the exercise of the court's inherent jurisdiction. She opined that an extension of a time limit set out in such a scheme was a "material alteration" (see [38] of the GD, quoting from *Kempe* at 276) and, therefore, the court had no jurisdiction to make such an alteration. The Judge's reasoning was as follows (see the GD at [38] and [40]):

> 38 Once a scheme of arrangement has been sanctioned and registered, it may only be amended in *very limited circumstances*. This is effected through the exercise of the court's inherent jurisdiction. ***Thus, a court-sanctioned scheme may be set aside where consent to it has been obtained by fraud (Fletcher v Royal Automobile Club Ltd [2000] 1 BCLC 331), or***

where there are any "obvious mistakes" in the document (Kempe at 276). The general principle, however, is that the court cannot alter the *substance* of the scheme and impose upon creditors arrangements to which they did not agree (*Kempe* at 276). ***It has been held that an amendment to time limits set out in a scheme constitutes a "material alternation"*** (*Kempe* at … 276) and an "amendment of substance" (*In Re Forklift Sales (SA) Pty Ltd* (1972) 3 SASR 21 at 25 …).

…

4 0 ***In my view, this proposition is in tandem with the principle that the court has no jurisdiction to alter the substance of the scheme and impose upon creditors an arrangement to which they had not agreed***. The s 210 procedure would need to be adhered to rigorously in any application for amendment to schemes of arrangement and the safeguards therein would ensure that terms to which the majority of the creditors do not agree will not be imposed on them – the original scheme is amended by the creditors, *not* by the court. Even then, the court is naturally reluctant to reopen [creditors'] rights and obligations: *Re Elliott's* [*MF Services Pty Ltd* [1965] VR 756] (at 757). ***This strengthens the view that a scheme of arrangement should be viewed as a statutory contract the terms of which have been agreed to by the parties rather than imposed on them by an order of court***. Where the amendments sought are material or substantial, the court has no jurisdiction to grant such amendments and thereby impose on creditors something which they had not considered or agreed to.

[emphasis added in bold italics]

24 The Judge concluded by noting (at [41] of the GD):

The basis on which Oriental sought an extension of time was O 3 r 4 of the Rules of Court ... As I accepted the English position enunciated in *Kempe*, and this was not a case of fraud or obvious mistake, I found that there was no jurisdiction to grant such an extension of time.

25 In arriving at her decision, the Judge (as mentioned at [20] above) considered at some length certain established principles relating to schemes of arrangement (which will be discussed at [42]–[46] below), and was of the opinion that these principles supported and were consistent with the position adopted in *Kempe* (see the GD at [36] and [40]). The Judge also took pains to stress that "[t]he overarching principle here [*ie*, in the case of a court-approved scheme] is one of *clarity*, *certainty* and *finality*, without which a scheme of arrangement cannot be efficaciously implemented" [emphasis added] (see the GD at [25]), and it appeared that this was one of the main reasons which persuaded her to adopt the English approach as laid down in *Kempe*. She stated (at [44] of the GD):

… I was of the view that there would be serious repercussions if this application [by Oriental for an extension of time to file its proof of debt] was allowed, not only for Reliance, but also for future schemes of arrangement. *The most weighty consequence is that the certainty, efficacy and finality of schemes such as the present would be severely compromised*. If, on the facts of the present case, an application to extend time had been granted, the threshold for future creditors to seek an extension of time would be very low. There will then be no certainty and finality in a scheme such as the present because every time a creditor obtain[s] an extension of time, all the claims will have to be re-adjudicated. Much delay, which would be prejudicial to the scheme, will also ensue. This will be further complicated if, for example, interim dividends have already been paid out under the scheme, such as in *Kempe*. In fact, counsel for Reliance informed the court at the hearing that, were this application to be allowed, the entire scheme might have

to be abandoned. This was in the light of the very nature and object of the Scheme, *viz,* to adjudicate and settle all claims more expeditiously than would be the case if Reliance continued to be in run-off. *In complex commercial arrangements such as the present where parties are legally advised and are fully informed, I am of the view that … the court should lean towards certainty as this is the course that is fairest and of most benefit to scheme creditors taken as a whole*. [emphasis added].

The parties' arguments on appeal

26 In the present appeal, the crux of Oriental's case was simply that "[the Judge] erred in accepting the English authorities, and that the correct approach in law [was] the approach taken by the Australian courts … that the scheme [of arrangement was] essentially an order of court".[note: 2] Oriental contended that if the decision in *Kempe* ([21] *supra*) were to be accepted as laying down the general proposition of law, then the court would become *functus officio* the moment it approved a scheme of arrangement. Such a sterile approach, it was submitted, could lead to manifest injustice. In contrast, Reliance, reiterating the reasons given by the Judge in the GD for adopting the approach in *Kempe*, submitted that there were "compelling reasons"[note: 3] for adopting that approach. Reliance also submitted that in *Daewoo Singapore Pte Ltd v CEL Tractors Pte Ltd* [2001] 4 SLR 35 ("*Daewoo*"), a case which we will deal with in greater detail at [58]–[59] below, "[t]he Singapore Court of Appeal ha[d] *affirmed* that a scheme of arrangement [was] a *statutory contract* entered into between the company and scheme creditors"[note: 4] [emphasis added].

27 At the hearing before us, counsel for Oriental, Mr N Sreenivasan ("Mr Sreenivasan"), sought leave (which we granted) to introduce a new legal argument which had not been raised either in the court below or in Oriental's written case for this appeal and which had been made for the first time only in Oriental's written skeletal submissions for this appeal. This argument[note: 5] was premised on s 392(4)(*d*) of the Companies Act. Oriental submitted that s 392(4)(*d*) gave the court the jurisdiction to grant an extension of time for, *inter alia*, creditors to file their proofs of debt under a scheme of arrangement, and thus afforded an alternative ground to the Rules of Court (if the Australian approach were adopted), *independent of the nature of schemes of arrangement*, for this court to allow Oriental's application for an extension of time. As this argument concerned purely a point of law, and as adequate notice had been given to Reliance's counsel, we gave leave to Mr Sreenivasan to raise this new argument before this court.

The issues on appeal

28 The main issue for our determination was whether the court had jurisdiction, be it pursuant to O 3 r 4 of the Rules of Court (if the Australian approach were adopted) or s 392(4)(*d*) of the Companies Act, to extend the time for a creditor to file its proof of debt in respect of a court-approved scheme. An affirmative answer to this main issue would raise the corollary issue of whether an extension of time should be granted to Oriental on the facts of the present case. We should perhaps point out at this juncture, for the sake of clarity, that in respect of the main issue, the word "jurisdiction" is used in these grounds of decision in the sense of "power" to denote jurisdictional power (see *Ng Swee Lang v Sassoon Samuel Bernard* [2008] SGCA 7 ("*Ng Swee Lang*") at [26]), and not in the strict sense of the authority of the court to hear and determine a dispute brought before it (which was the meaning adopted in *Muhd Munir v Noor Hidah* [1990] SLR 999 ("*Muhd Munir*") at 1007, [9]). In *Ng Swee Lang*, Chan Sek Keong CJ illustrated the concept of "jurisdiction" as jurisdictional power with the following example (at [26]):

> [W]hen the court says that it has no jurisdiction to issue a Mareva injunction in aid of a foreign arbitration, it does not mean that the court does not have the authority to hear applications for

Mareva injunctions in respect of pending or ongoing foreign arbitration. What it means, instead, is that that kind of injunction is not a relief which the court has jurisdiction (in the sense of jurisdictional power) or power to grant in the context concerned.

In the present appeal, it appears that the parties have, in their submissions before this court and in the court below, used the word "jurisdiction" interchangeably with "power". There is no doubt a distinction between "jurisdiction" (in the strict sense) and "power" (see *Muhd Munir* at 1007, [9] for an elucidation of the distinction between the two), but, for the purposes of this appeal, we wish to make it clear that the word "jurisdiction" is employed in the sense of jurisdictional power, and we believe that this is what the parties meant as well by their use of this term in their submissions.

Whether the court has jurisdiction to extend the time for filing proofs of debt in respect of a court-approved scheme

29 The question of the court's jurisdiction to extend the time (either pursuant to O 3 r 4 of the Rules of Court or s 392(4)(*d*) of the Companies Act) for a creditor to file its proof of debt after the court has approved of a scheme of arrangement under s 210 of the Companies Act appears to be before the local courts for the first time; thus, the Judge quite rightly considered, at some length, the established principles in relation to schemes of arrangement before coming to her decision (see [20] and [25] above). We note, further, that whether or not the court can extend time in this context pursuant to the Rules of Court (as opposed to s 392(4)(*d*) of the Companies Act) depends on the nature of schemes of arrangement, *viz*, whether they operate as statutory contracts or as orders of court.

30 We agreed with the Judge that the above issues had to be resolved in the context of the established principles relating to and the nature of schemes of arrangement. In addition, we were of the opinion that it was equally important to give due consideration to the legislative history and purpose of s 210 of the Companies Act. It would therefore be useful here for us to first examine the statutory context of s 210 before considering some of the established principles in relation to schemes of arrangement.

Legislative history and purpose of section 210 of the Companies Act

Legislative history

31 Section 210 of the Companies Act, which governs compromises and schemes of arrangements in Singapore, provides as follows:

> **Power to compromise with creditors and members**
>
> **210.**—(1) Where a compromise or [an] arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors or of the members of the company or class of members to be summoned in such manner as the Court directs.
>
> (2) A meeting held pursuant to an order of the Court made under subsection (1) may be adjourned from time to time if the resolution for adjournment is approved by a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members present and voting either in person or by proxy at the meeting.

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

…

(4) Subject to subsection (4A) [which is not relevant to the present appeal], *the Court may grant its approval to a compromise or [an] arrangement subject to such alterations or conditions as it thinks just*.

…

(5) An order under subsection (3) shall have no effect until a copy of the order is lodged with the Registrar [of Companies], and upon being so lodged, the order shall take effect on and from the date of lodgment or such earlier date as the Court may determine and as may be specified in the order.

…

(11) In this section —

"arrangement" includes a reorganisation of the share capital of a company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both these methods;

"company" means any corporation or society liable to be wound up under this Act.

[emphasis added]

32 Section 210 of the Companies Act originally appeared as s 176 of the Companies Act 1967 (Act 42 of 1967) ("the 1967 Act"), which was Singapore's first piece of companies legislation. Save for the renumbering of s 176 of the 1967 Act as s 210 in the Companies Act (Cap 50, 1985 Rev Ed) and the amendments made to s 210 of the Companies Act in 2007 via ss 65(*b*)–65(*d*) of the Banking (Amendment) Act 2007 (Act 1 of 2007) (these changes, which consisted of the insertion of ss 210(3A) and 210(4A) as well as the addition of the opening words "[s]ubject to subsection 4A" to s 210(4), are immaterial for the purposes of this appeal), s 210 has remained (substantially) more or less the same over the years.

33 As indicated by the Companies Bill 1966 (Bill 20 of 1966), s 176 of the 1967 Act was based on both s 206 of the Companies Act 1948 (c 38) (UK) and s 181 of the Companies Act 1961 of Victoria, Australia (see also Walter Woon, *Butterworths' Annotated Statutes of Singapore: Companies and Securities* vol 1 (Butterworths Asia, 1997 issue) ("*Butterworths' Annotated Statutes*") at p 588). Presently, s 210 of the Companies Act is substantially similar to s 425 of the Companies Act 1985 (c 6) (UK) ("the 1985 UK Companies Act"). (With effect from 6 April 2008, s 895 of the Companies Act 2006 (c 46) (UK) replaced s 425 of the 1985 UK Companies Act ("the UK s 425"): see *Boyle & Birds' Company Law* (John Birds *et al* eds) (Jordans, 6th Ed, 2007) at p 819.) Section 210 of the Companies Act is also substantively *in pari materia* with s 411 of the Corporations Act 2001 (Cth) ("the 2001

Australian Corporations Act") (see *Butterworths' Annotated Statutes* at p 588; see also the GD at [21]). Given the similarities between s 210 of the Companies Act on the one hand and the UK s 425 and s 411 of the 2001 Australian Corporations Act ("the Australian s 411") on the other, the English and the Australian cases on the respective provisions are instructive.

34 Although the Australian s 411 has its origins in UK legislation (see H A J Ford, R P Austin & I M Ramsay, *Ford's Principles of Corporations Law* (Butterworths, Looseleaf Ed, 1995) ("*Ford*") at vol 2, para 24.050 (June 2007 release)), the wording of this provision in its present-day form is quite different from that of its UK counterpart; both provisions, however, provide substantially the same mechanism for setting up a scheme of arrangement. Section 210 of the Companies Act appears to be a *hybrid* of both the UK and the Australian provisions as it uses language found in both provisions. For purposes of comparison, we set out the salient subsections of the UK s 425 and the Australian s 411 below.

35 The UK s 425 states as follows:

> **Power of company to compromise with creditors and members**
>
> **425.—**(1) Where a compromise or [an] arrangement is proposed between a company and its creditors, or any class of them, or between the company and its members, or any class of them, the court may on the application of the company or any creditor or member of it or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members (as the case may be), to be summoned in such manner as the court directs.
>
> (2) If a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members (as the case may be), present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement, *if sanctioned by the court, is binding on all creditors or the class of creditors, or on the members or class of members (as the case may be), and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company*.
>
> (3) The court's order under subsection (2) has no effect until an office copy of it has been delivered to the registrar of companies for registration; and a copy of every such order shall be annexed to every copy of the company's memorandum issued after the order has been made or, in the case of a company not having a memorandum, of every copy so issued of the instrument constituting the company or defining its constitution.
>
> …
>
> (6) In this section … —
>
> (*a*) "company" means any company liable to be wound up under this Act [*ie*, the 1985 UK Companies Act], and
>
> (*b*) "arrangement" includes a reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods.
>
> [emphasis added]

The Australian s 411 states as follows:

> (1) Where a compromise or [an] arrangement is proposed between a Part 5.1 body [Part 5.1 of the 2001 Australian Corporations Act is the part which deals with arrangements and reconstructions] and its creditors or any class of them or between a Part 5.1 body and its members or any class of them, the Court may, on the application in a summary way of the body or of any creditor or member of the body, or, in the case of a body being wound up, of the liquidator, order a meeting or meetings of the creditors or class of creditors or of the members of the body or class of members to be convened in such manner, and to be held in such place or places (in this jurisdiction or elsewhere), as the Court directs and, where the Court makes such an order, the Court may approve the explanatory statement required by paragraph 412(1)(a) to accompany notices of the meeting or meetings.
>
> …
>
> (2) The Court must not make an order pursuant to an application under subsection (1) … unless:
>
> > (a) 14 [days'] notice of the hearing of the application, or such lesser period of notice as the Court or the Commission [*ie*, the Australian Securities and Investments Commission] permits, has been given to the Commission; and
> >
> > (b) the Court is satisfied that the Commission has had a reasonable opportunity:
> >
> > > (i) to examine the terms of the proposed compromise or arrangement to which the application relates and a draft explanatory statement relating to the proposed compromise or arrangement; and
> > >
> > > (ii) to make submissions to the Court in relation to the proposed compromise or arrangement and the draft explanatory statement.
>
> …
>
> (4) *A compromise or [an] arrangement is binding on the creditors, or on a class of creditors, or on the members, or on a class of members, as the case may be, of the body and on the body or, if the body is in the course of being wound up, on the liquidator and contributories of the body, if, and only if*:
>
> > (a) at a meeting convened in accordance with an order of the Court under subsection (1) … :
> >
> > > (i) in the case of a compromise or [an] arrangement between a body and its creditors or a class of creditors – the compromise or arrangement is agreed to by a majority in number of the creditors, or of the creditors included in that class of creditors, present and voting, either in person or by proxy, being a majority whose debts or claims against the company amount in the aggregate to at least 75% of the total amount of the debts and claims of the creditors present and voting in person or by proxy, or of the creditors included in that class present and voting in person or by proxy, as the case may be; and
> > >
> > > (ii) in the case of a compromise or [an] arrangement between a body and its

members or a class of members – the compromise or arrangement is agreed to by a majority in number of the members, or of the members included in that class of members, present and voting, either in person or by proxy, being, in the case of a body having a share capital, a majority whose shares have nominal values that amount, in the aggregate, to at least 75% of the total of the nominal values of all the shares of the members present and voting in person or by proxy, or of the members included in that class present and voting in person or by proxy, as the case may be; and

(b) *it is approved by order of the Court*.

…

(6) *The Court may grant its approval to a compromise or [an] arrangement subject to such alterations or conditions as it thinks just*.

…

(10) An order of the Court made for the purposes of paragraph (4)(b) does not have any effect until an office copy of the order is lodged with the Commission, and upon being so lodged … the order takes effect, or shall be deemed to have taken effect, on and from the date of lodgment or such earlier date as the Court determines and specifies in the order.

…

(17) The Court must not approve a compromise or [an] arrangement under this section unless:

(a) it is satisfied that the compromise or arrangement has not been proposed for the purpose of enabling any person to avoid the operation of any of the provisions of Chapter 6 [which deals with takeovers]; or

(b) there is produced to the Court a statement in writing by the Commission stating that the Commission has no objection to the compromise or arrangement;

but the Court need not approve a compromise or [an] arrangement merely because a statement by the Commission stating that the Commission has no objection to the compromise or arrangement has been produced to the Court as mentioned in paragraph (b).

[emphasis added]

36 From the provisions cited above, it can be seen that s 210 of the Companies Act uses the same introductory subsection (1) as that used in the UK s 425. However, like the Australian s 411 (and contrary to the UK s 425), s 210 of the Companies Act uses the words "*approved* by *order* of the Court" [emphasis added] (see s 210(3) of the Companies Act and s 411(4)(b) of the 2001 Australian Corporations Act) instead of "*sanctioned* by the court" [emphasis added] (see s 425(2) of the 1985 UK Companies Act). Section 210 of the Companies Act also has a subsection (*ie*, s 210(4)) like subsection (6) of the Australian s 411, which allows a court to grant its approval to a compromise or scheme of arrangement "subject to such alterations or conditions as it thinks just". Such a provision is conspicuously missing from the body of the UK s 425. As will be elucidated later (at [64] below), the similarities between the wording of s 210 of the Companies Act and that of the Australian s 411, coupled with the differences in wording between these two statutory provisions and the UK

s 425, have indeed a rather profound impact on whether the English or the Australian approach should be adopted in Singapore.

37 Having discussed the legislative history of s 210 of the Companies Act as well as the corresponding provisions in the UK and Australia, we turn now to consider the purpose underpinning the enactment of s 210.

Purpose

38 The explanatory statement in the Companies Bill 1966 as well as the relevant parliamentary debates do not shed much light on the purpose behind the enactment of s 176 of the 1967 Act (the predecessor of s 210 of the Companies Act). However, the purpose behind legislative provisions on schemes of arrangement has been extensively considered and clarified by the English and the Australian courts. In *Re Norfolk Island And Byron Bay Whaling Co Ltd* (1969) 90 WN (Pt 1) (NSW) 351, Street J summarised the purpose behind the then equivalent of the Australian s 411 as follows (at 354):

> *The section is intended to provide machinery (i) for overcoming the impossibility or impracticability of obtaining the individual consent of every member of the class intended to be bound thereby [ie, by the scheme of arrangement], and (ii) for preventing, in appropriate circumstances, a minority of class members frustrating a beneficial scheme*. As Younger J. said in 1917 [in *In re Guardian Assurance Company* [1917] 1 Ch 431 at 441] of the corresponding English section [*viz*, s 120 of the Companies (Consolidation) Act 1908 (c 69) (UK)], in terms later quoted by Astbury J. in *In re Anglo-Continental Supply Co. Ltd.* [[1922] 2 Ch 723]: "Its purpose is strictly limited; it does not confer powers; its only effect at any time is to supply, by recourse to the procedure thereby prescribed, the absence of that individual agreement by every member of the class to be bound by the scheme which would otherwise be necessary to give it validity." [emphasis added]

39 Street J's view has been endorsed by the learned authors of *Australian Corporation Law: Principles and Practice* (Butterworths, Looseleaf Ed, 1991) ("*Australian Corporation Law*") at vol 2, para 5.1.0010 (May 2005 release), and has been cited with approval by this court in *Daewoo* ([26] *supra*) at [24]. The learned authors of *Palmer's Company Law* (Geoffrey Morse ed) (Sweet & Maxwell, Looseleaf Ed, 1992) ("*Palmer*") have also expressed a similar view (at vol 2, para 12.009 (April 2007 release)) in respect of the UK s 425, as follows:

> *The aid of the section may be invoked when it is not otherwise possible to make some arrangement or compromise which would be in the interests of [the] company and the other party or parties to the arrangement*. It can be used whether the company is a going concern or is in the course of winding up. …
>
> The value of the section is even more clearly shown when creditors are concerned. Prima facie no creditor can be bound by the agreement of the company with the other creditors or by an agreement between the latter. *A compromise approved by a great majority of creditors may be rendered ineffective if a comparatively small creditor were to object and to stand out against it. It is one of the purposes of s. 425 to meet this situation*.
>
> [emphasis added]

40 A leading local commentary on companies law shares the same view as well (see *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell Asia, 3rd Ed, 2005) ("*Walter Woon*") at

para 16.2):

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

41 Bearing in mind the purpose of statutory provisions on schemes of arrangements as outlined in the preceding paragraphs, we turn now to consider some of the established principles in relation to such schemes.

Certain established principles relating to schemes of arrangement

42 As mentioned earlier (at [20], [25] and [29] above), in adopting the English approach and arriving at the decision that a court had no jurisdiction to extend the time for a creditor to file its proof of debt after the court had approved a scheme of arrangement, the Judge took into consideration, *inter alia*, some of the established principles in relation to schemes of arrangement (see the GD at [22]–[25], [33]–[36] and [38]–[40]). As such, it would be appropriate to set out here (in a summary fashion) an overview of these principles before going on to consider in greater depth the question of the court's jurisdiction to grant an extension of time for a creditor to file its proof of debt in respect of a court-approved scheme.

43 Firstly, it is clear that a scheme of arrangement will not bind a company, its members and its creditors until the court approves it (see s 210(3) of the Companies Act, s 425(2) of the 1985 UK Companies Act, s 411(4)(b) of the 2001 Australian Corporations Act and *Walter Woon* at para 16.11). The sanction of the court is not a mere formality (see *Buckley on the Companies Acts* (Dame Mary Arden, Dan Prentice & Sir Thomas Stockdale gen eds) (LexisNexis UK, 15th Ed, 2007) ("*Buckley*"), vol 2 at para 425.53; *Kempe* ([21] *supra*) at 276; and *Re British Aviation Insurance Co Ltd* [2006] 1 BCLC 665 at [69]). Before the court sanctions a scheme, it will have to be satisfied of three matters (see *Palmer* ([39] *supra*), vol 2 at paras 12.026–12.030 (July 2006 release); *Buckley*, vol 2 at para 425.53; *Butterworths' Annotated Statutes* ([33] *supra*) at p 591; *Walter Woon* at paras 16.11–16.15; *Gore-Browne on Companies* (Alistair Alcock gen ed) (Jordans, 45th Ed, 2005) ("*Gore-Browne*"), vol 2 at para 46.27 (December 2004 release); *Ford* ([34] *supra*), vol 2 at para 24.160 (June 2007 release); *Re Halley's Departmental Store Pte* Ltd [1996] 2 SLR 70 at 73, [12]; *Daewoo* ([26] *supra*) at [36]; and *Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd* [2003] 3 SLR 629 at [10]), namely:

(a) The court must be satisfied that the statutory provisions have been complied with. For example, the court must be satisfied that the resolution is passed by the requisite statutory majority at a meeting of the company's creditors or members (as the case may be) duly convened and held in accordance with the court order convening the meeting.

(b) The court must be satisfied that those who attended the meeting were fairly representative of the class of creditors or the class of members (where applicable), and that the statutory majority did not coerce the minority in order to promote interests adverse to those of the class whom the statutory majority purported to represent.

(c) The court must be satisfied that the scheme is one which a man of business or an intelligent and honest man, being a member of the class concerned and acting in respect of his interest, would reasonably approve.

In respect of the last of the requirements just mentioned, the learned authors of *Palmer* provide a concise summary (at vol 2, para 12.030 (July 2006 release)) of how the court assesses whether the proposed scheme is one which an intelligent and honest member of the class concerned would reasonably approve:

> In exercising its discretion whether or not to sanction a scheme, the court traditionally, as we have seen, has stressed that *its function does not extend to usurping the view of the members or creditors.* … That approach has never meant, however, that, provided that the resolutions are duly passed, and that there is no coercion of a minority by a majority the court is bound to confirm the scheme and has no discretion. *The court is not a mere rubber stamp. … It will look at the scheme to see that it is a reasonable one: if it concludes that there is "such an objection to [the scheme] as that any reasonable man might say that he could not approve it"* [*per* Lindley LJ in *In re Alabama, New Orleans, Texas, and Pacific Junction Ry. Co.* [1891] 1 Ch 213 at 239]*, then the court may refuse to confirm the scheme*. The issue is often whether the scheme strikes a balance between the various interests involved which could be reasonably approved by the meetings. …
>
> *The court will, however, in cases where the minority object, be strongly influenced by a big majority vote, for, provided that the scheme is fair and equitable, the court will not itself judge upon the commercial merits [of the scheme], which is the function of the class itself. The court in such cases will be slow to differ from the conclusion of the majority*.
>
> [emphasis added]

The discretion of the court as to whether or not it should sanction a scheme is important since, once the scheme has been sanctioned, it binds all parties, even the dissentients (see *Buckley*, vol 2 at para 425.53). In addition, we would add that, in Singapore, the court has the discretion pursuant to s 210(4) of the Companies Act to grant its approval "subject to such alterations or conditions as it thinks just" (in Australia, a similar discretion exists under s 411(6) of the 2001 Australian Corporations Act). This is a broad discretion that allows the court to modify a scheme, circumscribed only by what it deems just. One would imagine, however, that if the court proposes to make an amendment or a modification that would result in a substantive rather than, say, a procedural change, the court would in all likelihood refer the proposed change back to the scheme manager and the company's creditors or members for further consideration.

44 Secondly, once the court gives its approval to a scheme, the scheme is binding on all the parties to the scheme (see also [43] above), and the scheme *cannot afterwards be altered*, even if the shareholders and the creditors of the company acquiesce in the alteration (see *Palmer*, vol 2 at para 12.032 (December 2006 release); *Buckley*, vol 2 at para 425.63; *Gore-Browne*, vol 2 at para 46.30 (June 2005 release); *Srimati Premila Devi v Peoples Bank of Northern India, Ltd* [1938] 4 All ER 337 ("*Devi*"); *Eltraco International Pte Ltd v Sennet Electrical Engineering Pte Ltd* [2003] SGHC 40 ("*Eltraco*"); and *Chew Eu Hock Construction Co Pte Ltd v Central Provident Fund Board* [2003] 4 SLR 137 ("*Chew Eu Hock*")). The binding nature of the court's sanction is so wide-reaching that if the court sanctions a scheme which is beyond the capacity of the company or in conflict with other statutory provisions, the scheme is nonetheless still binding on the parties, notwithstanding that it is *ultra vires* the objects of the company (see *British and Commonwealth Holdings plc v Barclays Bank plc* [1996] 1 All ER 381 ("*British and Commonwealth Holdings plc*")).

However, it should be noted that the effect of the *ultra vires* doctrine has been much diminished in Singapore because of ss 23(1) and 25(1) of the Companies Act (see *Walter Woon* ([40] *supra*) at para 3.76, as well as *Bee See & Tay v Ong Hun Seang* [1997] 2 SLR 193, where this court held (at [61]) that "s 25 [of the Companies Act (Cap 50, 1994 Rev Ed) was] so clear that there [was] no answer" to the vendors' argument in that case that the company in question could not rely on its lack of capacity to take a transfer of property to invalidate the transfers).

45 Nevertheless, the court retains an inherent jurisdiction to amend or set aside a scheme in limited circumstances, for instance, if consent to the scheme was obtained by fraud (*Fletcher v Royal Automobile Club Ltd* [2000] 1 BCLC 331) or where there are obvious mistakes in the documents setting out the scheme (*Kempe* ([21] *supra*) at 276). It is also possible for a subsisting scheme of arrangement to be amended by another scheme approved by the court (see *Re Elliott's MF Services Pty Ltd* [1965] VR 756; *Re Application of Gasweld Pty Ltd* (1986) 5 NSWLR 494; and *Re Challenger Group Holdings Ltd* (2003) 48 ACSR 498).

46 Thirdly, in line with the first two principles stated above, a creditor or member "should raise his objections at the hearing for court sanction and not any later" (see *Walter Woon* at para 16.18; see also *Eltraco* and *Chew Eu Hock*). As explained in *Chew Eu Hock*, the rationale for this principle is that any late objections after a scheme of arrangement has been approved by the court would be "*unfair*, *unreasonable* and *prejudicial*" [emphasis added] (at [26]) to the other parties to the scheme, and (more importantly) there is a need to ensure that there is *certainty* as to the validity of a court-approved scheme:

> 26 A consideration which I took into account was the defendants' failure to attend the creditors' meeting and voice the objections which they now seek to raise in Ng's affidavit. As was rightly pointed out by counsel for the JM [judicial manager], the defendants raised their objections *far too late* (on 17 December 2002), well after the order sanctioning the scheme had been obtained and lodged with the Registry of Companies pursuant to s 210(5) of the Companies Act [Cap 50, 1994 Rev Ed]. *To accept the defendants' objections at such a late stage would be unfair, unreasonable and prejudicial to the JM, the new investor (Hiap Hoe) of the Company and to other creditors alike.* …
>
> …
>
> 29 In the Australian decision of *Chief Commissioner of Pay-Roll Tax v Group Four Industries Pty Ltd* (1984) 8 ACLR 973 the plaintiff sought a declaration that he was not bound by the scheme of arrangement reached between the defendant company with certain of its creditors (and approved by the court under s 315(4)(b) of the Companies (NSW) Code), by virtue of his having statutory priority in a liquidation. McLelland J at 976 refused the application and held that the Commissioner was bound as:
>
> > otherwise, *despite approval by the court there could never be any certainty that a compromise or [an] arrangement was legally operative*, and it might remain open to collateral challenge indefinitely on grounds not susceptible to ready discovery or investigation.
>
> Consequently, McLelland J held that once the court made an order under s 315(4)(b) approving a compromise or [an] arrangement and an office copy had been lodged with the Commission pursuant to s 315(12), the compromise or arrangement was binding, notwithstanding any defect or irregularity that [might] have occurred in the steps leading up to the making of the order. The judge further endorsed the comments of Hart J in *Frick Australia Pty Ltd v Pen Pak Ocean*

Products Pty Ltd [1971] Qd R 286 that

> "the public would never be safe in treating a scheme as valid and great inconvenience would result to companies, to creditors, to shareholders and to the community"

if a court accepts the contention of a party that he is not bound by a scheme of arrangement approved by the court, on the ground that there had been no separate meeting of a distinct class of creditors to which he claimed to belong.

[emphasis added]

47 With these established principles in mind, we turn now to address the question of the court's jurisdiction to extend the time for a creditor to file its proof of debt *after* the court has approved a scheme of arrangement. We will consider, first, the position under the Rules of Court. This will entail a review of the conflicting English and Australian approaches, as well as a consideration of the nature of schemes of arrangement.

Whether the court has jurisdiction under the Rules of Court to extend the time for filing proofs of debt

The English approach

48 It appears that the question of extension of time in the context of court-approved schemes has, to date, not arisen squarely in England. However, the Privy Council in *Kempe* ([21] *supra*), which concerned an appeal from Bermuda, considered the question in relation to a scheme of arrangement which had been approved by the Bermudian court under a similar statutory framework, namely, s 99 of Bermuda's Companies Act 1981 (which is *in pari materia* with the UK s 425). Clause 2.3.1 of the scheme in *Kempe* imposed a 21-day time limit for a creditor to apply to the court to reverse or vary any assessment by the liquidators of its claims. One of the creditors ("Ambassador") filed a notice of claim, the bulk of which was rejected by the liquidators. As a result of an administrative lapse, Ambassador failed to file a summons challenging the liquidators' decision within 21 days. It then sought an order that the time limit be extended (although *Kempe* concerned an extension of time for a creditor to file an appeal against a rejection of its claim as opposed to an extension of time for a creditor to file its claim (or proof of debt), the same principles should apply in both scenarios). The Court of Appeal of Bermuda granted Ambassador the extension of time sought. On appeal by the liquidators, the Privy Council reversed the Bermudian Court of Appeal's decision. Lord Hoffmann, delivering the judgment of the Privy Council, considered the nature of a scheme of arrangement before reaching the decision that a court had no jurisdiction to grant an extension of time. As the Judge's decision in the present case centred on the holding in *Kempe*, we reproduce below the relevant extracts from Lord Hoffmann's judgment at 275–276:

> [T]he … question is whether it [the time limit laid down in cl 2.3.1 of the scheme] has been "fixed by any order of the court." On the answer to this question depends … whether [the court] has inherent jurisdiction to [extend time], … [which is] as Lord Denning M.R. said in *Reg. v. Bloomsbury and Marylebone County Court, Ex parte Villerwest Ltd*. [1976] 1 W.L.R. 362, 365, a power "to enlarge any time which a judge has ordered." Is the period of 21 days in clause 2.3.1 a time which was ordered by the Chief Justice [of Bermuda] when he approved the scheme? In the [Bermudian] Court of Appeal, Kempster J.A. thought that it was. He said that the clauses of the scheme would have been "without effect" but for the order of the Chief Justice giving the sanction of the court on 23 March 1993 and the subsequent delivery of that order to the registrar. Although the case was not cited to him, his view has the support of the decision of the

Supreme Court of Western Australia in *Caratti v. Hillman* [1974] W.A.R. 92. Jackson C.J. said, at p. 94, that the scheme was "an integral part of the court's order" and Burt J. said, at p. 95, that "the rights [under the scheme] are ... in my opinion created by the order and the procedure whereby those rights are to be established or ascertained is a procedure which is also created by the order." Accordingly, the court could extend any period prescribed by the scheme under its power to extend periods fixed by its orders. The case has since been followed at first instance in Australia and in *Bond Corporation Holdings Ltd. v. State of Western Australia (No. 2)* (1992) 7 W.A.R. 61, 68 Anderson J. said its reasoning was that "once the order is made, it is the order, 'speaking in terms of the scheme' [*per* Burt J. in *Caratti v. Hillman* at p. 95] that has effect, not the resolution of the creditors and not the statute."

Their Lordships respectfully disagree. It is true that the sanction of the court is necessary for the scheme to become binding and that it takes effect when the order expressing that sanction is delivered to the registrar. *But this is not enough to enable one to say that the court (rather than the liquidators who proposed the scheme or the creditors who agreed to it) has by its order made the scheme. It is rather like saying that because royal assent is required for an Act of Parliament, a statute is an expression of the royal will*. Under section 99 [of the Bermudian Companies Act] it is for the liquidators to propose the scheme, for the creditors by the necessary majority to agree to it and for the court to sanction it. *It is the statute which gives binding force to the scheme when there has been a combination of these three acts, just as the rules of the constitution give validity to [A]cts duly passed by the Queen in Parliament*: see *In re Garner's Motors Ltd*. [1937] Ch. 594, 598–599 and *Devi v. People's Bank of Northern India Ltd*. [1938] 4 All E.R. 337, 343.

[emphasis added]

Having held that a scheme of arrangement derived its efficacy from the statute and not from the court order sanctioning the scheme, Lord Hoffmann went on to hold (at 276) that it was not open to a court to extend the time limits laid down in a scheme as this would be a *material alteration* that would detract from certainty and expedition, which were the chief objects of any scheme:

It is of course true that the sanction of the court is by no means a formality. Furthermore, in giving its sanction, the court has an inherent jurisdiction to correct any obvious mistakes in the document which sets out the scheme. *But it cannot alter the substance of the scheme and impose upon the creditors an arrangement to which they did not agree. The question of whether the time limits in the scheme are fixed or flexible is in their Lordship's opinion one of substance*. Mr. Crystal [counsel for Ambassador] accepts that if there is jurisdiction to enlarge the period for filing an appeal against the rejection of a claim, there must also have been jurisdiction to extend the final filing deadline for filing the original claims. But their Lordships think that *this would have been a material alteration, detracting from the certainty and expedition which were the chief objects of the scheme. If creditors felt that in providing fixed time limits the scheme was creating traps into which the unwary might fall, the time to raise this question was when the scheme was under consideration or by way of objection when the court was asked to give its sanction*.

[emphasis added]

49 It will be noted, from the first of the two passages cited at [48] above, that Lord Hoffmann relied on the cases of *In re Garner's Motors, Limited* [1937] Ch 594 ("*Re Garner's Motors*") and *Devi* ([44] *supra*) in support of the holding that a scheme of arrangement derived its efficacy from the statute. In *Re Garner's Motors*, the question before the court was whether a scheme of arrangement

entered into between a creditor and one of its joint and several debtors would discharge the liability of the other joint and several debtor. In answering the question in the negative, Crossman J considered the effect of the court's sanction of a scheme of arrangement at 598–599 (in a passage which was subsequently cited by Lord Hoffmann in *Kempe* at 276), as follows:

> *In my judgment the effect of s. 153 of the Companies Act, 1929* [(c 23) (UK)]*, is to give to a scheme when sanctioned by the Court under the section a statutory operation*. The scheme when sanctioned by the Court becomes something quite different from a mere agreement signed by the parties. *It becomes a statutory scheme*. In my judgment, therefore, the discharge of Sentinel Waggon Works, Ld. [the debtor which entered into the scheme of arrangement], from the debt to Temple Press, Ld. [the creditor], which was effected under clause 15 of the scheme sanctioned by the Court on March 23, 1936, did not have the effect of discharging Garner's Motors, Ld. [the other joint and several debtor of the creditor], from its liability in respect of the debt. It is settled law that a discharge of one of several judgment-debtors by operation of law does not release the other debtors. *But in my judgment the effect of s. 153 of the Companies Act, 1929, is to give a scheme when sanctioned by the Court a statutory operation*. [emphasis added]

50 In *Devi*, the directors of an Indian bank ("the bank") purported to forfeit the appellants' shares in the bank by reason of the appellants' non-payment upon the bank's calls on these shares. The calls on the shares had been made via a resolution that was passed in complete ignorance of the terms of an amended scheme of arrangement that had been approved by the court. The bank contended on appeal that the forfeitures had subsequently been ratified by the whole body of its creditors and shareholders. The Privy Council held that the forfeitures were *ultra vires* the bank as a court-approved scheme could not be amended or departed from by the mere acquiescence of the company's shareholders and creditors. The Privy Council held (*per* Lord Romer) at 343, in a passage which was subsequently relied upon by Lord Hoffmann in *Kempe* (at 276), as follows:

> *Upon confirmation by the court of the amended scheme of arrangement, that scheme became, by virtue of sect. 153 of the Indian Companies Act, binding upon the creditors, the shareholders and the bank alike. Its terms could thereafter only be varied by order of the court after the variation had been approved at meetings of the creditors and shareholders*. It was not, therefore, possible for the bank or its directors or shareholders, whether by resolution or ratification or otherwise, to alter the dates fixed by cl. 6 of the scheme for payment of the 20 per cent. called up in Mar., 1932, or the 5 per cent. called up on Jan. 18, 1933. [emphasis added]

In contrast to Crossman J's judgment in *Re Garner's Motors* (see the passage quoted at [49] above), it would appear that the above passage in *Devi* does not quite support Lord Hoffmann's holding in *Kempe* that a scheme of arrangement derives its efficacy from the statute, although it emphasises the corollary point that a court-approved scheme is binding on all parties to the scheme. However, we note that in an English work published before the decision of the Privy Council in *Kempe* (namely, David Brown, *Corporate Rescue: Insolvency Law in Practice* (John Wiley & Sons, 1996)), the learned author cited (at para 18.54) the two cases of *Re Garner's Motors* and *Devi* as authority for the proposition that the effect of the court's approval of a scheme of arrangement was as follows:

> *The scheme, founded originally in contract, becomes statutory* and thus cannot be altered by contractual agreement, other than by a supplemental scheme sanctioned by the court. [emphasis added]

51 As mentioned at [48] above, it appears that, to date, the question of the court's jurisdiction

to extend the time for filing proofs of debt in respect of a court-approved scheme has not directly arisen for consideration in England whether before or after the Privy Council's decision in *Kempe*. *Kempe* has, however, been followed by the Hong Kong courts in two cases, *viz*, *Re Universal Dockyard Ltd* [2003] 3 HKEC 893 and *Re UDL Holdings Ltd* [2006] 3 HKLRD 84. In both cases, the Hong Kong High Court simply unquestioningly accepted the holding in *Kempe* as correct, and no (or little) comments were made in relation to Lord Hoffmann's judgment (see *Re Universal Dockyard Ltd* at [20] and *Re UDL Holdings Ltd* at [58]).

5 2 *Kempe* is also cited by the learned authors of *Buckley* ([43] *supra*) for the following proposition (at vol 2, para 425.64):

> A scheme does not operate as an agreement between the parties affected but *it has binding force by virtue of statute* once an application to the court has been made and the consent of the relevant parties and the sanction of the court [have] been obtained. [emphasis added]

Kempe is likewise cited by the learned authors of *Gore-Browne* ([43] *supra*) for a similar proposition (at vol 2, para 46.30 (June 2005 release)):

> It has been held that, although a scheme of arrangement requires the court's approval, it is not made solely by reason of the court's order. It comes into effect as a result of the application to the court by the appropriate persons, approval by the court and the court order. *It is not proper to say that it is solely the order that makes the scheme*. [emphasis added]

The Australian approach

53 Contrary to the approach taken by the Privy Council in *Kempe* ([21] *supra*), the Australian courts have consistently taken the position that once a scheme of arrangement is approved by the court, it becomes an order of court, and thus, the statutory provisions on civil procedure (the Rules of Court, in our local context) permit the court to grant an extension of time for, *inter alia*, a creditor to file its proof of debt.

54 A good starting point is the decision of the Supreme Court of Western Australia in *Caratti v Hillman* [1974] WAR 92 ("*Caratti*"), which was rejected by the Privy Council in *Kempe* at 276 (see the first of the two passages from Lord Hoffmann's judgment reproduced at [48] above). In *Caratti*, cl 9(e) of a court-approved scheme provided that any creditor whose claim was rejected by the scheme manager had 14 days to commence legal proceedings, failing which the creditor "shall be forever barred from bringing any such proceedings". The scheme manager sent letters to three creditors informing them that their claims were not admitted, and these letters, together with the relevant documents, were subsequently forwarded by the creditors to their solicitors. The letters and documents were, unfortunately, mislaid in the solicitors' office, and by the time they were discovered, the 14-day time limit laid down in cl 9(e) of the scheme for commencing legal proceedings had expired. On appeal to the Supreme Court of Western Australia, the lower court's refusal to grant the three creditors an extension of time to commence legal proceedings was reversed and an extension of time granted. Jackson CJ held at 93–94:

> … I have reached the conclusion, in agreement with the other members of this court, that *we have power to extend the time under O. 3, r. 5 of the Supreme Court Rules* [the Western Australian equivalent of O 3 r 4 of the Rules of Court] which are made applicable to proceedings under the Companies Act by r. 4 of the Supreme Court (Companies) Rules 1963. …
>
> *[I]n my view, the approved scheme is an integral part of the court's order [such] that the time*

fixed by cl. 9(e) of the scheme is a period within which "a person is … authorized" by that order "to do any act in any proceedings", to quote the words of O. 3, r. 5(1) of the Supreme Court Rules. The "proceedings" for this purpose are those commenced on 15 November 1971, by the summons numbered 43 of 1971 [*ie*, the application by which the court's sanction of the scheme of arrangement was sought], under s. 181 of the [Companies] Act for an order convening a meeting of creditors, and those proceedings are not concluded, in my opinion, by the order approving the scheme, but remain on foot for the purpose of enabling the court to supervise the acts and decisions of the scheme manager under cl. 18 of the scheme.

[emphasis added]

Similarly, Burt J stated at 94–95:

In my opinion this Court has power to extend the time within which those proceedings can be brought and … the effect of such an extension if granted is to defer the time at which "the claimant shall be forever barred …" [from bringing legal proceedings].

…

Order 3, r. 5 of the Rules of the Supreme Court is a rule which by r. 4 of the Supreme Court (Companies) Rules 1963 applies to proceedings to which those rules relate and hence applies to proceedings being an application for an order that a compromise or [an] arrangement under s. 181 of the [Companies] Act be approved by the Court. … *If such an order is made, the scheme so approved being in the terms of this scheme, the release and discharge of the debts is effected not by the resolution of the creditors agreeing to the compromise but by the order and upon the order taking effect*: *Hill v. Anderson Meat Industries Ltd.,* [1971] 1 N.S.W.L.R. 868, at p. 877, per Street, J. *And the rights which are given in substitution for the debts so released are likewise in my opinion created by the order and the procedure whereby those rights are to be established or ascertained is a procedure which is also created by the order*. *The order speaking in the terms of the scheme then can be seen to fix a period within which a scheme creditor is authorized to lodge his claims or, in the terms of O. 3, r. 5 the order fixes the period within which a person is "authorized … to do any act in any proceedings" the relevant proceeding being a working out of the order, i.e., the scheme*. And if an order extending the time within which a claimant may take legal proceedings to establish his debt is made then, as it seems to me, the claim of the rejected claimant is not barred until that extended time has expired.

[emphasis added]

5 5 *Caratti* was subsequently followed by the Supreme Court of New South Wales in *Re AGL Gas Networks Ltd* (2001) 37 ACSR 441 ("*Re AGL Gas Networks*"), where Santow J elaborated further on the Australian approach and carefully explained why the approach in *Kempe* should not be followed. It would be helpful to set out here, in full, his reasons (see *Re AGL Gas Networks* at [46]–[47]):

46 …

…

(b) ***In Australia, [the] authorities*** [namely, *Hill v Anderson Meat Industries Ltd* [1971] 1 NSWLR 868, *Caratti* and *Bond Corp Holdings Ltd v Western Australia* (1992) 7 ACSR 472] ***establish that an approved scheme does indeed derive its force from the court***

order, [and] not from the antecedent resolutions of members and creditors. In this respect Street J found (at 877) in *Hill v Anderson Meat Industries Ltd* in relation to a creditors [*sic*] scheme:

> "The approval by the court of the scheme amounts to a discharge of the debtor company's liability by operation of law. The discharge is effected by the court order and not by the events antecedent thereto, albeit that these antecedent events are indispensable statutory prerequisites of the court's jurisdiction to make an order approving a scheme and thus rendering it binding on the company and on the creditors."

(c) The effect of these cases is that, once approved, there is no "scheme" separate from the order of the court. Rather, any "scheme" in the sense of the proposal decided at the relevant meetings is subsumed into and by the order of the court.

(d) In *Re Matine Ltd* (1998) 28 ACSR 268, the above authorities were considered by me and their apparent conflict with the Privy Council decision in *Kempe* … noted. While it was unnecessary for me to decide that issue for the purpose of that case, I did indicate a tentative view that I would prefer to follow the Australian cases were it necessary.

(e) Unless satisfied that the Australian decisions to which I have referred are plainly wrong, I should, especially in national legislation, follow them as a matter of comity: *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485; 112 ALR 627.

(f) ***With respect, I do not find the reasoning in Kempe's case compels me to a different conclusion. Their Lordships proceed[ed] on the assumption that a scheme does not derive its efficacy from the order of a court. Rather a scheme is given binding force by a statute which operates on a number of ingredients*** (in the case of a scheme, a scheme put forward by the scheme proponent, the necessary majorities of members or creditors and the sanction of the court). ***Taken to its logical conclusion, that reasoning would produce incongruous consequences. Take, for example, the jurisdiction of a court which is conferred by statute. The fact that the jurisdiction is conferred by statute does not make any decisions of the court under the statutory jurisdiction any less orders of the court deriving their efficacy from being made***. The statute may be an indispensable statutory prerequisite to the [court's] jurisdiction. But it is, in causative terms, a "background" fact behind that efficacy, part of the "res inter alios acta". It is like saying that the birth of Lee Harvey Oswald "caused" the death of President Kennedy.

(g) The fact that their Lordships [in *Kempe*] were proceeding from what may be ***attackable reasoning*** does not necessarily mean that their conclusion is wrong. ***However, an analysis of the facts of Kempe's case indicate[s] that the reasoning is indeed vulnerable***. The scheme considered in *Kempe's* case allowed a dissatisfied scheme creditor to apply to the court for an order reversing or varying certain decisions of *the liquidators*. Their Lordships proceeded on the basis that there was nothing untoward in this. ***However, their Lordships [did] not indicate where the court obtains jurisdiction to exercise the functions conferred. If schemes generally operate as an order of the court, jurisdiction is inherent. On the other hand, if schemes only operate by virtue of the relevant statute then the court would have no jurisdiction as the statute only refers to a compromise or [an] arrangement between a company and its creditors (or between a company and its members)***.

47 …

…

(d) Once one accepts that the scheme operates by virtue of the court order, then it is clear that the failure [of the plaintiff company in *Re AGL Gas Networks*] to obtain the approval within time was a failure to comply with a time specified in a court order.

…

(f) Accordingly, I am satisfied that it is open for me to exercise my discretion pursuant to Pt 2 r 3 [of the] Supreme Court Rules [the New South Wales equivalent of O 3 r 4(1) of the Rules of Court] and amend order 1 of the orders made on 6 June 1994 so as to allow the plaintiff until 10 minutes after midnight on 30 June 1994 to satisfy the conditions precedent to the scheme.

(g) ***In making any such order, it was submitted that I would not be amending the scheme as such as it would not involve a change to any substantive provision of the scheme***. Rather I would be extending the time in which an act required to be done under the *order* can be done, that order embodying the scheme and itself intrinsically capable of variation. While that conclusion is not beyond doubt, I am prepared to adopt it in making the various orders as I have done. In particular I do not consider the earlier cited Australian cases "plainly wrong" and will follow them as the basis for these orders, in preference to *Kempe*. It may be that at some future time, and with an effective contradictor, their reasoning may need to be further tested either at trial or appellate level.

[emphasis added in bold italics]

56 More recently, *Caratti* was followed in *Ray Brooks Pty Ltd v New South Wales Grains Board (No 2)* (2002) 43 ACSR 657 ("*Ray Brooks Pty Ltd*"). However, as rightly pointed out by Mr Ashok Kumar, counsel for Reliance, it appears that Austin J in the latter case preferred the approach in *Kempe* ([21] *supra*), but followed *Caratti* as a matter of precedent. This can be seen from the following passage in *Ray Brooks Pty Ltd* (at [88]–[90]):

The issue was addressed, admittedly in a different context, in *Caratti v Hillman* [1974] WAR 92; (1973) 4 ACLR 170. *In that case the Full Court of the Supreme Court of Western Australia took the view that the procedure leading to the extinguishment of rights of creditors under a scheme of arrangement under companies legislation was a procedure created by order of the court*. The order approving the scheme of arrangement fixed the period within which a creditor was authorised to lodge a claim under the scheme. *Therefore the order of the court approving the scheme was an order fixing the period within which a person was authorised to do an act, for the purposes of the rule of court comparable with Pt 4, r 4* [of the Supreme Court Rules (NSW), which is *in pari materia* with O 3 r 4 of the Rules of Court]. *Consequently the rule of court was available to permit the court to extend the period for lodgment of claims by creditors*.

That reasoning has been accepted by later Australian cases on several occasions: *Re Terri Co Pty Ltd* (1987) 12 ACLR 457; *Bond Corp Holdings Ltd v Western Australia (No 2)* (1992) 7 WAR 61; 7 ACSR 472; *Re Matine Ltd* (1998) 28 ACSR 268. However, it is inconsistent with the reasoning of the Privy Council in *Kempe* …

The reasoning of Lord Hoffmann [in Kempe] is highly persuasive. However, the approach taken in

Caratti was the approach of an intermediate appellate court in Australia. According to the High Court in Australian Securities Commission v Marlborough Gold Mines Ltd (1993) 177 CLR 485; 112 ALR 627; 10 ACSR 230, a judge at first instance in this country should not depart from the interpretation of companies legislation adopted by an Australian intermediate appellate court. Moreover, the *Caratti* decision has stood since 1973 and has been followed, as I have said, on several occasions. I note, in particular, that although Santow J found it unnecessary to choose between *Caratti* and *Kempe* in *Re Matine*, he expressed the view (at 286) that he would follow the Australian cases were [it] necessary to do so. *As a matter of precedent, therefore, I shall follow the reasoning in Caratti in preference to the reasoning in Kempe*.

[emphasis added]

57 We also note with some interest that an approach not unlike that taken in *Carrati* was adopted by the Bermudian Court of Appeal in *Ambassador Insurance Company v Charles W Kempe and Nigel Hamilton* Civil Appeal No 13 of 1995 (14 March 1996) (unreported) (whose decision was, however, reversed in *Kempe* on further appeal to the Privy Council), where it was held that a scheme of arrangement derived its efficacy from the court order sanctioning that scheme:

Though the Scheme makes no provision for extension of [the] time [period] within which to appeal against the rejection of a claim in the liquidation *its clauses would be without effect but for the delivery to the Registrar of the Order of the Chief Justice made on 23 March 1993* [*ie*, the court order sanctioning the scheme] as subsection (3) of section 99 of the [Bermudian Companies] Act makes clear. … Section 157 of the Companies Winding-up Rules, which is applicable under clause 8.1.1 [of the scheme of arrangement] and allows the Court to extend "the time … fixed by *any order of the Court* for doing any act", may therefore be invoked by Ambassador … to extend any time limits which a judge has ordered whether or not a creditor's rights have notionally been extinguished. [emphasis added]

Which approach should prevail in Singapore?

58 Before giving our reasons as to why we preferred the Australian approach, we first need to address Reliance's submission (see [26] above) that "[t]he Singapore Court of Appeal ha[d] *affirmed* that a scheme of arrangement [was] a *statutory contract* entered into between the company and scheme creditors"[note: 6] [emphasis added] in *Daewoo* ([26] *supra*). If Reliance's submission is correct, it would mean that the question of the nature of a scheme of arrangement (and the related question of the court's jurisdiction to extend the time for a creditor to file its proof of debt where the court has already approved the scheme) has already been decided in Singapore. The passage relied on by Reliance for its submission is to be found at [24] of *Daewoo* (*per* Yong Pung How CJ):

It is trite law that, where a scheme of arrangement or compromise … is approved by *all* the creditors of the company, it is binding on the company as well as its creditors. In such a case, there is no need on the part of the company to invoke s 210 of the Companies Act [Cap 50, 1994 Rev Ed]. *The scheme is wholly a contractual scheme*. Where, as is usually the case, it is not practical or practicable to secure the unanimous agreement of all the creditors, s 210 is invoked. And when s 210 is invoked, and the scheme is approved by the requisite majority of the creditors and the court, the scheme becomes binding on all the creditors or the class of creditors (as the case may be). That is provided in s 210(3) of the Act. ***The binding effect of the scheme is given by the court order approving the scheme***. As Street J said in *Re Norfolk Island and Byron Bay Whaling Co* (1969) 90 WN (Pt 1) (NSW) 351 at 354 with reference to s 181 of the Companies Act 1961 of the State of New South Wales (which is the equivalent of our s 210), the section is intended to provide a machinery (1) for overcoming the impossibility or

impracticability of obtaining the individual consent of every member of the class intended to be bound thereby, and (2) for preventing, in appropriate circumstances, a minority of class members [from] frustrating a beneficial scheme. [emphasis added in italics and bold italics]

59 With respect, we do not see how the above passage could even begin to remotely support Reliance's submission. If anything, Yong CJ went only as far as to say that a scheme of arrangement, when approved by all the creditors of the company, was a "contractual scheme" (*Daewoo* at [24]); he did not describe such a scheme as, to use Reliance's words, a "statutory contract". In fact, the words in bold italics in the quotation from *Daewoo* (at [58] above) would appear to support the *Australian* position that a scheme of arrangement derives its efficacy from the *court order* approving that scheme. We note that the Judge, in arriving at her decision that the English approach was more persuasive, appeared to have found some penumbral encouragement in Yong CJ's comments in *Daewoo* (see the GD at [30]), but she certainly did not go as far as to say that *Daewoo decided* that a scheme of arrangement was in the nature of a statutory contract. If the Judge had regarded *Daewoo* as laying down such a legal principle, there would have been no need for her to elaborate (at length) on her reasons for adopting the English approach. As such, we rejected Reliance's submission on what this court held in *Daewoo vis-à-vis* the nature of a scheme of arrangement.

60 We note, however, that in *Eltraco* ([44] *supra*), a High Court decision concerning the scope and the operation of a scheme of arrangement, MPH Rubin J held at [23] that the effect of a court-approved scheme was as follows:

> The effects of a court-sanctioned scheme of arrangement came up for discussion in New South Wales in *Hill v Anderson Meat Industries Ltd* [1971] 1 NSWLR 868 as well as before the Singapore Court of Appeal in *Daewoo* ... *Both Street J in Hill v Anderson and Yong Pung How CJ in Daewoo reaffirmed the view that a scheme of arrangement duly passed and sanctioned by the court inherited a* ***statutory effect*** *upon the relationship between the debtor company and its creditors*. [emphasis added in italics and bold italics]

The above passage may plausibly be read as suggesting that a scheme of arrangement derives its efficacy from the statute (which is the English position). However, as clarified at [59] above, the decision in *Daewoo* certainly does not stand for this proposition. As for the New South Wales case of *Hill v Anderson Meat Industries Ltd* [1971] 1 NSWLR 868, that case was, in fact, relied on by Burt J in *Caratti* ([54] *supra*) at 95 and by Santow J in *Re AGL Gas Networks* ([55] *supra*) at [46] for the contrary (Australian) position that a scheme of arrangement derives its efficacy from the court order approving the scheme. One should, therefore, be slow to read *Eltraco* as *correctly* supporting the proposition (and also the English position) that a scheme of arrangement derives its efficacy from the statute and operates as a statutory contract.

61 We noted earlier (at [25] above) that the Judge justified her preference for the English approach on the basis that the purpose of s 210 of the Companies Act, the established principles relating to schemes of arrangement and the overarching need for clarity, certainty and finality in this area of the law cumulatively supported the position in *Kempe* ([21] *supra*). Nevertheless, we are of the view that the Australian approach is also consistent with these established principles. Adopting the Australian approach does not necessarily mean that clarity, certainty and finality would be sacrificed on the altar of expediency or that the objectives of s 210 can no longer be properly achieved. Between the English and the Australian approaches, we are not entirely comfortable with the former approach, which, with respect, appears to be unnecessarily strict and mechanical, leading perhaps to potentially unjust consequences in some instances. We now elaborate on the reasons for our decision.

62 The English approach will invariably mean that once the court has approved a scheme of arrangement, it no longer has jurisdiction to grant an extension of time for a creditor to file its proof of debts in respect of that scheme *regardless* of the circumstances, save in cases of "*obvious mistakes* in the document which sets out the scheme" [emphasis added] (*Kempe* at 276 (see the second of the two passages reproduced at [48] above)) or where consent to the scheme was obtained by fraud (see the GD at [38], citing *Fletcher v Royal Automobile Club Ltd* ([45] *supra*)). This seems intuitively restrictive as it is not difficult to envisage a situation, such as that in *Caratti* ([54] *supra*) or in the other Australian cases cited at [55]–[56] above (we will elaborate on the factual matrices of those cases below at [71]–[78]), where the failure to file a claim in time is not in any way attributable to the fault of the creditor and where allowing the creditor an extension of time to file its claim does not prejudice any of the parties, and yet (under the English approach), an extension of time cannot be granted because there is no obvious mistake in the documents setting out the scheme or no fraud. Perhaps, on the facts of *Kempe*, the Privy Council's decision can arguably be said not to be unduly harsh or unfair, given that the Privy Council had found, as a *fact*, that it was a "*principal feature*" [emphasis added] (*id* at 273) of the scheme in question to impose a strict deadline for filing claims, after which creditors would be altogether barred from participating in the liquidation. (By logical implication, that feature of the scheme in *Kempe* would entail that the deadline for a creditor to apply to court to challenge the liquidators' decision in respect of its claim likewise had to be strictly observed.) However, the same cannot be said for all other schemes of arrangement without such a feature. We would reiterate here that, as a general principle, the court should be slow to abdicate the powers conferred on it by s 210 of the Companies Act *vis-à-vis* schemes of arrangement, especially when doing so would allow an injustice to stand.

63 Santow J in *Re AGL Gas Networks* ([55] *supra*) pointed out at [46] that *Kempe* proceeded on "attackable reasoning" which was "vulnerable" (see the passage quoted at [55] above). Referring to the assumption that a scheme of arrangement derived its efficacy from the statute and not from the court order sanctioning it, Santow J persuasively argued that if this approach was taken to its logical conclusion, it would produce "incongruous consequences" (*Re AGL Gas Networks* at [46]). He drew an analogy with the court's statutorily-conferred jurisdiction to illustrate his argument, pointing out that "[t]he fact that the [court's] jurisdiction is conferred by statute does not make any decisions of the court under the statutory jurisdiction any less orders of the court deriving their efficacy from being made" (*ibid*). According to Santow J, the statute might be an indispensable statutory prerequisite to the existence of the court's jurisdiction, but it was nonetheless "a 'background' fact" (*ibid*) behind that efficacy, and to say that it was the statute which gave a court order its binding authority "[was] like saying that the birth of Lee Harvey Oswald 'caused' the death of President Kennedy" (*ibid*). While we see the merit in Santow J's analogy in *Re AGL Gas Networks*, the same cannot be said about the analogy of royal assent given by the Privy Council in *Kempe* to support its holding that a scheme of arrangement derived its efficacy from the statute. The Privy Council had (at 276 (see the first of the two passages quoted at [48] above)) likened the court's sanction of schemes of arrangement to royal assent to Acts of the UK parliament; the fact that royal assent was required for an Act did not make the statute an expression of royal will and, likewise, the same reasoning applied to the court's sanction of schemes of arrangement. We note that this analogy is apt only if the court's sanction of a scheme is regarded as a *mere formality* like the royal assent required for UK Acts. However, as we have seen (at [43] above), cases (including English ones) have established that the court's sanction is not just a formality and that the court, in fact, has a crucial role to play in deciding whether a scheme is to be approved. Further, under the Singapore and the Australian provisions governing schemes of arrangement, the court has the expressly-defined power to impose such conditions on or make such amendments to the terms of a scheme as it deems fit before approving any scheme (see s 210(4) of the Companies Act (reproduced at [31] above) and s 411(6) of the 2001 Australian Corporations Act (reproduced at [35] above); the significance of these provisions will be dealt with in greater detail shortly). In the light of this, we do not see how (at least

in Singapore and Australia) the court's sanction of schemes of arrangement can be approximated to royal assent to Acts of the UK parliament. Another flaw in the reasoning in *Kempe* is exposed by the facts of the case itself. This was astutely pointed out by Santow J in *Re AGL Gas Networks* at [46] (see the passage quoted at [55] above), where he noted that the scheme in *Kempe* allowed a dissatisfied scheme creditor to apply to the court in respect of certain decisions made by the liquidators, and their Lordships had proceeded on the basis that there was nothing untoward in this. However, if indeed a court loses all jurisdiction in respect of a scheme of arrangement once it has sanctioned the scheme (save for its inherent jurisdiction to intervene in cases of fraud or obvious mistakes in the documents setting out the scheme), this begs the question of where the court obtains the necessary jurisdiction to exercise the appellate function conferred by the scheme in *Kempe*. We agree with Santow J that if a scheme of arrangement operates as an order of court instead of as a statutory contract, no such difficulty arises since the jurisdiction of the court to vary an order which it made earlier would continue.

64 Crucially, the approach adopted in *Kempe* does not comport with the plain *wording* of the relevant UK, Australian and Singapore provisions on schemes of arrangement, all of which stipulate that a scheme becomes *binding* only "*if sanctioned by the court*" (s 425(2) of the 1985 UK Companies Act (see [35] above)) or if it is "*approved by order of the Court*" (s 411(4) of the 2001 Australian Corporations Act (see [35] above) and s 210(3) of the Companies Act (see [31]) above)). The plain wording of these subsections would suggest that the efficacy of a scheme (or, at least, its binding nature, which is the key to the ability of a scheme of arrangement to fulfil its intended function of serving as machinery to overcome the impossibility of obtaining the individual consent of every creditor or member to a proposed scheme) stems from the court order which sanctions or approves it. This is *all the more so* under the Australian and the Singapore provisions, which use the specific words "*order* of the Court". Further, under the Australian and the Singapore provisions, there are specific subsections (namely, s 411(6) of the 2001 Australian Corporations Act (see [35] above) and s 210(4) of the Companies Act (see [31] above)) that stipulate that the court "may grant its approval to a compromise or [an] arrangement *subject to such alterations or conditions as it thinks just*" [emphasis added]. We accept that these provisions only allow a court to substantially amend the terms of a scheme *before* the court's approval of the scheme is given and, contrary to what counsel for Oriental contended, do not go as far as to allow the court to amend the terms of a scheme *after* approving the scheme. As seen earlier (at [44] above), it is an established principle that the terms of a scheme cannot be substantially amended (save in exceptional circumstances) after it has been approved by the court. However, these provisions do nonetheless somewhat reinforce the view that under the Australian and the Singapore companies legislation, the courts are allowed a more active participatory role in respect of schemes of arrangement as compared to the position under the UK's companies legislation, given that there is no equivalent of s 210(4) of the Companies Act or s 411(6) of the 2001 Australian Corporations Act in the 1985 UK Companies Act. It would seem incongruous that the court has such wide powers to amend the terms of a scheme before giving its approval to the scheme, but promptly loses all jurisdiction after it approves the scheme. A more tenable view would be that a scheme, when approved by the court, takes effect as an order of court and, like any other court order, can be varied, but only in deserving circumstances (which we will elaborate on at [70]–[82] below).

65 Finally, we note that the Privy Council in *Kempe* considered the amendment of time limits laid down in a scheme of arrangement to be one of *substance* and, thus, a "material alteration" (*id* at 276). Accordingly, the Privy Council dismissed Ambassador's application for an extension of time. As emphasised at [44] above, it is an established principle that a scheme cannot be altered after the court's sanction has been given to it so as to impose upon the creditors or the members an arrangement to which they did not agree. With respect, however, it is doubtful, to say the least, whether an extension of time to file a proof of debt (or to commence legal proceedings in respect of

the liquidator's decision on a proof of debt, as in the case of *Kempe*) should be treated, in the first place, as a material alteration or amendment of the substance of a court-approved scheme. It also appears to us that the Privy Council in *Kempe* did not consider this point carefully, but merely accepted it as a valid assumption (*id* at 276). In contrast to the cases cited at [44] above (namely, *Devi*, *British and Commonwealth Holdings plc*, *Eltraco* and *Chew Eu Hock*, all of which support the above-mentioned established principle), where the creditors in question (or, on the facts of *Devi*, the directors of the debtor company) sought to amend or object to the substantive terms of a court-approved scheme such that they were, in fact, trying to *resile* from the original scheme which had been agreed to by the requisite majority of supporting creditors and sanctioned by the court, the applicant in an extension of time case (such as Oriental in the present appeal) is usually not trying to substantially amend or resile from the scheme that it has entered into. *In fact, the applicant in such a scenario usually wholeheartedly supports the court-approved scheme and wants to take part in it, and the purpose of seeking an extension of a time limit laid down in the scheme is precisely for the purpose of participating in the scheme*. It appears that the significance of this distinction was also, at least partially, appreciated by the Judge in the proceedings below when she noted (at [37] of the GD):

> While *the applicant in the present case [ie, Oriental] did not seek to amend the scheme*, in my view, the principles governing this issue are important as they form another part of the framework in which the issue should be analysed. [emphasis added]

A better view, perhaps, is to treat an extension of time in respect of a court-approved scheme simply as a matter of *procedure*, rather than as a matter going to the substance or materiality of the commercial dimension of the scheme (an amendment of the latter nature would entail seeking the views of all the parties bound by the scheme). We note that Santow J himself in *Re AGL Gas Networks* ([55] *supra*) accepted (at [47]) the submission that in making an order to extend the time for the plaintiff company in that case to comply with a particular condition stipulated in a court-approved scheme, "[the court] would not be amending the scheme as such as it [*ie*, the extension of time] would not involve a change to any *substantive* provision of the scheme" [emphasis added]. If the view that an extension of time is usually a matter of procedure is accepted, then the grant of an extension of time will not be seen as detracting from the established principle that a court-approved scheme should not be altered in substance. An application for an extension of time after the court has approved a scheme should then likewise not be viewed as being tantamount to raising a late objection to the scheme that will jeopardise the certainty of the scheme's validity (see, in this regard, [46] above).

66 Viewed in this light, the Australian approach is in no way inconsistent with the established principles relating to schemes of arrangement, and also gives due consideration to the overarching need for clarity, certainty and finality in this area of the law (a point made briefly earlier at [61] above). We would also add, in respect of the latter concern, that a court order is in no way less binding than a statutory contract on the parties to a scheme of arrangement, and it is trite law as well as common sense that a court order cannot be altered at will by the parties who are subject to the order. As such, it is hard to see, with due respect, why there would invariably be less commercial certainty if the Australian approach is adopted: Any court order, once finalised, can only be amended in very limited circumstances, and any application to amend a court order would be subject to due process. It follows from the binding nature of a court order that the Australian approach can also achieve the legislative intent that schemes of arrangement should function as machinery to overcome the impossibility of attaining absolute consensus from all the company's creditors or members on a proposed scheme and to bind minority dissentients to the scheme.

67 There is also no reason why the Australian approach cannot embrace the legal concept that

a scheme of arrangement which is approved by *all* the creditors of a company "is wholly a *contractual* scheme" [emphasis added] (*Daewoo* ([26] *supra*) at [24]); the court order sanctioning such a scheme (*ie*, a scheme which is approved by all of the company's creditors) can be seen, in essence, as a *consensual order*. Viewed in this light, the sanctity of contract which lies at the heart of a scheme that has been duly approved by the company's creditors or members is preserved.

68 Further, the Australian approach will have the added advantages of:

(a) avoiding a strained construction of the plain wording of s 210(3) of the Companies Act, which, as demonstrated above at [64], suggests that a scheme of arrangement is made binding only upon its approval by the court; and

(b) avoiding the unfairness or injustice which may potentially be caused to an innocent creditor who is not to be blamed for its failure to file its proof of debt in time.

69 We note that the Judge did not take the view that the Australian approach was wrong; rather, she decided that "the English position [was] more persuasive" (see the GD at [32]). The question of whether the court has jurisdiction to extend time in respect of a court-approved scheme is essentially a question of discretion, and invariably requires a judge to take a considered view on what best accords with the need for commercial certainty and fairness in this area of the law. The Judge was unduly concerned with the overarching need for clarity, certainty and finality (all of which are crucial to the efficacious implementation of schemes of arrangement), and thus mistakenly concluded that anything less than the strict English approach would be undesirable. However, as we have shown, there are real practical conundrums with the strict English approach, and the reasoning in *Kempe* is, with respect, sharply flawed. On the other hand, adopting the Australian approach does not necessarily entail sacrificing clarity, certainty and finality. In fact, the Australian approach mitigates some of the injustice that may potentially result under the English approach. It also gives due consideration to the established principles relating to schemes of arrangement while meeting, at the same time, the objectives of the legislative framework governing such schemes. We have therefore adopted the Australian approach as according with both the underlying policy and the objectives of s 210 of the Companies Act.

Circumstances where the court's jurisdiction to extend time will be exercised

70 Having adopted the Australian approach, it would be helpful to provide some guidelines as to when the court should exercise its jurisdiction in favour of extending the time for a creditor to file its proof of debt (or extending other time limits prescribed in a scheme of arrangement) in respect of a court-approved scheme. Before doing so, it would be helpful to examine the factual matrices of the Australian cases in which such extensions of time have been granted.

(1) The Australian cases

71 We begin first with the case of *Caratti* ([54] *supra*). As mentioned earlier (at [54] above), in *Caratti*, three creditors under a court-approved scheme filed their claims in time, but failed to commence proceedings for a review of the scheme manager's decision to reject their claims ("review proceedings") within 14 days of the notice of rejection as stipulated in the scheme. It transpired that the scheme manager had sent letters to those creditors informing them that their claims had not been admitted, and the letters, together with the relevant documents, had been forwarded by the creditors to their solicitors. *The letters and the documents were, unfortunately, mislaid in the office of the creditors' solicitors*, and by the time they were discovered, the 14-day time period for commencing review proceedings had expired.

72 As noted by Wallace J at 96, the creditors' failure to commence review proceedings in time was due to an "accident". Given those circumstances, the Supreme Court of Western Australia reversed the decision of Wickham J in the court below and granted the three creditors an extension of time to commence review proceedings. Besides the fact that the creditors themselves were not to be blamed for failing to commence review proceedings in time, (more importantly) the court took into consideration the fact that no prejudice would be suffered by any party bound by the scheme if an extension of time was granted, *given that no distribution had been made yet under the scheme*. In fact, a refusal to grant an extension would have disadvantaged the three creditors. As Burt J explained at 95:

> *If, as I think is the case, there is power to extend the time, then a sound exercise of the discretion on the facts of this case requires that it be exercised*. It may be that in some cases the extension would be granted on terms, i.e., that if the debt be established, the claimant is to be excluded from any distribution made before that date. *In the present case however no distribution has been made and on the merits of the case the scheme manager does not oppose the making of an unconditional order. To refuse to make such an order might have the effect of a creditor's debt being released with no compensating advantage. This is not the idea of the scheme, or as Brightman, J., put it in Re NFU Development Trust, [1972] 1 W.L.R. 1548, at p. 1555; [1973] 1 All E.R. 135: "Confiscation is not my idea of an arrangement."* [emphasis added]

73 The second case, *Re AGL Gas Networks* ([55] *supra*), concerned a scheme of amalgamation and reconstruction of a gas company ("AGL") and its related companies. The scheme was perceived to have numerous advantages such as eliminating the duplication of record-keeping, accounting and maintenance procedures and bringing about greater flexibility and potential for improved growth for the whole organisation. The scheme was approved by an order of court made on 6 June 1994, and other related orders were also made at the same time to provide for the transfer of all the properties, powers and liabilities of the subsidiary companies to their parent company. The relevant orders (other than the order approving the scheme) were all subjected to certain conditions precedent stipulated in the scheme. Six years after the orders were made (and the scheme effected), it was discovered that the scheme had never become operative as one of the conditions precedent, *viz*, the amendment of AGL's then existing authorisation under the Gas Industry Restructuring Act 1986 (NSW) ("the NSW Gas Act") before midnight on 30 June 1994, had never been fulfilled (AGL had received notification of its amended authorisation a few seconds after midnight on 1 July 1994). In the words of Santow J (at [2]), "[t]he non-fulfilment [of the condition precedent] was *technical in the extreme* and *entirely accidental*" [emphasis added].

74 In fact, Santow J found that it would have been *impossible* in the first place for that condition precedent (*ie*, the amendment of AGL's then existing authorisation under the NSW Gas Act before midnight on 30 June 1994) to be fulfilled. He explained (at [5]):

> [T]he formulation of that condition and in consequence the 1994 court orders, was inherently circular in its terms. *Thus fulfilment of the scheme condition depended on the scheme transfer of assets while the scheme transfer of assets depended on fulfilment of the scheme condition. On that basis, the 1994 orders read literally could never bring the scheme into effect*. This was contrary to the expectation of all involved in the scheme process, including, it can be assumed, the judge's. [emphasis added]

Consequently, Santow J found that the parties had been labouring under a mistake of fact as to the fulfilment of the condition precedent (at [33]):

> I infer from all the evidence before me that at the hearing on 6 June 1994, the plaintiff [AGL] and its representatives honestly and reasonably believed that all the conditions precedent (including the requirement for the authorisation held by the plaintiff to be amended) were capable of being satisfied and would be satisfied prior to midnight on 30 June 1994. The court was not misled deliberately in relation to the orders that were sought. *Instead both the parties and the court were operating under a mistake of fact* (that is, that the authorisation would be obtained prior to midnight on 30 June 1994). [emphasis added]

75 In these circumstances, one of the questions before Santow J was whether the court could, pursuant to the Supreme Court Rules (NSW), amend the orders made on 6 June 1994 and extend the time for AGL to obtain amendment of its authorisation under the NSW Gas Act to 10 minutes after midnight on 30 June 1994 so that the unfulfilled condition precedent would be retrospectively satisfied. As seen above (at [55]), Santow J held that the court had the jurisdiction to do so since the efficacy of the scheme was derived from an order of court. Besides taking into account the fact that the non-compliance in question was technical and accidental, Santow J also considered the question of prejudice before concluding that the court's jurisdiction to grant an extension of time should be exercised in that case. At the outset, he made the following observation (at [3]):

> ***What now is to be done? Clearly no-one would be prejudiced if the scheme were able to be rendered operative, along with the consequential steps purportedly taken***. If possible this should be retroactive, though that involves an element of retrospective fiction. Indeed if it were *not* possible to achieve that rectification and validation, ***prejudice would flow both for the AGL group of companies, and the many who have dealt with it on the assumption that the scheme was effective***. [emphasis added in bold italics]

Further in his judgment, Santow J made the following essential findings of fact (at [21]):

> I find as a matter of fact that:
>
> (a) As at about one second past midnight on 30 June 1994 and thereafter, the plaintiff [AGL] and the subsidiary companies (to the extent that the effectiveness of their dissolution and other associated steps is questioned) *acted on the basis that the conditions precedent to the scheme of arrangement and the court orders had been complied with so that the scheme was assumed to be operative*.
>
> (b) After midnight on 30 June 1994, *the affairs of the plaintiff and the subsidiary companies have been conducted on the assumption that the scheme and its associated steps have been fully implemented*.
>
> (c) In the event the court is able to and does make orders validating, rectifying or confirming the validity of the scheme and its associated steps retroactively, *no injustice will be occasioned to any person now or in the future*.
>
> (d) If no such orders are made, then *substantial injustice in the form of inconvenience, cost and confusion will inevitably be occasioned to the scheme companies, their ultimate shareholders, customers and to the public generally in so far as it has dealings with the scheme companies*.
>
> [emphasis added]

In essence, Santow J was satisfied that no prejudice would be caused to any of the parties bound by

the scheme if an extension of time was granted since all the parties concerned had assumed and acted on the basis that the scheme was valid right from the start. Instead, certain parties would suffer prejudice if an extension was not granted. In view of this, coupled with the fact that the failure to comply with the condition precedent in question was technical and accidental, there was every reason to grant AGL an extension of time.

76 We turn now to the case of *Ray Brooks Pty Ltd* ([56] *supra*). Like the present appeal, *Ray Brooks Pty Ltd* was a case where a creditor ("Ray Brooks") had filed a (second, amended) proof of debt after the stipulated deadline for lodging proofs of debt. In that case, the administrator of an insolvent company ("Mr Smith") had developed and proposed a scheme of arrangement as an alternative to liquidation, with a view to achieving a better return for the company's creditors than would be available in liquidation. The scheme was eventually approved by the court. Pursuant to the scheme, Ray Brooks lodged a proof of debt on 28 November 2001, which was before the stipulated deadline of 3 December 2001. Mr Smith subsequently wrote to Ray Brooks on a few occasions requiring further particulars of its claim. To assist it in responding to Mr Smith's queries, Ray Brooks engaged a consultancy firm, which sought (and was granted) an extension of time from Mr Smith to provide the necessary particulars and supporting documents. The consultancy firm subsequently advised Ray Brooks that the claim originally submitted was significantly understated, and the latter thus submitted an amended proof of debt on 18 February 2002. Mr Smith rejected this amended proof of debt on the basis that it had been submitted out of time, although the first proof of debt submitted was accepted as valid.

77 In exercising the court's jurisdiction to extend the deadline for filing proofs of debt from 3 December 2001 to 18 February 2002 so as to admit Ray Brooks' amended proof of debt, Austin J held at [91]–[92]:

> *In my opinion, this is a case where considerations of fairness, in the exercise of its discretion under Pt 40 r 4 [of the Supreme Court Rules (NSW)], should lead the court to vary the time for Ray Brooks to lodge a formal proof of claim from 3 December 2001–18 February 2002*, so as to treat the second claim as the claim of Ray Brooks for the purposes of the scheme.
>
> In reaching this conclusion, I take specifically into account *the difficulties to which the company was subjected in preparing proof of its claim during the extremely busy grain harvesting period, and the propensity for error that this circumstance created*. I also take into account the *very large discrepancy between the first claim and the second claim*, reflecting a considered assessment by Ray Brooks that its entitlement was much higher than originally framed. I also take into account that, according to counsel for Ray Brooks, *his client does not seek to be able to rank for a distribution of a net amount greater than the amount of the first claim. It seems to me that unfair prejudice to the administration and other creditors can be avoided if orders are appropriately framed to limit the participation of Ray Brooks in a further distribution by reference to counsel's concession*.
>
> [emphasis added]

78 As noted above, although the company was insolvent, Austin J felt that no prejudice could possibly be caused to the other creditors if an extension of time was granted as Ray Brooks had undertaken to rank equally with the other creditors for only the amount stated in its first proof of debt.

(2) Distilling some principles

79 As seen from the cases above, *prejudice* to the company which is the subject of the scheme of arrangement, the other parties to the scheme as well as *the party who seeks the extension of time* is a significant (if not the most important) factor that the court takes into consideration in deciding whether to exercise its jurisdiction to grant an extension of a deadline contained in a court-approved scheme. In considering whether prejudice will be caused to any party (including the party seeking the extension of time), the court must consider the *entire* circumstances of the case, *notably*:

(a) whether any distribution has been made under the scheme;

(b) whether allowing the application for extension of time will inconvenience the other creditors or substantially affect the dividends that they can expect to receive;

(c) whether the order for extension of time can be framed to avoid any potential prejudice to other creditors; and

(d) how much the creditor seeking the extension of time stands to lose if no extension is granted.

We would stress that this list of factors is not exhaustive and the court must always consider the circumstances of the case *as a whole* in deciding if prejudice would be caused to any of the interested parties.

80 Leaving aside the factor of prejudice, it appears that another factor that the court takes into consideration in deciding whether to exercise its jurisdiction to extend time in this context is the *reason* behind the failure of the party seeking the extension of time to comply with the timeline originally stipulated. A common theme that runs through the cases discussed above (at [71]–[78]) is that the party seeking an extension of time in each case was not *blameworthy* for its non-compliance with the original timeline – in *Caratti* ([54] *supra*), the creditors' solicitors had mislaid the documents in their office; in *Re AGL Gas Networks* ([55] *supra*), Santow J found that it was impossible in the first place for AGL to have complied with the condition precedent in question; and in *Ray Brooks Pty Ltd* ([56] *supra*), Ray Brooks had filed its first proof of debt in time and had a valid excuse for not providing the correct figure in that proof of debt (which had been prepared during the busy grain harvesting period), thus necessitating the filing of an amended proof of debt after the original deadline.

81 Besides prejudice, the conduct of the party seeking an extension of time (including its reasons for failing to comply with the original deadline) and, of course, the extent of the delay involved, it is difficult (or perhaps impossible) for us to list here all the other factors that may be relevant. Many of the other relevant factors would in any case be subsumed under the consideration of prejudice (see [79] above). What other factors are relevant will depend on the facts of each case, and it would always be important for a court considering an application for an extension of time to have regard to the entire factual matrix. However, we emphasise (and this point also emerges from the Australian cases discussed above) that the *overriding consideration* remains (and should remain) that of prejudice – *ie*, whether prejudice would be caused to any party bound by the scheme if the extension of time is or is not granted, and, if so, whether such prejudice can be redressed. Thus, a creditor who is late in filing its proof of debt due to a genuine oversight should not be penalised with forfeiture of its entire debt if no prejudice would be caused to the other creditors or the company by granting an extension of time. That is not to say, however, that a creditor can be as negligent or lackadaisical as it wants in filing its proof of debt.

82 It should not come as a surprise that prejudice and the conduct of the party seeking an extension of time are relevant considerations in the present context (*viz*, extension of a time frame contained in, specifically, a court-approved scheme), given that they are the same factors that a court considers when deciding whether to exercise its discretion to extend or abridge time pursuant to O 3 r 4 of the Rules of Court in other types of legal proceedings (see, generally, *Singapore Court Practice 2006* (Jeffrey Pinsler gen ed) (LexisNexis, 2006) at paras 3/4/1–3/4/10 and *Singapore Civil Procedure 2007* (G P Selvam chief ed) (Sweet & Maxwell Asia, 2007) at paras 3/4/1–3/4/8). However, one difference, we would add, between an application for an extension of time in the context of a court-approved scheme and the same application in other contexts is that a court deciding whether to exercise its jurisdiction to extend time in the former should have regard to the overarching need for clarity, certainty and finality, all of which are crucial for the proper functioning of schemes of arrangement. A court must therefore be circumspect when considering an application to extend time in the context of a court-approved scheme.

Whether an extension of time pursuant to the Rules of Court should be granted in the present case

83 In the court below, the Judge held that "even if there were jurisdiction to give an extension … the facts of this case did not merit the court's indulgence" (see the GD at [42]). She noted that Oriental had been reminded on a number of occasions about the deadline for filing its proof of debt as well as the consequences of not filing one in time. More importantly, she held that "contrary to Oriental's arguments that Reliance would suffer minimal prejudice if the present application was allowed … there would be *serious repercussions* if this application was allowed … for Reliance" [emphasis added] (see the GD at [44]), and accepted Reliance's submission that "the entire scheme might have to be *abandoned*" [emphasis added] (*id*) if the application was allowed. Unfortunately, the Judge did not elaborate on what "serious repercussions" Reliance would suffer if Oriental's application for an extension of time were allowed or why the Scheme might have to be abandoned in that event. Indeed, this appeared to be nothing short of a bare submission by Reliance, unsupported by the facts before us. We therefore could not agree with the Judge that the facts of this case merited such a conclusion.

84 We found, on the contrary, that no prejudice would be caused to Reliance or the other Scheme Creditors if we were to allow Oriental's application; in fact, Oriental would be severely prejudiced if we were to dismiss its application. Our reasons for coming to this conclusion are as follows.

85 Firstly, as mentioned earlier (see [8] above), the Scheme was a *solvent* one. Based on Reliance's audited accounts as at 31 December 2005, Reliance had sufficient assets to pay *all* the Scheme Creditors, including Oriental, *in full* (a point which counsel for Reliance acknowledged at the hearing before this court). In fact, it was clear from the Scheme Documents (see [7] above) that the purpose of the Scheme was to make *full payment* to all the Scheme Creditors so as to conclude the run-off of Reliance's business more expeditiously than would be the case if the run-off were to continue until all claims from Scheme Creditors had materialised and had been paid. It followed then that if an extension of time were granted to Oriental to file its proof of debt and its claim subsequently admitted, the rest of the Scheme Creditors would not in any way be prejudiced given that all of them would, in any event, be receiving full payment for their ascertained claims. Indeed, counsel for Reliance, upon being queried by us, conceded that Reliance had thus far not received any objection from any of the Scheme Creditors in respect of Oriental's application for an extension of time to file its proof of debt and for its claim to be admitted. The fact that the Scheme was a solvent one was an important factor (although by no means a decisive one) that we took into consideration in assessing if any prejudice would be caused to the rest of the Scheme Creditors or any other parties bound by the Scheme if Oriental's application were to be allowed.

86 Secondly, at all material times, Oriental was a creditor *known* to Reliance, and Reliance was always prepared to meet Oriental's claim. Mr Andy Campbell, a director of Reliance, had flown to India to garner Oriental's support for the Scheme, and Reliance had admitted Oriental's claim of approximately US$20m for the purposes of voting at the Court Meeting. It appeared from the Explanatory Statement that Oriental was (by virtue of the size of its claim) by far the largest creditor of Reliance, and if Oriental (voting by proxy at the Court Meeting) had not voted in favour of the Scheme, the Scheme might not have received the requisite approval of three-fourths in value of the Scheme Creditors present and voting either in person or by proxy at the Court Meeting as stipulated by s 210(3) of the Companies Act, and might in turn never have been implemented in the first place. In such circumstances, we could not see how Reliance would in any way be prejudiced if Oriental's claim were admitted as a result of our granting Oriental an extension of time to file its proof of debt. This was certainly not a case of a creditor suddenly materialising out of thin air.

87 Thirdly, Oriental was only two months late in filing its proof of debt, and when Oriental first notified Reliance that it wished to file its proof of debt out of time in its letter dated 16 July 2007 (see [18] above), there was still a good six months before the targeted payment date of 28 February 2008 under the Scheme. Had Oriental's claim been admitted then (*ie*, in July 2007), the Scheme Manager would have had more than adequate time to ascertain Oriental's claim. Given also that no payment has been made under the Scheme thus far, we do not see how Reliance or any of the other Scheme Creditors would be prejudiced even if Oriental files its proof of debt now and has its claim admitted at this late stage. If anything, this would only mean that payment has to be deferred to a later date, but we note that the original *targeted* payment date was only a *tentative* date in the first place.

88 Finally, we were of the opinion that the only prejudice that could potentially arise in the present case would be that which would be caused to Oriental if its application for an extension of time were not granted. Oriental has a claim of US$19,031,656, and, although this figure is an estimate, the ascertained claim would in any case still be a significant sum. This was what was at stake for Oriental in the present appeal, and if we had refused its application for an extension of time, we would, as contended by counsel for Oriental, literally be handing to the shareholder(s) of Reliance (WIG, in this case) an unmerited windfall. Oriental would be left with virtually nothing, although it had voted in favour of the Scheme and was all along a creditor known to Reliance to have an apparently genuine claim.

89 This brings us to the question then of whether Oriental could only blame itself for not filing its proof of debt in time and whether it should be entitled to a second bite of the cherry. The Judge was clearly of the view that Oriental should not be given a second chance, given the numerous reminders that Reliance had purportedly sent out. We note that there was some dispute in the court below as to whether Oriental did receive those reminders. The Judge was of the view that since the letter of 14 November 2006 (see [14] above) had been sent to Oriental at the General Address (which was the address that the Scheme Documents had been sent to, and Oriental had confirmed receipt of those documents), and since at least three of the e-mails sent after November 2006 had been sent to the e-mail address provided by Oriental in its completed voting form, Reliance had done as much as it could to notify Oriental of the need to file its proof of debt before the Claims Cut-Off Date (see the GD at [42]).

90 With respect, we do not share the Judge's view that Reliance had done its best to notify Oriental of the deadline for filing its proof of debt. The crucial letter of 14 November 2006, which informed Oriental that the Scheme had been sanctioned by the High Court and which enclosed a proof of debt form as well as instructions for filing up the form, was addressed to Mr Mohan, who had retired from Oriental in February 2005 (see [15] above). Although it was not wrong for Reliance to have sent this letter to the General Address, we would have thought that, as a matter of prudence

and common sense, a copy of the letter, clearly addressed to Mr Jindal (who had signed the voting form on behalf of Oriental), should also have been forwarded to the address provided in Oriental's completed voting form. As for the three e-mail reminders that were sent to Mr Jindal's e-mail address (see [16] above), we note that although Reliance had produced "Delivery Status Notification (Relay)" reports to prove that those e-mails were indeed sent out, the reports did not in any way prove that Mr Jindal had received the e-mails. We are also puzzled as to why Reliance only made two attempts (both unsuccessful) to contact Oriental by telephone and why those telephone calls were made to Oriental's fax number instead of Oriental's telephone number (see [17] above). Even if Reliance did not have Oriental's telephone number, it would have been able to obtain the number if it had genuinely resolved to do so.

91 Nonetheless, we accept that Oriental was certainly not blameless (unlike the parties seeking an extension of time in the Australian cases discussed at [71]–[78] above) for its failure to file its proof of debt in time. Even if Reliance had not informed Oriental that the Scheme had been sanctioned or had not reminded the latter about the deadline for filing its proof of debt, it would have been prudent for Oriental to make the necessary enquiries itself. However, as mentioned above (at [81]), the overriding consideration in determining whether the court's jurisdiction should be exercised in favour of granting an extension of time would be whether any prejudice will be caused to any party bound by the scheme if an extension of time were granted (or not granted), even though the court is also entitled to take into account, *inter alia*, the conduct of the party seeking an extension of time. The present case was not one of a patent oversight. Rather, there seemed to have been a slip between the cup and the lip on Oriental's part that ought to have been viewed with a measure of leniency. The facts we have referred to plainly show that no discernible prejudice would be caused to either the rest of the Scheme Creditors or Reliance if the present application for an extension of time were allowed; on the contrary, dismissing the application would have grave and irreparable consequences for Oriental. We are of the view that the failure by Oriental to file its proof of debt in time here was a case of inadvertent oversight on Oriental's part. Upon learning of its failure in this regard two months after the deadline for filing its proof of debt had passed, Oriental immediately wrote to notify Reliance of its wish to submit its claim, and, at that time, there was still approximately six months before the targeted payment date under the Scheme. Given these circumstances, we are of the view that the present case was one that warranted the exercise of the court's jurisdiction to grant an extension of time. Accordingly, we granted Oriental an extension of time.

Whether the court has jurisdiction under section 392(4)(d) of the Companies Act to extend the time for filing proofs of debt

92 In view of our reliance on O 3 r 4 of the Rules of Court to allow Oriental's appeal (and, thus, its application for an extension of time), it was not strictly necessary for us to consider the new (and alternative) legal argument raised by Oriental in its written skeletal submissions for this appeal (see [27] above), *viz*, that s 392(4)(*d*) of the Companies Act conferred on the court jurisdiction (which was independent of the nature of schemes of arrangement) to grant an extension of time for a creditor in Oriental's position to file its proof of debt. In the interests of completeness, however, we will now deal with this issue.

Legislative history of section 392(4)(d)

93 Section 392(4)(*d*) of the Companies Act provides as follows:

> (4) Subject to the following provisions of this section and without limiting the generality of any other provision of this Act, the Court *may*, on application by any interested person, make all or any of the following orders, either unconditionally or subject to such conditions as the Court

imposes:

…

(*d*) an order *extending the period* for doing any act, matter or thing or instituting or taking any proceeding under this Act or *in relation to a corporation* (including an order extending a period where the period concerned expired before the application for the order was made) or abridging the period for doing such an act, matter or thing or instituting or taking such a proceeding,

and may make such consequential or ancillary orders as the Court thinks fit.

[emphasis added]

94 Section 392(6)(*c*) further provides that an order under s 392(4)(*d*) can only be made if such an order will not cause "substantial injustice" to any person:

(6) The Court shall not make an order under this section unless it is satisfied —

…

(*c*) in every case, that no *substantial injustice* has been or is likely to be caused to any person.

[emphasis added]

95 Section 392 of the Companies Act, which was first enacted in 1987 (via the Companies (Amendment) Act 1987 (Act 37 of 1987)), was inspired by s 539 of the Companies Act 1981 (Cth) (see *Butterworths' Annotated Statutes* ([33] *supra*) at p 940). As there appears to be no equivalent provision in the UK's companies legislation, s 392 seems to have been derived entirely from Australian legislation. Presently, s 392 of the Companies Act is *in pari materia* with s 1322 of the 2001 Australian Corporations Act, of which s 1322(4)(d) (the subsection corresponding to s 392(4)(*d*) of the Companies Act) reads as follows:

(4) Subject to the following provisions of this section *but* without limiting the generality of any other provision of this Act, the Court may, on application by any interested person, make all or any of the following orders, either unconditionally or subject to such conditions as the Court imposes:

…

(d) an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under this Act or in relation to a corporation (including an order extending a period where the period concerned ended before the application for the order was made) or abridging the period for doing such an act, matter or thing or instituting or taking such a proceeding …

[emphasis added]

Thus, save for the word "but" (italicised in the quotation above) in the opening words of s 1322(4)(d) of the 2001 Australian Corporations Act, the wording of that provision is exactly the same as the wording of s 392(4)(*d*) of the Companies Act. Section 392(6)(*c*) of the Companies Act is also

substantially the same as s 1322(6)(c) of the 2001 Australian Corporations Act, which reads as follows:

> (6) The Court must not make an order under this section unless it is satisfied:
>
> …
>
> (c) in every case – that no substantial injustice has been or is likely to be caused to any person.

Section 392(4)(d): its scope and its applicability to extensions of time in respect of court-approved schemes

96 It appears that s 392(4)(*d*) of the Companies Act has hitherto not been interpreted by the local courts. However, a plain reading of this provision would suggest that it has a rather broad remit. The learned authors of *Australian Corporation Law* ([39] *supra*) note (at vol 3, para 9.4.0080 (April 2007 release)) in relation to the corresponding Australian provision (*ie*, s 1322(4)(d) of the 2001 Australian Corporations Act):

> Section 1322(4)(d) confers power on a court to extend or abridge the period for doing *any* act "in relation to a corporation". *The section does not identify the instrument or authority that has the prescribed period which the court is able to extend or abridge*. [emphasis added]

It would thus follow that as long as the act in respect of which an extension of time is sought is "in relation to a corporation", but subject to the qualification in s 1322(6) of the 2001 Australian Corporations Act, the court will be able to grant an extension of time if it deems it fit to do so.

97 Before we proceed further to discuss some of the cases that have applied the Australian provision, a clarification is perhaps first needed. It will be seen shortly that some of the cases discussed below concern legislation that predates the 2001 Australian Corporations Act. These cases are nonetheless relevant as they deal with essentially the same provision as the present s 1322(4)(d) of the 2001 Australian Corporations Act. Some brief comments on the background of the 2001 Australian Corporations Act are necessary to understand this (see, generally, *Ford* ([34] *supra*]), vol 1 at paras 2.170–2.320 (March 2002 release); *Halsbury's Laws of Australia* vol 7 (J D Heydon gen ed) (Butterworths, Looseleaf Ed, 1993) at para 120-130 (March 2007 release); and Phillip Lipton & Abe Herzberg, *Understanding Company Law* (Lawbook Co, 10th Ed, 2001) at pp 7–9). Companies legislation in Australia used to be under the purview of each state's legislature, but, in 1989, the Commonwealth parliament enacted the Corporations Act 1989 (Cth) ("the Commonwealth Corporations Act") as a national law governing companies. Although enacted in 1989, this Act did not take effect because of a successful constitutional challenge to it in *The State of New South Wales v The Commonwealth of Australia* (1990) 169 CLR 482, where the Australian High Court held that the Constitution of the Commonwealth of Australia did not confer power on the Commonwealth to make laws on the incorporation of companies generally. Pursuant to this decision, the Commonwealth, the various states and the Northern Territory, through co-ordinated legislation, sought to put in place a uniform companies law. The Commonwealth Corporations Act was amended such that it became the companies legislation of the Australian Capital Territory only, and s 82 of that Act (as amended) set out what was termed "the Corporations Law". Instead of each state and the Northern Territory passing different statutes on companies law, each of them enacted as its companies legislation the Corporations Law set out in s 82 of the Commonwealth Corporations Act (as amended) ("the Australian Corporations Law"). This state of affairs continued until the 2001 Australian Corporations Act was enacted following a reference of power by the various states to the Commonwealth.

Section 1322(4)(d) of the Australian Corporations Law is, in fact, equivalent to s 1322(4)(d) of the 2001 Australian Corporations Act (the same applies in respect of s 1322(6)(c) of the 2001 Australian Corporations Act). Many Australian textbooks, when referring to s 1322(4)(d), do not state whether they are referring to this provision as it is set out in the 2001 Australian Corporations Act or as it is set out in the Australian Corporations Law. References to s 1322(4)(d) in cases dealing with legislation predating before the 2001 Australian Corporations Act are, in fact, references to s 1322(4)(d) of the Australian Corporations Law, and we shall use the generic term "s 1322(4)(d)" in these grounds of decision to denote this subsection regardless of the particular piece of Australian legislation which it appears in . With this in mind, we proceed now to consider some of these cases.

98 In Australia, s 1322(4)(d) has been applied in a number of instances where the time for doing a certain act was prescribed by the Australian Corporations Law and/or the 2001 Australian Corporations Act (see, for instance, *Village Roadshow Broadcasting Pty Ltd v Austereo Ltd* (1997) 24 ACSR 185, where Goldberg J used s 1322(4)(d) to abridge the period during which dissenting offerees to a takeover offer could apply under s 701(6) of the Australian Corporations Law in respect of notices given to them by the offeror, and *National Roads and Motorists' Association Ltd v Parkin* (2004) 49 ACSR 485, where Campbell J used s 1322(4)(d) to extend by two months the time for the applicant company to hold a general meeting pursuant to a requisition from its members under s 249D of the 2001 Australian Corporations Act; see also, generally, *Ford* ([34] *supra*), vol 1 at para 7.583 (November 2005 release)). The Australian courts have, however, also held that s 1322(4)(d) does not apply in some instances (see, for example, *Re Panbio Pty Ltd* (2000) 35 ACSR 458, where it was held that s 1322(4)(d) could not be used to extend or abridge the one-month period specified in s 164 of the Australian Corporations Law for a company which had changed its company type to alter the details of its registration as to invoke s 1322(4)(d) in this manner would undermine the protection provided in s 164(7) of the Australian Corporations Law; and *S T (2) Pty Ltd v Lockwood* (1998) 27 ACSR 667, where it was held that s 1322(4)(d) did not apply to cure a failure to comply with s 444B(2)(a) of the Australian Corporations Law, which required a company to execute a deed of company arrangement within 21 days after the end of the creditors' meeting at which it was resolved that the company should execute such a deed, as s 444B(2) already contained within it a specific remedial provision (*viz*, s 444B(2)(b)) in the event that an extension of time was needed). It appears that in instances where a specific time period is prescribed by the 2001 Australian Corporations Act and/or the Australian Corporations Law, whether s 1322(4)(d) can operate to extend that time period will depend upon the particular statutory context (*Brown v DML Resources Pty Ltd (No 6)* (2002) 40 ACSR 669). Section 1322(4)(d) has also been applied in instances where the time period was not directly fixed by statute, such as in *Re Dana Australia (Holdings) Pty Ltd* (2006) 57 ACSR 99, where Finkelstein J held that the subsection permitted the court to extend the time for doing certain acts fixed by the Australian Securities and Investments Commission in class orders made under s 341 of the 2001 Australian Corporations Act.

99 As for the applicability of s 1322(4)(d) to the extension of time *vis-à-vis* schemes of arrangement, this was considered by Santow J in *Re AGL Gas Networks* ([55] *supra*). He opined at [51]:

> Although it is not necessary finally to decide whether s 1322(4)(d) applies in these circumstances, and especially with no contradictor, clearly *s 1322(4)(d) was drawn in very wide terms as a remedial provision*. Moreover, the words "in relation to" are well recognised as words of expansive meaning (see, eg, *Tooheys Ltd v Cmr of Stamp Duties* (1961) 105 CLR 602) but gathering its meaning "from the context in which it appears ... which will determine the matters to which it extends": per Deane, Dawson and Toohey JJ in *Workers' Compensation Board (Qld) v Technical Products Pty Ltd* (1988) 165 CLR 642 at 653; 81 ALR 260. It allows the court to make an order extending or abridging time whether for any proceeding under the [Australian

Corporations] Law or "relating to a corporation". *A scheme of arrangement clearly "relates to a corporation" being the corporation which proposed the scheme.* [emphasis added]

100 Since Santow J had already decided that the court could grant AGL the extension of time sought pursuant to the Supreme Court Rules (NSW) (on the basis that a scheme of arrangement derived its efficacy from the order of court approving the scheme), his comments above were strictly *obiter*. We note that Santow J himself prefaced the above passage with the caveat that "it [was] not necessary finally to decide whether s 1322(4)(d) [applied] in these circumstances", and he made it clear again later in his judgment (at [53]) that he was not deciding if the subsection would apply in the case before him:

> The plaintiff [AGL] submits that in the circumstances of this case the operation of the section [*ie*, s 1322(4)(d)] is enlivened and that as a matter of discretion I could make appropriate orders. If I had not been minded to make orders on the bases set out above, I would have needed to reach a conclusion on that; but *I do not need to do so and prefer to leave that question for another day*. [emphasis added]

101 Counsel for Reliance submitted that s 392(4)(*d*) of the Companies Act would not be of avail to Oriental in the present case as it has been held in *Diversified Mineral Resources NL v Amusmet Investments Pty Ltd* (1991) 24 NSWLR 77 ("*Diversified Mineral Resources*") that the corresponding Australian provision (*ie*, s 1322(4)(d)) did not apply in a situation where an event occurred automatically upon the termination of a prescribed time frame, as opposed to a case where some act must be undertaken in order for the event in question to occur within the stipulated time frame. Reliance contended that Oriental's claim:[note: 7]

> … was, pursuant to the Scheme, deemed zero automatically when it failed to submit its Proof of Debt on time; no further action was required on the part of [Reliance]. Thus, Section 392(4)(d) of the [Companies] Act cannot avail [Oriental].

At the hearing before this court, counsel for Reliance pointed out, in support of the above submission, that Santow J himself in *Re AGL Gas Networks* at [51] had observed that *Diversified Mineral Resources* was authority for the proposition that s 1322(4)(d) did not apply where time expired automatically.

102 With respect, we do not agree with Reliance's submission. In relation to Santow J's observation, the relevant part of his judgment in *Re AGL Gas Networks* at [51] reads as follows:

> [T]here is authority for the proposition that where time expires automatically, for example under the [Australian Corporations] Law or the [company's] articles – and it might be suggested a scheme condition – s 1322(4)(d) cannot be used to extend it: *Diversified Mineral Resources NL v Amusmet Investments Pty Ltd* (1991) 5 ACSR 465; 9 ACLC 1047 per McLelland J. *Dicta by the High Court may suggest that that constraint does not apply at least where the step is one directly for the corporation or its creditors to take, rather than one which less directly merely concerns the corporation*: *Australasian Memory Pty Ltd v Brien* (2000) 172 ALR 28; 34 ACSR 250 at 260. [emphasis added]

From the above passage, it appears that Santow J was of the view that *Diversified Mineral Resources* represented the proposition that if a stipulated time period for doing an act expired automatically under the Australian Corporations Law or the articles of association of a company, s 1322(4)(d) could not be used to extend that time period. However, he qualified his view by commenting that that constraint did not appear to apply at least where the step to be taken within the stipulated time

period was one *directly* for the corporation or its creditors to take. As discussed earlier (see [73]–[75] above), in *Re AGL Gas Networks*, an extension of time was sought for AGL to fulfil a condition precedent laid down in the scheme, namely, an amendment of its then existing authorisation under the NSW Gas Act before midnight on 30 June 1994. Santow J noted that such an amendment was not exactly "a step directly relating to a corporate proceeding though indispensable to it taking effect" (*id* at [51]). However, as he had already decided that the court could extend time pursuant to the Supreme Court Rules (NSW), he felt that there was no need to decide if s 1322(4)(d) applied on the facts (see [99]–[100] above). Unlike the factual scenario in *Re AGL Gas Networks*, the present appeal concerns the filing of a proof of debt by a company's creditor (*ie*, Oriental) under a court-approved scheme (*ie*, the Scheme). Unlike the fulfilment of the particular condition precedent which was considered in *Re AGL Gas Networks*, the filing of a proof of debt, on Santow J's own view that a scheme of arrangement "clearly 'relate[d] to a corporation' being the corporation which proposed the scheme" (*id* at [51]) and "so too [did] performance of all the scheme steps" (*ibid*), is clearly a step directly "in relation to a corporation" for the purposes of s 392(4)(*d*) of the Companies Act.

103 The present case is also distinguishable from *Diversified Mineral Resources* on two points. Firstly, the latter case involved a statutory provision, *ie*, s 388(1) of the Australian Corporations Law, which prescribed a 14-day time period for a shareholder to pay up upon a demand for payment pursuant to a call by the company on that shareholder's shares, failing which the shareholder's shares would be automatically forfeited for non-payment. Thus, unlike the scenario in this appeal, *Diversified Mineral Resources*, to begin with, was not concerned with a situation where the time period in question was not prescribed by statute. Secondly, in *Diversified Mineral Resources*, the interlocutory application brought by the defendant shareholder was for an extension of the time period set out in s 388(1) of the Australian Corporations Law, upon the expiry of which a shareholder's shares could be automatically forfeited for non-payment pursuant to a call made on those shares. McLelland J held (*inter alia*) at 78 that s 1322(4)(d) did not apply because under s 1322(4)(d), the relevant power conferred on the court was to extend the period "for *doing* any act, matter or thing or instituting or taking any proceeding under this Law or in relation to a corporation" [emphasis added]; since forfeiture for non-payment upon a call on shares occurred automatically under s 388(1) without occasion for anyone to do any act, matter or thing or institute or take any proceeding in order for forfeiture to occur, s 1322(4)(d) was inapplicable. This appeared to be the holding relied on by Reliance (see [101] above) in its submission that s 392(4)(*d*) of the Companies Act was similarly of no avail to Oriental in this appeal. With respect, Reliance has misapplied McLelland J's holding in *Diversified Mineral Resources*. In that case, the time period in question related to the *forfeiture* of shares; the defendant shareholder was seeking to delay forfeiture by obtaining an extension of the time period set out in s 388(1) of the Australian Corporations Law pending the hearing of the substantive proceedings as to whether there was in fact any money owing on its shares. In contrast, the relevant time period in this appeal related to the *filing* of a proof of debt, and not the *deeming* of a Scheme Creditor's claim to be zero if its proof of debt was not filed by the Claims Cut-Off Date. The filing of a proof of debt would certainly be an act "in relation to a corporation" within the meaning of s 392(4)(*d*) of the Companies Act if Santow J's reasoning in *Re AGL Gas Networks* at [51] (see the passage cited at [99] above) is accepted. It can, perhaps, plausibly be said that in *Diversified Mineral Resources*, the defendant shareholder was effectively seeking an extension of time to make payment following the company's call on its shares, and although such payment would certainly have been an act in relation to a corporation, the court held that s 1322(4)(d) did not apply. However, this was not how the application for extension of time was framed before McLelland J (perhaps, if the application in that case had indeed been framed in that way, McLelland J might have allowed it, but we need say no further on this). In any event, as mentioned at [98] above, whether s 1322(4)(d) can be applied to extend a time limit prescribed by a provision in the Australian Corporations Law and/or the 2001 Australian Corporations Act would invariably depend on the particular statutory context. No such consideration arises where the time period which is sought to be extended is *not* prescribed by

statute, such as in the present appeal.

104 Given the plain wording of s 392(4)(*d*) of the Companies Act, we are of the view that there is no reason why this subsection cannot, in principle, apply to any step to be taken by a creditor under a court-approved scheme, such as the filing of a proof of debt in this case, subject to the caveat that no order under s 392(4)(*d*) can be made unless the court is satisfied that no substantial injustice would be caused to any party by the making of such an order (see s 392(6)(*c*)).

"Substantial injustice" for the purposes of section 392(6)(c)

105 It remains to be seen what the meaning of "substantial injustice" in s 392(6)(*c*) of the Companies Act is. The learned authors of *Ford* ([34] *supra*) explained the requirement of "no substantial injustice" in the corresponding Australian provision (*ie*, s 1322(6)(c) of the 2001 Australian Corporations Act) as follows (at vol 1, para 7.584 (November 2005 release)):

> Section 1322(6)(c) prescribes a condition which affects all four kinds of order [which can be made under s 1322]. *The court must be satisfied that no substantial injustice has been or is likely to be caused to any person*. As it appeared in s 366 of the Uniform Companies Act 1961 (Cth), this condition was considered in *Re Compaction Systems Pty Ltd* [1976] 2 NSWLR 477; (1976) 2 ACLR 135; (1977–78) CLC 40-313. Bowen CJ in Eq said (ACLR at 150):
>
> > *In my view, the word "injustice" in this provision requires the court to consider any real, and not merely insubstantial or theoretical, prejudice which will be suffered by, for example, a member by the making of an order, and to weigh this in the scales against the prejudice to the company, other members and creditors, if an order is not made*. In other words, it is insufficient to show that there may be some prejudice to a member if, on a consideration of the whole matter, the overwhelming weight of justice, as it were, is in favour of making the order (see *Re Australian Continental Resources Ltd* (1975) 10 ACTR 19; 1 ACLR 405 per Blackburn J at 33–4; see also *Re Castlereagh Securities Ltd* [1973] 1 NSWLR 624; (1971–73) CLC 40–066 and *Elderslie Finance Corporation Ltd v ASC* (1993) 11 ACSR 157 at 160; 11 ACLC 787).
>
> [emphasis added]

106 Essentially, Bowen CJ held in *Re Compaction System Pty Ltd* [1976] 2 NSWLR 77 that it was necessary to show *real* rather than *insubstantial* or *theoretical* prejudice in order to dissuade the court from making an order under the then equivalent of s 1322(4) of the 2001 Australian Corporations Act. The prejudice against a particular party if an order were made must be weighed against the prejudice to the other members and creditors of the company as well as to the company itself if the order were not made, and thus, a decision as to whether substantial injustice exists is "a *balancing act*" [emphasis added] (see *Australian Corporation Law* ([39] *supra*), at vol 3, para 9.4.0080 (April 2007 release)). Bowen CJ's observations as set out above have been approvingly referred to locally in *Golden Harvest Films Distribution (Pte) Ltd v Golden Village Multiplex Pte Ltd* [2007] 1 SLR 940 at [54], where this court suggested that the determination of substantial injustice under s 392 of the Companies Act involved "a holistic weighing and balancing of the various interests of all the relevant parties".

107 In our opinion, the *same* balancing act is undertaken by the court when it considers the potential prejudice that may be caused to the interested parties if it were to exercise or decline to exercise its jurisdiction to extend time under O 3 r 4 of the Rules of Court (see [79] and [81] above). A question that then arises is whether the test of "no substantial injustice" in s 392(6)(*c*) of the

Companies Act entails a consideration of the same factors as those relating to prejudice which the court takes into account in determining whether an extension of time should be granted under the Rules of Court. We agree with Bowen CJ's observation in *Re Compaction Systems Pty Ltd* (see the passage quoted at [105] above) that "injustice" in s 392(6)(*c*) refers to the same thing as (real) prejudice. As for the word "substantial", it is defined in A S Hornby, *Oxford Advanced Learner's Dictionary of Current English* (Oxford University Press, 5th Ed, 1995) at p 1192 as "large in amount or value; considerable". In our opinion, the court can grant an extension of time under s 392(4)(*d*) of the Companies Act so long as it is satisfied that no *considerable* prejudice would be caused to any of the interested parties if the order is made. It thus appears to us that "substantial injustice" in s 392(6)(*c*) amounts to something greater than just ordinary prejudice.

108 However, we would stop short of saying that a party who fails to obtain an extension of time under the Rules of Court can, in contrast, do so under s 392(4)(*d*) of the Companies Act if, say, it is shown that some prejudice may be caused to a relevant party, but the prejudice does not amount to "substantial injustice". It must be borne in mind that the power conferred on the court by s 392(4) is *discretionary*, given that the provision directs that the court "*may*, on application by any interested person, make all or any of the following orders [in ss 392(4)(*a*)–392(4)(*d*)], either unconditionally or *subject to such conditions as the Court imposes*" [emphasis added] (see [93] above). Thus, the learned editors of *The Laws of Australia* vol 4 (Thomson Lawbook Co, Looseleaf Ed, 1993) have, in regard to the making of orders under s 1322 of the 2001 Australian Corporations Act, commented as follows (at para 4.2.1320 (April 2006 release)):

> Even where the court is satisfied of the matters specified in s 1322(6) [*ie*, that no substantial injustice has been or is likely to be caused to any party], it retains a *discretion* whether or not to make a validating order, and does not do so unless it considers intervention to be justified. [emphasis added]

It follows that notwithstanding that the court is satisfied that no substantial injustice would be caused to any party if an order is made under s 392(4)(*d*) of the Companies Act, the court can decline to make the order, having regard to the entire circumstances of the case. In our opinion, the same considerations that a court takes into account in deciding if an extension of time should be granted under the Rules of Court (as summarised at [79]–[81] above) should equally apply for the purposes of deciding if an extension of time should be granted under s 392(4)(*d*) of the Companies Act. This would mean that the court in the latter situation could, besides prejudice, also take into consideration, *inter alia*, the reason(s) why the party seeking an extension of time failed to comply with the timeline originally stipulated. It would be anomalous if an extension of time can be granted to a creditor to file its proof of debt under the Rules of Court, but not under s 392(4)(*d*) of the Companies Act, or *vice versa*.

Whether section 392(4)(d) was of avail to Oriental in the present case

109 We have already given our reasons as to why we would exercise our jurisdiction pursuant to the Rules of Court to grant Oriental an extension of time to file its proof of debt in the present case (see [85]–[91] above). For the same reasons, we would have been prepared to grant Oriental an extension of time pursuant to s 392(4)(*d*) of the Companies Act.

110 In any event, since granting Oriental an extension of time pursuant to the Rules of Court to file its proof of debt would not cause any prejudice to either the rest of the Scheme Creditors or Reliance, we do not see how these parties would suffer any "substantial injustice" within the meaning of s 392(6)(*c*) of the Companies Act if we were to allow, in the alternative, the extension of time under s 392(4)(*d*) of that Act. We therefore held that s 392(4)(*d*) would be of avail to Oriental in the

present case.

Conclusion

111 Considering para 1.7 of the Explanatory Statement and cl 2.1 of the Scheme of Compromise and Arrangement (see [7] above), it was clear beyond peradventure that the unmistakeable objective of the Scheme was to ensure accelerated *full payment* to all the Scheme Creditors. Given the fact that Reliance had *prima facie* not only acknowledged Oriental as a legitimate creditor, but had also sought as well as obtained the latter's support as a majority creditor, was it not plainly consistent with the Scheme's declared intent and purport to grant Oriental an extension of time to file its proof of debt so that its claim could be processed? Reliance's stance in relying on a barren procedural obstacle (namely, Oriental's failure to file its proof of debt by the Claims Cut-Off Date), which would not in the overall scheme of things prejudice the implementation of the Scheme, to reject (effectively) Oriental's claim was unmeritorious, to say the least. In the result, we allowed Oriental's appeal with costs here, but not below (we ordered each party to bear its own costs of the proceedings in the court below), and granted Oriental an extension of time until 5.00pm on 22 January 2008 to file its proof of debt.

[note: 1] See para 20 of Reliance's written submissions filed on 11 October 2007 for the hearing of Oriental's application for an extension of time to file its proof of debt.

[note: 2] See para 9 of Oriental's skeletal arguments filed on 2 January 2008 for this appeal.

[note: 3] See p 10 of Reliance's skeletal arguments filed on 10 January 2008 for this appeal.

[note: 4] See para 49 of Reliance's written case filed on 27 December 2007 for this appeal.

[note: 5] See paras 27–28 of Oriental's skeletal arguments filed on 2 January 2008 for this appeal.

[note: 6] See n 4, *supra*.

[note: 7] See para 59 of Reliance's skeletal arguments filed on 10 January 2008 for this appeal.

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