MDSA RESOURCES SDN BHD

v.

ADRIAN SIA KOON LENG

Federal Court, Putrajaya
Abdul Rahman Sebli CJSS, Zabariah Mohd Yusof, Nordin Hassan FCJJ
[Civil Appeal No: 02(I)-65-07-2022(M)]
11 July 2023

Company Law: *Arrangements — Scheme of arrangement — Sanction of scheme of arrangement pursuant to s 366(1) Companies Act 2016 — Whether votes of related-party creditors to be treated differently from votes of other creditors in same class in scheme of arrangement — Whether votes of related-party creditors in scheme of arrangement should be discounted or not counted altogether — Whether scheme of arrangement should not be sanctioned*

This appeal arose from the decision of the High Court (affirmed by the Court of Appeal) which dismissed the application by the appellant for sanction of a scheme of arrangement pursuant to s 366 of the Companies Act 2016 ('CA'). The appellant, MDSA Resources Sdn Bhd ('MDSA'), was a company engaged in property development and related activities. MDSA was owned by Hatten MS Pte Ltd Singapore and had completed several projects in Melaka, including Hatten Place. The respondent was a joint owner of a property at Hatten Suites and had leased the property to the appellant at the rate of RM17,280.00 per annum under a tenancy agreement dated 26 May 2014. The scheme was known as the 'Guarantee Rental Return' ('GRR') scheme. However, the appellant failed to make the rental payments to the respondent with an outstanding balance of RM17,280.00. Apart from the respondent, other property owners who joined the scheme also claimed the outstanding sums of rental payments owed by the appellant under the respective tenancy agreements that they entered into with the appellant.

On 1 July 2020, due to the appellant's financial distress, an application was filed at the High Court for leave to convene a creditors' meeting on the proposed scheme of arrangement under s 366(1) of the CA and a restraining order under s 368(1) of the CA. At the time, the appellant's debt to its creditors was RM322,622,612.00. Subsequently, a restraining order was granted and leave to convene the proposed scheme was also granted by the High Court. In the Explanatory Statement ('ES') to the proposed scheme, the Hatten Group Scheme Creditors comprised the ultimate holding company, MDSA's Holding company, subsidiaries of MDSA, the directors of MDSA, and related parties with common directors of MDSA. There were 1,636 Third-Party Creditors with a value of RM98,104,585.17 and 19 Hatten Group Creditors with a combined value of RM276,084,693.78. On 13 January 2021, at the meeting of

the scheme creditors, 90.4% voted in support of the scheme. The High Court then dismissed the appellant's sanctions application, and the Court of Appeal affirmed this decision. Hence, the present appeal in which, among others, the following two Questions of law required determination: (1) whether the votes of related-party creditors were to be treated differently from the votes of other creditors in the same class in the scheme of arrangement; and (2) if the answer to Question 1 was in the affirmative, whether the votes of related-party creditors in the scheme of arrangement should be discounted or not counted altogether.

Held (dismissing the appeal with costs):

Per Nordin Hassan FCJ delivering the majority judgment of the Court:

(1) A wholly-owned subsidiary or related party of a company that proposed a scheme of arrangement under the CA should not be placed in a single class of creditors due to their special interest in promoting the scheme. There was no community of interest between the subsidiary and the other creditors. Further, the weight to be attached to the related parties' votes was also pertinent in the classification of the class of creditors. What was the purpose of placing the related parties' creditors in the single class with other creditors if, at the end of the day, their votes were discounted or given less weight at the sanction stage? This affected the result of the voting at the meeting stage and the voting would only be an exercise in futility. In the present case, the legal right of the Third-Party Creditors against the appellant was the outstanding rental of the units of Hatten Suits under the GRR agreements. This legal right or interest deriving from the legal right was dissimilar from that of the Hatten Group Creditors which had a special interest in promoting the scheme. They obviously could not sensibly consult together with a view to their common interest. In the circumstances, the Third-Party Creditors should not be placed in a single class creditor with the Hatten Group Creditors, as the single classification was not fairly representative of the scheme creditors in this case. (paras 32, 33 & 35)

(2) The total debt value of the Hatten Group Creditors present was 88%, and if the wholly-owned company of the appellant discounted to zero and other related parties to the appellant were to be given less weight, certainly the requirement of 75% of the total value of creditors present under s 366(3) of the CA would not have been fulfilled. Therefore, the result of the voting at the meeting stage was not binding. The net result was that the votes of the related parties must be discounted or given less weight as they had a special interest in promoting the proposed scheme with the propensity to disregard the interests of the other creditors in the scheme. (paras 47 & 48)

(3) On 2 July 2020, a day after the Originating Summons was filed for the proposed scheme, in response to queries from the Singapore Exchange Securities Trading Limited, the Hatten Group replied that a total debt of RM322 million would be eliminated at consolidation whereas, in the affidavit in support of the Originating Summons, the total debt owing to the Scheme Creditors was RM322,622,612. As such, almost the entire debt of the said RM322 million,

including the respondent's outstanding sum, would be written off. Thus, the Third-Party Creditors would not have any avenue to claim the outstanding sums against the appellant if the Court sanctioned the scheme. These material facts were not disclosed or revealed in the ES or at any time before the response to the Singapore Exchange Securities Trading Limited. What was important was the information presented in initiating the proposed scheme and not the explanation given after the event. This went to the reasonableness of the scheme and the issue of whether an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve. The answer to this was in the negative. The *bona fide* conduct of the appellant in this case, was questionable. Thus, the non-disclosure of the material facts by the appellant ran counter to the reasonableness and fairness of the proposed scheme by the appellant. (paras 53 & 58)

(4) The proposed scheme as a whole was unreasonable, inequitable, and unfair. An intelligent and honest man would not reasonably approve of the proposed scheme. In the circumstances, the answers to Questions 1 and 2 were in the affirmative, which was sufficient to dispose of this appeal. In the upshot, the High Court Judge was not plainly wrong in exercising his discretion not to sanction the appellant's proposed scheme of arrangement under s 366(1) of the CA, which decision was affirmed by the Court of Appeal. (paras 65 & 67)

Per Zabariah Mohd Yusof FCJ (minority judgment):

(5) There should only be one class of unsecured creditors for the proposed scheme. Any issues on treatment of the votes of the Hatten Group Scheme Creditors would only come into play at the third stage of sanction. Although there was no rule of law in classifying creditors, the emphasis was on rights, which were not dissimilar, and the rights in question were the rights against the company with respect to the shares or debts in question. Extraneous interests ought to be disregarded. The test was based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights. Therefore, the classification of the creditors in this case was correctly based on the similarity of legal rights. In a liquidation scenario of MDSA, the rights of the related party creditors and the other unsecured creditors were similar, namely these creditors would only be paid '*pari passu*' from the surplus funds of the wound-up company. (paras 119 & 120)

(6) With the two different stages which entailed the Court to determine, firstly, the classification of creditors and secondly, the appropriate weight to be given to the votes of the creditors, the High Court and the Court of Appeal in the present case had conflated both the two stages in determination of the classification and the appropriate weight to be accorded to the votes. In this respect, both the Courts had erred. Therefore, at the sanction stage, ultimately, the Court had the discretion to determine whether the related party creditors had interests that were adverse to the class as a whole, which were directly linked to their votes. There was no absolute rule on whether to discount or

disregard certain scheme creditors' votes, especially where they were related party creditors in a scheme of arrangement. It was better to adopt the flexible approach by applying discretionary factors depending on the facts of each case. This scheme framework, which gave the Court the discretion and flexibility to discount creditor's votes at the sanction stage, enabled the Court to adequately consider issues of varying creditors' interests (and not rights) without having to limit such considerations to the principles of classification. Hence, Question 1 was answered in the negative, and Question 2 was irrelevant in view of the answer to Question 1. (paras 137-139)

(7) As for the non-disclosure issue, even if the Courts below were to find that there was any omission in the ES, the Court might make orders for the scheme meeting to be reconvened with an updated ES, especially where the scheme was *bona fide*. In the present case, nowhere did the Courts below make any findings that the scheme was not *bona fide*. Applying the principles of the law to the facts herein, there was sufficient disclosure in the ES in relation to the proposed scheme and disclosure of MDSA's financial circumstances and debts to the scheme creditors and to the Court. MDSA was not required to provide the genesis and extent of all the debts owed to each creditor. Further, there was no evidence adduced of any *prima facie* impropriety in the admission of the Hatten Group Scheme Creditors' debts. (paras 195 & 196)

(8) It was not sufficient for the Court only to ascertain that the statutory conditions had been complied with, in approving a scheme of arrangement: the Court ought to go further than that. In going the distance, the statutory majority which was to bind the dissentient minority had acted *bona fide*, had not acted adversely to those whom they professed to represent, and, ultimately, the proposed scheme of arrangement was a fair one, which an intelligent and honest man being a member of the class concerned and acting in respect of his interest would reasonably approve. The Court ought to give full weight to the decision of the scheme creditors (in this case 90.4 % voted in favour of the scheme), acting in their capacity as members of the class in which they were voting. The percentage reflected a desire on the part of an overwhelming majority in value and in number of the scheme creditors wanting the scheme. It was not for the Court to determine that it would not have reached the same decision as the creditors. (para 231)

(9) Given the aforesaid, in the absence of some procedural or jurisdictional hurdle or some taint on the face of the proposed scheme itself, the application for sanction for the scheme of arrangement ought to be allowed. The High Court and the Court of Appeal had erred in dismissing the application for sanction. (para 232)

Case(s) referred to:

AirAsia X Bhd v. BOC Aviation Ltd & Ors [2021] MLRHU 2008 (refd)

Dato' Tan Chin Woh v. Dato' Yalumallai @ M.Ramalingam V Muthusamy [2016] 5 MLRA 613 (refd)

Francis Augustine Pereira v. Dataran Mantin Sdn Bhd & Ors And Other Appeals [2013] 6 MLRA 443 (refd)

Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor [2009] 2 MLRA 471 (refd)

Primacom Holding GmbH v. A Group of the Senior Lenders & Credit Agricole [2013] BCC 201; [2012] EWHC 164 (refd)

Primus (Malaysia) Sdn Bhd v. Rin Kei Mei & Ors [2012] 1 MLRA 581 (refd)

Re Apcoa Parking Holdings GmbH And Others [2015] 2 BCLC 659 (refd)

Re Axa Asia Pacific Holdings Ltd [2011] VSC 4 (refd)

Re Bluebrook Ltd And Other Companies [2009] EWHC 2114 (refd)

Re Century Sun International Ltd [2021] HKCFI 2928 (refd)

Re Century Sun International Ltd [2022] HKCF 1237 (refd)

Re Dorman, Long and Company Limited [1934] 1 Ch 635 (refd)

Re Halley's Departmental Store Pte Ltd [1996] 2 SLR 70 (refd)

Re Hawk Insurance Co Ltd [2001] 2 BCLC 480 (refd)

Re Hawk Insurance Co Ltd [2002] 2 BCC 300 (refd)

Re Hellenic & General Trust Ltd [1975] 3 All ER 382 (folld)

Re Landmark Corporation Ltd [1968] 1 NSWR 759 (refd)

Re Lehman Brothers International Europe (In Administration) [2018] EWHC 1980 (Ch) (folld)

Re Linton Park Plc [2008] BCC 17 (refd)

Re Noble Group Limited [2018] EWHC 3092 (refd)

Re Reliance National Asia Re Pte Ltd [2007] SGHC 206 (refd)

Re Sateras Resources (Malaysia) Bhd [2005] 2 MLRH 131 (folld)

Re Smith & Williamson Holdings Ltd [2020] EWHC 3931 (refd)

Re Stronghold Insurance Co Ltd [2019] 2 BCLC 11 (refd)

Re Sunbird Business Services Ltd [2020] EWHC 3459 (refd)

Re UDL Holdings & Ors [2002] 1 HKC 172 (refd)

Re UDL Holdings Ltd & Ors (No 3) [2000] 3 HKC 405 (refd)

Re Western Grocers Ltd [1936] MJ No 38 (refd)

Salomon v. Salomon [1897] AC 22 (refd)

Sea Assets Ltd v. Perusahaan Perseroan (Persero) PT Perusahaan Penerbangan Garuda Indonesia [2001] EWCA Civ 1696 (refd)

SK Engineering & Construction Co Ltd v. Conchubar Aromatics Ltd And Another Appeal [2017] 2 SLR 898 (refd)

Sovereign Life Assurance Co v. Dodd [1892] 2 QB 573 (folld)

Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd [1989] 2 MLRH 800 (refd)

TH Heavy Engineering Berhad & Ors [2018] MLRHU 2016 (refd)

The Royal Bank of Scotland NV And Others v. TT International Ltd And Another Appeal [2012] 2 SLR 213 (refd)

Top Builders Capital Bhd & Ors v. Seng Long Construction & Engineering Sdn Bhd & Ors [2022] 3 MLRH 262 (refd)

Transmile Group Bhd & Anor v. Malaysian Trustee Bhd & Ors [2013] 2 MLRH 427 (refd)

UDL Argos Engineering & Heavy Industries Co Ltd v. Li Oi Lin [2002] 1 HKC 172 (refd)

Wah Yuen Electrical Engineering Pte Ltd v. Singapore Cables Manufactures Pte Ltd [2003] SGCA 23; [2003] 3 SLR 629 (refd)

Legislation referred to:

Companies Act 1965, ss 176, 197

Companies Act 2016, ss 7, 8(5), 59, 197, 225, 228, 229, 366 (1), (3), 368(1), 369(1)(a)

Insolvency Act 1986 [UK], s 249

Insolvency Restructuring and Dissolution Act 2018 [Sing], ss 64(4)(d), 65

Other(s) referred to:

Jennifer Payne, *Schemes of Arrangement - Theory, Structure and Operation*, 1st edn 2014, p 9

The English High Court Practice Statement (Companies Scheme of Arrangement) [2002] 1 WLR 1345

Counsel:

For the appellant: Lee Shih (Nathalie Ker Si Min with him); M/s Lim Chee Wee Partnership

For the respondent: Ho Yuk Yuen (Nai Mei Kei with him); M/s Y Y Ho & Lee

JUDGMENT

Nordin Hassan FCJ (Majority):

Introduction

[1] This is an appeal against the decision of the High Court Judge of Melaka not to sanction the appellant's proposed scheme of arrangement under s 366(1) of the Companies Act 2016 ("the CA") and consequently dismiss the appellant's application for a restraining order under s 368 of the same Act. The decision of the High Court was affirmed by the Court of Appeal.

[2] Aggrieved by the decision, the appellant applied for leave to appeal to the Federal Court and this was allowed with 10 questions of law posed to this Court for determination.

[3] The questions are as follows:

Question 1

Whether the votes of related-party creditors are to be treated differently from the votes of other creditors in the same class in the scheme of arrangement.

Question 2

If the answer to 1 is yes, whether the votes of related-party creditors in the scheme of arrangement should be discounted or not counted altogether.

Question 3

Whether the issue of proper classification of creditors should be determined at the Court leave stage (following the English Court of Appeal decision in *Re Hawk Insurance Co Ltd* [2001] 2 BCLC 480 and *AirAsia X Bhd v. BOC Aviation Ltd & Ors* [2021] MLRHU 2008) or only to be determined at the Court scheme sanction stage (following the Hong Kong of Final Appeal case of *Re UDL Holdings Ltd* [2002] 1 HKC 172)

Question 4

Whether the Court at the scheme sanction stage should be slow to depart from its earlier determination on the proper classification of creditors unless there are material changes in circumstances (following the English High Court decision of *Re Lehman Brothers International (Europe) (In Administration)* [2018] EWHC 1980 (Ch))

Question 5

Whether the challenge to the adequacy of disclosure in the explanatory statement issued under s 369(1)(a) of the Companies Act 2016 ("explanatory statement") should be at the stage before the Court approves the issuance of the explanatory statement or at the Court scheme sanction stage.

Question 6

Where the Court finds inadequate disclosure in the explanatory statement at the scheme sanction stage, whether the Court can order, as a remedial measure, a re-issuance of the Explanatory Statement and re-voting at the meeting of creditors in a scheme of arrangement.

Question 7

Whether the duty of disclosure in the Explanatory Statement would require the appellant company to objectively provide each creditor

the genesis and extent of all the company's debt (see the Singapore Court of Appeal decision in *Wah Yuen Electrical Engineering Pte Ltd v. Singapore Cables Manufacturers Pte* [2003] SGCA 23, a decision cited by the Court below)

Question 8

Whether the Court hearing the scheme sanction is bound by the principles set out in the Federal Court case of *Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor* [2009] 2 MLRA 471 such that the Court should only decide on any scheme of arrangement objections based on the pleadings and after hearing parties on those objections.

Question 9

Whether the Court hearing the scheme sanction is entitled to apply *Re Halley's Departmental Store Pte Ltd* [1996] 2 SLR 70, as was applied by the Court below, to ignore separate corporate personality in considering any connection or motives of the creditors.

Question 10

Whether the Court hearing the scheme sanction should follow the principle that the Court ought not to embark on a dissection of the relative commercial merits of the scheme of arrangement (applying *Transmile Group Bhd & Anor v. Malaysian Trustee Bhd & Ors* [2013] 2 MLRH 427).

[4] The appellant grouped the 10 questions posed into 4 areas which are as follows:

(i) treatment of related party votes (area 1) — Questions 1,2, and 9;

(ii) stage of determination of classification (area 2) — Questions 3 and 4;

(iii) disclosure of Explanatory Statement (area 3) — Questions 5, 6, and 7;

(iv) Court's role in sanctioning the scheme (area 4) — Questions 8 and 10.

The Background Facts

[5] The appellant, MDSA Resources Sdn Bhd ("MDSA"), is a company engaged in property development and related activities. MDSA which is owned by Hatten MS Pte Ltd Singapore had completed several projects in Melaka including Hatten Place which was completed in November 2015.

[6] The respondent, Adrian Sia Koon Leng ("Adrian") is a joint-owner of a property at Hatten Suites and had leased the property to the appellant at the rate of RM17,280.00 per annum under a tenancy agreement dated 26 May 2014. The scheme was known as the "Guarantee Rental Return Scheme" (GRR). This was a buy-to-let offer where the purchaser of the unit was guaranteed monthly rentals over a period of time. Rental payable by the appellant to the respondent under this scheme was RM4,320.00 every 3 months. However, the appellant failed to make the rental payments to the respondent with an outstanding balance of RM17,280.00. Apart from the respondent, other property owners who joined the scheme also claimed the outstanding sums of rental payments owed by the appellant under the respective tenancy agreements that they entered into with the appellant.

[7] On 1 July 2020, due to the appellant's financial distress, an application was filed at the Melaka High Court for leave to convene a creditors' meeting on the proposed scheme of arrangement under s 366(1) of the CA and a restraining order under s 368(1) of the same Act. At the time, the appellant's debt to its creditors was RM322,622,612. On 24 July 2020 a restraining order was granted and on 10 September 2020, leave to convene the proposed scheme was also granted by the High Court. As of 29 June 2020, the appellant's debt to its creditors was RM374 million.

[8] The main features of the proposed scheme of arrangement include:

(i) a total of RM167.4 million will be waived by the scheme creditors and the balance of RM206.6 million will be transferred and vested in a special-purpose vehicle ("SPV");

(ii) the applicant will be released and discharged from all claims and liabilities;

(iii) "earmarked properties" of approximately RM142.2 million will be transferred to the SPV;

(iv) the "earmarked properties" may be sold in 3 to 5 years and proceed to be channelled to the SPV for distribution;

(v) the appellant will further inject RM64.4 million into the SPV;

(vi) the recovery rate of 70% under the scheme compared to a 40% recovery date if the appellant went under liquidation;

(vii) there was a single class of unsecured scheme of creditors under the scheme comprising the GRR and/or LAD creditors and trade creditors known as the Third-Party Scheme Creditors and the Hatten Group Creditors.

[9] In the explanatory statement to the proposed scheme, the Hatten Group Scheme Creditors comprise the ultimate holding company, MDSA's Holding

company, subsidiaries of MDSA, the directors of MDSA, and related parties with common directors of MDSA.

[10] There were 1,636 Third-Party Creditors with a value of RM98,104,585.17 and 19 Hatten Group Creditors with a combined value of RM276,084,693.78. The Third-Party Creditors made up only 26.2% and the Hatten Group Creditors constituted 73.8%.

[11] On 13 January 2021, at the meeting of the scheme creditors, out of the total value of the scheme creditors of RM313,962,670, the scheme creditors in the value of RM283,882,044.00 or 90.4%, voted in support of the scheme.

[12] On 29 January 2021, the Melaka High Court dismissed the appellant's sanction application and the application for a restraining order which were later affirmed by the Court of Appeal.

[13] The High Court found that the proposed scheme was unreasonable and to the detriment of the Third-Party Creditors. The learned High Court Judge was of the view *inter alia*, that the waiving and release and discharge of all debts owed by the appellant to the Scheme Creditors were done merely to perpetuate the existence of the appellant to the detriment and at the expense of the Third-Party Creditors in that the Third-Party Creditors would no longer have an avenue against the appellant if the Court were to sanction the scheme.

[14] It was also the finding of the learned High Court Judge that the Hatten Group Scheme Creditors should not have been categorized together with the Third-Party Scheme Creditors during the voting at the Scheme Meeting as the Hatten Group Scheme Creditors were related to the appellant and had a special interest in the appellant. Further, the enormous difference in the debt value between the Hatten Group Scheme Creditors and the Third-Party Creditors, the learned Judge was of the view that this cannot make the Hatten Group of Creditors' views in the Scheme Meeting a fair representative of the class of creditors of the proposed scheme.

[15] Next, the learned Judge found, correctly in my view, that there was much uncertainty in the proposed scheme which is as follows:

(i) no explanation as to the significant increase of RM27,674,236.00 in the appellant's total current liabilities in the audited account as of 30 June 2019 and the audited account as of 30 June 2020;

(ii) no explanation of how the amount of RM167.4 million owing to the scheme creditors by the appellant in the proposed scheme to be waived was derived;

(iii) no explanation of how the appellant would inject further assets of RM64.2 million into the SPV;

(iv) the uncertainties concerning the earmarked properties in value of RM142.2 million which were to be transferred to the SPV and the properties may be

sold in 3 to 5 years. This involves the volatility of the property market and the fact that no individual strata titles were issued to the earmarked properties.

[16] The learned Judge also found that the information was insufficient in the application for the sanction for the proposed scheme and its accompanying documents which included the explanatory statement, chairman minutes, scrutineers' report, and account's report in respect of Hatten Group Creditors debts to the applicant. Here, there was no information as to when the debts to the Hatten Group Creditors were incurred and the circumstances under which they were incurred. The learned Judge was of the view that the information was material to determine the credibility of the transaction in light of them being the related parties to the appellant.

[17] On appeal to the Court of Appeal, having considered the evidence, it was decided that the composition of the class of creditors comprising the Third-Party Creditors and the Hatten Group Scheme Creditors in a single class of the scheme creditors was unfair, uneven, and downright lop-sided. The Court of Appeal also endorsed the findings of facts by the learned High Court Judge on the uncertainty of the proposed scheme including the non-disclosure of material facts and the unreasonableness of the said scheme.

The Appeal

[18] As alluded to earlier in this judgment, the appeal before us concerns the non-granting of a sanction for the proposed scheme of arrangement under s 366(1) of the CA and the related matters thereto.

[19] Before I deal with the issues at hand, it is instructive to recapitulate the main purpose of this scheme of arrangement and its process. This scheme of arrangement is to assist companies heavily burdened with debts to survive and manage their affairs and avoid liquidation by an arrangement with the creditors for a compromise on their debts. There are three stages in this scheme of arrangement under the CA which are, firstly, the application to convene a creditors meeting (convening stage), secondly, the presentation of the proposed scheme at the creditors' meeting to be agreed by a majority of 75% of the total value of creditors present and voting and thirdly (meeting stage), to obtain the sanction of the Court of the proposed scheme of arrangement (sanction stage).

[20] Regarding the exercise of the Court's power to grant or refuse the sanctioning of a proposed scheme of arrangement, the pertinent questions to be taken into consideration are as follows:

(i) whether the provisions of the relevant statute have been complied with;

(ii) whether the class of creditors was fairly represented by the meeting and the statutory majority is acting *bona fide* and is not coercing the minority to promote interests adverse to those of the class they purport to represent;

(iii) whether the proposed scheme of arrangement is such that an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.

(See *Re Western Grocers Ltd* [1936] MJ No 38; *Re Dorman, Long And Company Limited* [1934] 1 Ch 635; *Re Sateras Resources (Malaysia) Bhd* [2005] 2 MLRH 131; *Re Halley's Departmental Store Pte Ltd* [1996] 1 SLR(R) 81; *UDL Argos Engineering & Heavy Industries Co Ltd v. Li Oi Lin* [2002] 1 HKC 172; *Re Noble Group Limited* [2018] EWHC 3092(Ch)).

[21] It is not disputed that in the present case, all the requirements under the statute for initiating the proposed scheme of arrangement had been complied with.

Classification Of Creditors In The Scheme

[22] The first disputed issue here is whether there was a fair representation of the class of creditors. As mentioned earlier, the Third-Party Creditors which comprises the GRR and/or LAD creditors and trade creditors were placed in one single scheme creditors with the Hatten Group Creditors. It is also not disputed that the Hatten Group Creditors were constituted by parties related to the appellant.

[23] No doubt that all creditors have the same rights in the creditor's scheme but we should not disregard the interest of the group of creditors in the said class. After all, the class of creditors should uphold their common interests. The class of creditors must be fairly represented by the meeting of the proposed scheme.

[24] It is accepted that a related party has a special interest to achieve in the proposed scheme and may disregard the interest of other creditors.

[25] This concern was addressed in a plethora of cases including the case of *SK Engineering & Construction Co Ltd v. Conchubar Aromatics Ltd And Another Appeal* [2017] 2 SLR 898 where this was mentioned:

> "40. In considering the issue of related creditors, the Judge noted this Court's statements in *Wah Yuen Electrical Engineering Pte Ltd v. Singapore Cables Manufactures Pte Ltd* [2003] 3 SLR(R) 629 ("*Wah Yuen*") at [35] that "[a] **related party may have been motivated by personal or special interest to disregard the interest of the class as such vote in a self-centered manner**", and that it was for this reason that "Courts have consistently attributed less weight to [related parties] votes when asked to exercise their discretion in favour of a scheme". As we mentioned earlier (at [30] above), the Judge held that "**special interest that a party may have that differ from [the interest] of ordinary, independent and objective creditors of the same class that may cause that party to exercise its vote in a manner that differs from the ordinary, independent and objective creditors of the class**" (see [26] of GD ([1] *supra*). This echoes Chadwick LJ's comment in *Re BTR Plc* [2000] 1 BCLC 740 at 747, in the context of a scheme of arrangement proposed by

shareholders, that "special interest" means any interest "which differs from the interest of the ordinary independent and objective shareholder".

[Emphasis Added]

[26] On this issue of related parties, the Counsel for the appellant submitted that creditors should be classed according to their legal rights against the company and not their interests outside those legal rights. As such, it was argued that both the High Court and the Court of Appeal were in error for not adhering to the correct classification test based on the creditors' legal rights against the company. Both Courts ruled that the Third-Party Creditors and the Hatten Creditors should not be placed in a single group of creditors as done in the present case.

[27] On this issue, the general principle adopted in many jurisdictions including here in Malaysia, is that the determination of the classification of creditors is based on the similarity or dissimilarity of legal rights against the company and not on the similarity or dissimilarity of interests not derived from such legal rights.

[28] In the oft-quoted case of *Sovereign Life Assurance Co v. Dodd* [1892] 2 QB 573, Lord Esher M.R. explained as follows:

"Now as to the meeting, we have to consider the persons who must be summoned to it, and who are to be dealt with as different classes; that is, we must consider the state of affairs at the date of the meeting, for the persons to attend it are those who have a right to attend it at the time, and it is that state of affairs, and not the position of things at the date of the original contract, that we must look at. **The Act says that the persons to be summoned to the meeting (all of whom, be it said in passing, are creditors) are persons who can be divided into different classes. Classes which the Act of Parliament recognises, though it does not define them. This, therefore, must be done: they must be divided into different classes. What is the reason for such a course? It is because the creditors composing the different classes have different interests; and, therefore, if we find a different state of facts existing among different creditors which may differently affect their minds and their judgment, they must be divided into different classes.**"

[Emphasis Added]

[29] In the same case, Bowen L.J. further explained as follows:

"**What is the proper construction of that statute? It makes the majority of creditors or a class of creditors bind the minority**; it exercises a most formidable compulsion upon dissentient or would-be dissentient creditors; and it, therefore, requires to be construed with care, so as not to place in the hands of some of the creditors the means and opportunity of forcing dissentients to do that which it is unreasonable to require them to do, or of making a mere jest of the interest of the minority. **If we are to construe the section as it is suggested on behalf of the plaintiffs it ought to be construed, we should be holding that a class of policy-holders whose interests of those**

> **who have nothing with futurity, and whose rights have been ascertained. It is obvious that these two sets of interests are inconsistent**, and that those whose policies are still current are deeply interested in sacrificing the interest of those policies have matured. **They are bound by no community of interests, and their claims are not capable of being ascertained by any common system valuation. Are we then, justified in so construing the Act of Parliament as to include these persons in one class?** The word "class" is vague, and to find out what is meant by it we must look at the scope of the section, which is a section enabling the Court to order a meeting of class of creditors to be called. **It seems plain that we must give such a meaning to the term "class" as it will prevent the section being worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so familiar as to make it impossible for them to consult together with a view to their common interest."**
>
> [Emphasis Added]

[30] Next, in *Re Hellenic & General Trust Ltd* [1975] 3 All ER 382, the Court held that the wholly-owned subsidiary must not be in the same single class of creditors of the proposed scheme of arrangement. In that case, Templeman J opined as follows:

> "**.. Counsel for the company submitted that since the parent and subsidiary were separate corporations with separate directors, and since MiT were ordinary shareholders of the company, it followed that MiT had the same interests as the other shareholders. The directors of MiT were under a duty to consider whether the arrangement was beneficial to the whole class of ordinary shareholders, and they were capable of forming an independent and unbiased judgment, irrespective of the interests of the parent company. This seems to be unreal.** Hambros are purchasers making an offer. When the vendors meet to discuss and vote whether or not to accept the offer, it is incongruous that the loudest voice in theory and the most significant vote in practice should come from the wholly-owned subsidiary of the purchaser. No one can be both a vendor and a purchaser and, **in my judgment for the purpose of the class of meetings in the present case, MiT was in the camp of the purchaser. Of course, this does not mean that MIT should not have considered at a separate class meeting whether to accept the arrangement. But their consideration will be different from the considerations given to the matter by the other shareholders. Only MIT could say, within limits, that what was good for Hambros must be good for MIT.**"
>
> [Emphasis Added]

[31] I am also inclined to agree with the observation made in the *Re Sateras* case *(supra)* where Ramli Ali J (as he then was) said this:

> "..A Scheme will not be approved if the Promoter of the Scheme has not correctly identified the separate classes.
>
> ...

It is therefore essential for the petitioner to hold separate meetings between the different classes of creditors. In the present case, on September 2004 the petitioner had convened only one creditors meeting grouping the petitioner's secured creditors, unsecured creditors together with the petitioner's subsidiaries. The amount purportedly owing to the petitioner's subsidiaries is more than 50% of the total debts owed by the petitioner. **The Court is of the view that it would be highly unfair to group the petitioner's subsidiaries in the same class of creditors with the petitioner's unsecured creditors as there is a divergence of interest between the petitioner's subsidiaries and the other unsecured creditors and that both these classes of creditors will not be able to consult together with a view to their common interests. It is undeniable that the petitioner having full control of the subsidiaries would cause the subsidiaries to vote in support of the Scheme. There is no community of interests such in so far as the subsidiaries and other creditors are concerned.**

By lumping the subsidiaries with the other creditors, the petitioner had effectively deprived the other creditors of a meaningful voice in voting for the Proposed Scheme depriving the other creditors of their legitimate rights against the petitioner."

[Emphasis Added]

[32] Based on the authorities cited above, a wholly-owned subsidiary or related party of a company that proposed a scheme of arrangement under the CA should not be placed in a single class of creditors due to their special interest in promoting the scheme. There is no community of interest between the subsidiary and the other creditors. Further, I am of the view that the weight to be attached to the related parties' votes is also pertinent in the classification of the class of creditors. What is the purpose of placing the related parties' creditors in the single class with other creditors if, at the end of the day, their votes are discounted or given less weight at the sanction stage? This affects the result of the voting at the meeting stage and the voting would only be an exercise in futility. This issue will be discussed further in this judgment.

[33] In the present case, the legal right of the Third-Party Creditors against the appellant is the outstanding rentals of the units of Hatten Suits under the GRR agreements. This legal right or interest deriving from the legal right is dissimilar from that of the Hatten Group Creditors which had a special interest in promoting the scheme. They obviously cannot sensibly consult together with a view to their common interest.

[34] There was an argument raised on the issue of similarity or dissimilarity of legal rights or private interest where private interest not derived from legal rights should not be the basis for the creditors to be placed in a different class of creditors of the proposed scheme. In the present case, as mentioned earlier, the Third-Party Creditors' legal rights are different from the Hatten Group Creditors against the appellant, however, even if the rights of the Third-Party Creditors are considered only as "interest", this interest is derived from their legal rights. In any event, this is mere terminology where the words 'rights' and

'interest' are used interchangeably. Lord Millet NPJ in *Re UDL Holdings Ltd & Ors* [2002] 1 HKC 172 (Court of Final Appeal) said this:

> "The case was relied on by the present appellants as showing that separate meetings should have been held because the shareholders had conflicting interests rather than different rights and it is true that Templeman J consistently referred to the parties' respective 'interest' rather than their 'rights'. But it is important not to be distracted by mere terminology. Judges frequently use imprecise language when precision is not material to the question to be decided, and in many contexts the words 'interest' and rights are interchangeable."

(See also *Primacom Holding GmbH v. A Group of the Senior Lenders & Credit Agricole* [2013] BCC 201; [2012] EWHC 164(Ch)).

[35] In the circumstances, I find that there was no error committed by the learned High Court Judge and the Court of Appeal Judges in deciding that the Third-Party Creditors, in this case, should not be placed in a single class creditor with the Hatten Group Creditors as the single classification was not fairly representative of the scheme creditors in this case.

Weight To Be Attached To The Votes Of The Related Parties In The Scheme

[36] As regards the treatment of votes of the related party creditors, the appellant's Counsel submitted that the approach should be one of the discretion of the Court and not rigid rules to circumscribe this discretion. In other words, the votes of the related parties should not automatically be discounted or given less weight but by applying the law as propounded by the English and Hong Kong Courts that the Court should determine whether there is any reason to disregard the votes of related party creditors and the "but for" test applies in the circumstances.

[37] In response, Counsel for the respondent contended that the votes cast by the related parties' creditors in this case ought to be discounted and disregarded as the related parties have a special interest to promote the scheme and did not vote in the best interest of other creditors. It was further argued that the English and the Hong Kong authorities cited by the appellant seem to suggest that in deciding whether to discount or disregard related party votes, the person challenging the vote must show that an intelligent and honest member of the class without those collateral interests could have voted in the way that he did.

[38] In the present case, the total debt value of the 19 Hatten Group Creditors present in the meeting was RM276,084,693.78 or 88% of the total value of Scheme Creditors whilst 290 Third-Party Creditors present was RM37,877,987.00 or 12% of the total value of the Scheme. As mentioned earlier, the Hatten Group Creditors comprise *inter alia* the holding company and the subsidiaries. The appellant owes a debt of RM68,709,995.00 to Hatten MS Pte Ltd, and its holding company, Hatten Land Limited RM58,501,454. The appellant's total debt to these companies was RM127,211,449.

[39] At the risk of repetition, the point here is that the related parties to the appellant have a special interest in supporting the proposed scheme through their relationship with the appellant. There are authorities to suggest that the wholly-owned company of the scheme company should be discounted to zero and related parties to the said company to be given less weight. Since a sanctioned scheme of arrangement binds all creditors in the scheme, it is fair that all the creditors who vote must have a common interest to protect.

(See *The Royal Bank of Scotland NV And Others v. TT International Ltd And Another Appeal* [2012] 2 SLR 213(CA), *SK Engineering & Construction Co Ltd v. Conchubar Aromatics Ltd And Another Appeal* [2017] 2 SLR 898(CA) and *Wah Yuen Electrical Engineering Pte Ltd v. Singapore Cables Manufactures Pte Ltd* [2003] 3 SLR 629 (CA))

[40] In *The Royal Bank of Scotland*'s case *(supra)*, VK Rajah JA, delivering the judgment of the Court said this:

> "155. Taken together, the authorities say with one voice that **it is the norm for the votes of related party creditors to be discounted in light of their special interest to support a proposed scheme by their relationship to the company.** The Judge in fact noted at [47] of her Judgment that she was "entitled to attach less weight to [the related parties] views in [her] overall decision whether to approve the Scheme because of their special interest in the [respondent] and the Scheme", but she did not do this in making her final decision. In our view, she erred here as there was no reason to depart from the norm."
>
> ...
>
> "158. In our view, **the votes of wholly-owned subsidiaries should be discounted to zero. Wholly-owned subsidiaries are entirely controlled by their parent company**, ie, the respondent in this case. Indeed, we view the Respondent's wholly-owned subsidiaries as extensions of the Respondent itself. If the Respondent were to wind up any of its wholly-owned subsidiary creditors, the debts owed by the wholly-owned subsidiary creditors (save for those debts owed by the wholly-owned subsidiary creditors to genuine third-party creditors) would be extinguished and the assets of the wholly-owned subsidiary creditors would be the Respondent. **Significantly, the votes of the wholly-owned subsidiary creditors at creditors' meetings are undoubtedly entirely controlled by the Respondent.**"
>
> [Emphasis Added]

[41] Next, in the *Wah Yuen Electrical Engineering* case *(supra)*, Yong Pung How CJ had this to say:

> "Although related party votes are counted for purposes of determining whether the statutory majority has been reached, **the Courts have consistently attributed less weight to such votes when asked to exercise their discretion in favour of a scheme. This is because the related party may have been motivated by personal or special interests to disregard the interests of the class as such and vote in a self-centered manner.** In the present case, we

found no reason to abandon our traditional reserve because Wah Yuen's continued reticence on the related party debts prevented the Court from making a competent assessment of the *bona fides* of the related party votes."

[Emphasis Added]

[42] Further, in the *SK Engineering* case, the same stand was taken on the issue of related party votes where this was said:

"64. In *TT International (No 1)* ([25] *supra*), **this Court held that the votes of creditors which are wholly-owned subsidiaries of the scheme company would be discounted to zero.** This ruling was expressly confined to wholly-owned subsidiaries, and this Court stated that the issue of the appropriate discount to apply to the partially-owned subsidiaries would have to be dealt with in the future in a more appropriate case (at [166]). **This Court did, however, proffer (at [170]-[171]) a partial discounting approach in dealing with the votes of two of the related creditors in that case, which, although not wholly owned by the scheme company, were related to the scheme company either by shareholding or by virtue of holding security over the scheme company's shares. It opined that those two creditors' votes could be discounted by the monetary value of their shareholding or security in the scheme company.**"

[Emphasis Added]

[43] In other jurisdictions, there are also authorities that adopted a similar view on this issue. The Supreme Court of New South Wales in *Re Landmark Corporation Ltd* [1968] 1 NSWR 759 held as follows:

"(3) **Little weight should be given to the votes cast by the subsidiary companies as they gave no indication as to the wishes of the class of unsecured creditors**"

[Emphasis Added]

[44] In the same case, Street J made this observation:

"I refer also to the concise and authoritative statement of Adam J in *Re Chevron (Sydney) Ltd* [1963] VR 249, at p 255. "The true position appears to be that where the members of a class have divergent interests because some have and others have no interests in a company other than as members of the class the Court may treat the result of the voting at the meeting of the class as not necessarily representing the views of the class as such and thus should apply with more reserve in such a case the proposition that the members of the class are better judges of what is to their commercial advantage than the Court can be. In so far as members of a class have in fact voted for the scheme not because it benefits them as members of the class but because it gives them benefits in some other capacity, their votes would of course, in a sense, not reflect the view of the class as such although they are counted for the purposes of determining whether the statutory majority has been obtained at the meeting of the class."

[45] Further, Street J said this:

> "The votes recorded at the meeting in favour of the scheme were from creditors with claims totalling $2,056,984. The associated companies whose claims amount to $1,526,097 were, as I have already stated, voting in favour of the scheme at a point of time when their affairs were **wholly controlled by their parent company**, there being no receiver or liquidator or external control in any of these associates companies. It is difficult to attribute to the management of these associated companies any motive which would differ from the motive of Landmark Corporation Ltd itself. **I am of the view that their votes could have little, if any, weight when using the voting at the meeting as having probative force in establishing what is best in the interests of the class of ordinary unsecured creditors. It would be rare in the circumstances such as these for a wholly-owned subsidiary, whilst still entirely within the control of its parent, to be permitted to have any significant weight attached to its vote at a meeting under s 181.**"
>
> [Emphasis Added]

[46] Next, the Hong Kong Court in *Re UDL Holdings Ltd & Ors* [2002] 1 HKC 172, laid down *inter alia* the following principle:

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

[47] Reverting to the present case, as alluded to earlier, the total debt value of the Hatten Group Creditors present was 88%, and if the wholly-owned company of the appellant discounted to zero and other related parties to the appellant were to be given less weight, certainly the requirement of 75% of the total value of creditors present under s 366(3) of the CA has not been fulfilled. Therefore, the result of the voting at the meeting stage is not binding. For ease of reference subsection 366(3) is reproduced below:

> "(3) The compromise or arrangement **shall be binding** on:
>
> (a) **all creditors or class of creditors**;
>
> (b) the members or class of members;
>
> (c) the company; or
>
> (d) The liquidator or contributories, if the company is being wound up
>
> **If the compromise or arrangement is agreed by a majority of seventy-five per centum of the total 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 and has been approved by order of the Court.

[Emphasis Added]

[48] The net result is that I subscribe to the view that the votes of the related parties must be discounted or given less weight as they have a special interest in promoting the proposed scheme with the propensity to disregard the interests of the other creditors in the scheme.

[49] In addition, based on the evaluation of evidence and the special interests of the Hatten Group Creditors to promote the proposed scheme, the learned High Court Judge decided to disregard or discount the votes of the Hatten Group Creditors which are related parties of the appellant. The High Court Judge had given his reasons for disregarding the related parties' votes which I am inclined to agree with.

Duty To Disclose Material Facts

[50] For all creditors in a scheme of arrangement to exercise their right of voting, all material information necessary for the creditor's decision either to approve or reject the proposed scheme must be revealed by the company. This will allow the creditors to make an informed and meaningful decision that can protect or safeguard their interests. This relates to the fact that once the Court sanctions the scheme, all creditors are bound by the terms of the scheme. Therefore, the company that proposes the scheme must disclose all material facts to the creditors at the meeting stage and to the Court at the sanctioning stage. Transparency is required to achieve a fair and reasonable scheme of arrangement and accepted by 'an intelligent and honest man, a member of the class concerned and acting in respect of his interest'. Transparency is also required to demonstrate the *bona fide* of the company in initiating the proposed scheme.

[51] In the *SK Engineering & Construction Co Ltd* case *(supra)*, it was opined as follows:

"88. Section 211 of the Companies Act, read together with the case law, **requires scheme companies to disclose to their creditors** (or their shareholders, as the case may be) **all material information relating to a scheme of arrangement which would allow the latter to exercise their voting rights meaningfully:** *Wah Yuen* ([40] *supra*) at [24]. **The information provided should not only enable creditors to determine their expected returns under the scheme but should also relate to the commercial viability of the scheme as a whole**: *The Royal Bank of Scotland NV And Others* v. *TT International Ltd And Another Appeal* [2012] 4 SLR 1182 at [21]."

[Emphasis Added]

[52] In the *Wah Yuen Electrical Engineering Pte Ltd* case *(supra)*, there was insufficient information regarding the circumstances in which the related

party debts were incurred. The Court held that the creditors were not in a position to assess the fairness and reasonableness of the scheme as they did not possess sufficient facts to exercise an informed vote. Therefore, the appeal against the decision of the High Court not to sanction the proposed scheme of arrangement was dismissed.

[53] In the present case, on 2 July 2020, a day after the Originating Summon ("OS") was filed for the proposed scheme, in response to queries from the Singapore Exchange Securities Trading Limited, the Hatten Group replied that a total debt of RM322 million would be eliminated at consolidation whereas, in the affidavit in support of the OS, the total debt owing to the Scheme Creditors was RM322,622,612. As such, almost the entire debt of the said RM322 million, including the respondent's outstanding sum, would be written off. Thus, the Third-Party Creditors would not have any avenue to claim the outstanding sums against the appellant if the Court sanctioned the scheme. These material facts were not disclosed or revealed in the explanatory statement or at any time before the response to the Singapore Exchange Securities Trading Limited. What is important, is the information presented in initiating the proposed scheme and not the explanation given after the event. This goes to the reasonableness of the scheme and the issue of whether an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve. The answer to this is in the negative. The *bona fide* conduct of the appellant, in this case, is also questionable.

[54] No doubt that the Court has the power to order further meetings of creditors and to furnish the relevant particulars needed by the creditors by having an amended explanatory statement. That is not the point here, the scheme company, the appellant, should not withhold any material information that affected the decision in the voting even at the meeting stage. This is prejudicial to the creditors in deciding to vote for or against the proposed scheme, in particular those who did not attend the meeting after reading the explanatory statement which lacked the material particulars. In the *Royal Bank of Scotland* case *(supra)* this was said:

> "…. Disclosure of material information about the scheme or the company's affair ought not to be deliberately withheld until the meeting so as to influence its outcome. This would unfairly prejudice those who may have decided not to attend after considering the information sent to them earlier and will likely be seen as an attempt to improperly influence the voting outcome."

[55] The appellant also should not rely on technicalities in withholding any material information if the proposed scheme is truly fair and reasonable to all creditors.

[56] In the circumstances, it was reasonable for the High Court Judge to conclude that the Hatten Group Creditors had to vote for the scheme to eliminate the applicant's debts as mentioned in the grounds of judgment *inter alia* as follows:

> "..a perusal of Hatten's answer **it would be reasonable to conclude that there was a preconception among the Hatten Group Creditors that the scheme had to be voted in so as to eliminate the applicant's debts.** This preconception is reflected in the voting result. These queries by the Singapore Exchange Securities were not disclosed to the Third-Party Creditors at any time."
>
> [Emphasis Added]

[57] In the present case also, the appellant had failed to furnish sufficient information on the debts of the related parties. There was no indication in the unaudited report up to June 2020 or audited report up to June 2019 as to the nature of the RM276,084,693.78 debts due to the 19 related parties to the applicant. There was a significant increase of RM27,674,236.00 from RM333,453,617.00 to RM361,127,853.00 in the applicant's total current liabilities as shown in the audited account as of 30 June 2019 and the unaudited account as of 30 June 2020. No explanation was given for this increase. This situation is similar to the issue decided in the *Wah Yuen Engineering* case alluded to earlier. In that case, although the statutory requirement of "seventy-five per centum" of the total value of creditors was reached, the Court of Appeal affirmed the decision of the High Court in deciding not to sanction the proposed scheme.

[58] Thus, it is our considered view that the non-disclosure of the material fact by the appellant as discussed earlier, runs counter to the reasonableness and fairness of the proposed scheme by the appellant.

Whether The Scheme Is Reasonable And Fair

[59] One of the important criteria in sanctioning a proposed scheme of arrangement by the Court is that the scheme is reasonable and fair to all creditors and the test is whether the proposed scheme is a scheme that an intelligent and reasonable man would approve.

[60] In the present case, firstly, because a total debt of RM322 million would be eliminated at consolidation based on the response by the Hatten Group to the queries of the Singapore Securities Trading Limited whereas the total debt owing to the Scheme Creditors is RM322,622,612, almost the entire debt of the said RM322 million, including the respondent's outstanding sum, would be written off. Thus, the Third-Party Creditors would not have any avenue to

claim their debts if the proposed scheme was sanctioned by the Court. This is unreasonable and unfair to the Third-Party Creditors.

[61] Next, the learned High Court Judge found that there are material uncertainties in the proposed scheme which, firstly, in the proposed scheme, RM167.4 million owing to the scheme creditors by the applicant are to be waived and the appellant will be discharged from all claims, and liability regarding the waived sum. However, there was no explanation of how the

large sum was derived at. The learned High Court Judge was of the view that the waiving and the discharge of the debts owed by the appellant to the scheme creditors was merely to perpetuate the existence of the appellant to the detriment and expense in particular the Third-Party Creditors. This also means that the Third-Party no longer has an avenue against the appellant if the Court sanctions the proposed scheme. This conclusion, to me, is tenable.

[62] Next, the other feature of the proposed scheme is that RM64.2 million of assets will be injected into the SPV. However, there was no explanation of how the RM64.2 million would be raised. Most of the applicant's assets are fixed assets and have to be sold to raise the said amount, but this would depend on the property market conditions which fluctuate and are uncertain. Thus, there is an element of uncertainty in the scheme.

[63] In the proposed scheme, earmarked properties to the value of RM142.2 million will be transferred to the SPV and the properties may be sold in 3 to 5 years. Again, this involves the volatility of the property market. These earmarked properties include the "Element Mall" which was completed in November 2015, however, no individual strata have been issued for this property. Further, all 133 units to be earmarked for the SPV were charged to a foreign company, Haitong International Financial Products (Singapore) Pte Ltd ("Haitong"). The properties will only be released by Haitong upon settlement with the company. Thus, the properties could only be earmarked for the SPV upon the release of the properties by Haitong. Here again, there is an element of uncertainty in the terms of the proposed scheme.

[64] The learned High Court Judge also had made a finding of fact that the number of legal claims against the applicant as of 15 January 2021 had totalled 310. The unsecured creditors as of 16 January 2021 totalled 1,897 claiming a sum of RM328,580,553. The applicant owes the Government of Malaysia, a preferred creditor in the form of taxes in the sum of RM23,739,871. What is significant here is that the total liabilities of the appellant had exceeded its total assets. Here, I agree with the learned High Court Judge that this situation would be unfair to the unsecured Third-Party Creditors if the Court sanctions the scheme in light of the uncertainties in the scheme mentioned earlier.

[65] Having viewed the proposed scheme as a whole, I agree with the decision of the learned High Court Judge which was affirmed by the Court of Appeal that the proposed scheme is unreasonable, inequitable, and unfair. An intelligent and honest man would not reasonably approve of the proposed scheme.

[66] In the circumstances, my answer to questions 1 and 2 are in the affirmative which is sufficient to dispose of this appeal. I find no necessity to answer other questions posed.

Conclusion

[67] Based on the reasons mentioned above, I find that the High Court Judge was not plainly wrong in exercising his discretion not to sanction the appellant's proposed scheme of arrangement under s 366(1) of the CA which its decision was affirmed by the Court of Appeal. As such, the appellant's appeal is dismissed with costs of RM50,000.00 to the respondent subject to payment of the allocator fee. The Chief Judge of Sabah and Sarawak (CJSS) has read this judgment in draft and has agreed to it.

Zabariah Mohd Yusof FCJ (Minority):

Introduction

[68] The appeal arises from the decision of the High Court (affirmed by the Court of Appeal) which dismissed the application by the appellant for sanction of a scheme of arrangement pursuant to s 366 of the Companies Act 2016 (CA 2016).

[69] The appellant was granted leave to appeal to the Federal Court premised upon the following 10 questions of law which are categorised into the various 3 headings:

A. Related Creditors and Classification of Creditors

a) Whether the votes of related-party creditors are to be treated differently from the votes of other creditors in the same class in a scheme of arrangement.

b) If the answer to 1 is yes, whether the votes of related-party creditors in a scheme of arrangement should be discounted or not be counted altogether.

c) Whether the issue on proper classification of creditors should be determined at the Court leave stage (following the English Court of Appeal's decision in *Re Hawk Insurance Co Ltd* [2001] 2 BCLC 480 and *AirAsia X Bhd v. BOC Aviation Ltd & Ors* [2021] MLRHU 2008) or only to be determined at the Court scheme sanction stage (following the Hong Kong Court of Final Appeal case of *Re UDL Holdings Ltd* [2002] 1 HKC 172).

d) Whether the Court at the scheme sanction stage should be slow to depart from its earlier determination on the proper classification of creditors unless there are material changes in circumstances (following the English High Court decision of *Re Lehman Brothers International (Europe) (In Administration)* [2018] EWHC 1980 (Ch)).

B. Explanatory Statement

e) Whether the challenge to the adequacy of disclosure in the explanatory statement issued under s 369(1)(a) of the Companies Act 2016 should be at the stage before the Court approves the issuance of the explanatory statement or at the Court scheme sanction stage.

f) Where the Court finds inadequate disclosure in the explanatory statement at the scheme sanction stage, whether the Court can order, as a remedial measure, a re-issuance of the explanatory statement and re-voting at the meeting of creditors in a scheme of arrangement.

g) Whether the duty of disclosure in the explanatory statement would require the applicant company to objectively provide each creditor the genesis and extent of all the company's debts (see the Singapore Court of Appeal decision in *Wah Yuen Electrical Engineering Pte Ltd v. Singapore Cables Manufacturers Pte Ltd* [2003] SGCA 23, a decision cited by the Court below).

C. Sanction of Scheme of Arrangement

h) Whether the Court hearing the scheme sanction is bound by the principles set out in the Federal Court case of *Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor* [2009] 2 MLRA 471 such that the Court should only decide on any scheme of arrangement objections based on the pleadings and after hearing parties on those objections.

i) Whether the Court hearing the scheme sanction is entitled to apply *Re Halley's Departmental Store Pte Ltd* [1996] 2 SLR 70, as was applied by the Court below, to ignore separate corporate personality in considering any connection or motives of the creditors.

j) Whether the Court hearing the scheme sanction should follow the principle that the Court ought not to embark on a dissection of the relative commercial merits of the scheme of arrangement (applying *Transmile Group Bhd & Anor v. Malaysian Trustee Bhd & Ors* [2013] 2 MLRH 427).

[70] In this judgment, I will refer to the appellant as "MDSA Resources".

Background

[71] MDSA Resources is part of the Hatten Group of Companies involved in property development and related activities. It is a distressed company facing 298 legal claims and demands, a substantive portion of it, was from property owners

who had purchased properties from MDSA Resources under a scheme known as the "Guaranteed Rental Return Scheme" (GRSS). The claims by these property owners were in respect of MDSA Resources' failure to pay rentals on these properties as agreed under a leaseback arrangement. This is a buy-to-let offer where the purchasers are assured of monthly rental over a period of time.

[72] In July 2020, MDSA Resources decided to restructure its debts and rehabilitate the company by entering into a proposed scheme of arrangement with its creditors under s 366(1) of the CA 2016 ("Proposed Scheme").

[73] The Proposed Scheme consists of MDSA Resources' unsecured creditors holding more than RM374 million of debts. The Scheme Creditors in the Proposed Scheme consists of only one class of creditors, namely, third-party creditors of MDSA Resources ("Third-Party Scheme Creditors") and the Hatten Group Scheme Creditors, also known as related party creditors. They all have the same legal rights against MDSA Resources.

[74] The respondent, Adrian Sia Koon Leng is one of the Third-Party Scheme Creditors with a debt of RM117,205.74, which is approximately 0.03% of the total scheme debt of RM374 million. He is a purchaser of one of the apartments within Hatten City Phase 1 under the GRRS.

[75] On 1 July 2020, MDSA Resources filed an Originating Summons in the High Court for leave to convene a creditors' meeting in relation to a proposed scheme of arrangement with its Scheme Creditors under s 366(1) of the CA 2016 and for a restraining order under s 368(1) of the same. The respondent opposed the application allegedly due to a lack of information disclosed by MDSA Resources.

[76] Despite such objections by the respondent, the High Court granted leave for the convening of a scheme meeting of the creditors of MDSA Resources within two months and for a restraining order for two months.

[77] An order was given by the High Court that MDSA Resources be at liberty to issue the finalised Explanatory Statement (ES) to the creditors pursuant to s 369 CA 2016. The respondent had again opposed and objected to the application at this stage.

[78] On 2 December 2020 and 3 December 2020, the Notice of the Scheme Meeting and the ES were sent to the Scheme Creditors. In the ES, the main terms of the scheme were presented to the creditors which include the following:

a) A total of RM167.4 million will be waived by the Scheme Creditors. The balance RM206.6 million will be transferred and vested in Resolve Resources Sdn Bhd, a special purpose vehicle (SPV).

b) MDSA Resources will be released and discharged from all claims and liabilities.

c) Earmarked properties of an approximate value of RM142.2 million transferred to the SPV.

d) MDSA Resources will inject further assets up to RM64.4 million into the SPV.

e) The earmarked properties may be sold in 3 to 5 years. The proceeds will be channelled to the SPV to be distributed.

f) A recovery rate of 70% if MDSA Resources is to go under the proposed scheme, and a recovery rate of 44.9% if MDSA Resources is to go under liquidation.

[79] On 13 January 2021, MDSA Resources held the Scheme Meeting virtually. 90.4% in value of the Scheme Creditors (amounting to RM283,882,044.00 of the debts of the Proposed Scheme) present and voting, voted in favour of the Proposed Scheme.

[80] On 18 January 2021, MDSA Resources filed the Sanction Application in the High Court to sanction the Proposed Scheme, which was dismissed and subsequently affirmed by the Court of Appeal.

Proceedings In The High Court

[81] The learned High Court Judge found that the scheme of arrangement as reflected in the ES is unfair and inequitable. The crux of the High Court's decision is outlined as follows:

a. The Hatten Group Scheme Creditors should not have been categorised together with the Third-Party Scheme Creditors;

b. The 3 to 5 years recovery period set out in the Proposed Scheme was unrealistic in the current economic conditions; and

c. There is no evidence to show that the SPV has experience in dealing with large amounts of assets and debts.

[82] With regards to the classification of the creditors for the purpose of the Scheme Meeting, the High Court held that the Hatten Group Creditors had considerable influence and played a significant role in securing the majority of 75% favouring the scheme.

[83] In answering whether the statutory "majority of 75% of the total value of creditors... present" under s 366(3) CA 2016 was reached in a transparent and equitable manner and "fairly represents the class in question" (namely in this present case, the "unsecured creditors"), the High Court relied on the Singaporean Court of Appeal case, *Wah Yuen Electrical Engineering Pte Ltd v. Singapore Cables Manufacturers Pte Ltd* [2003] 3 SLR(R) 629 at para [35] which ruled that, in exercising their discretion to approve a scheme, the Court should treat with reserve, related parties' votes, as such votes may be motivated by personal or special interests to disregard the interests of the class and vote in a

self-centred manner. The High Court also referred to the Hong Kong Court of Final Appeal's decision in the case of *UDL Argos Engineering & Heavy Industries Co Ltd v. Li Oi Lin* [2002] 1 HKC 172 (which is also referred to as *Re UDL Holdings & Ors* in this judgment), where the Court may disregard or discount the votes of members who have personal or special interests in supporting the proposals that their views cannot be regarded as fairly representative of the class in question (paras [52] to [56] of the High Court judgment).

[84] Given the facts that Hatten Group Creditors are related parties' creditors and the debts owed to them exceed the minimum 75%, it is crucial for MDSA Resources to explain to the Third-Party Creditors the effect of the compromise or arrangement and state, with particular reference to any material interests of the directors; whether as directors or as members or as creditors of the company or otherwise and the effect of the compromise or arrangement so far as it is different from the effect on the similar interests of other persons (Para [61] of the High Court Judgment). There was insufficiency of information in the Application for Sanction by MDSA Resources such as the ES, and the Account's Report in respect of Hatten Group Creditors' debts to the applicant (Para [63] of the High Court Judgment).

[85] Ultimately, the High Court finds that the Proposed Scheme was unreasonable because:

- The provision under the Proposed Scheme to waive and discharge all the debts owing by MDSA Resources to the Scheme Creditors was to the detriment and expense of the Third-Party Scheme Creditors (para [71] of the High Court Judgment); and
- as the Proposed Scheme involved the disposal of earmarked properties, the uncertainty in the property market conditions made the scheme undesirable and unreasonable (para [74] of the High Court Judgment).

Proceedings In The Court of Appeal

[86] The issues that arose for adjudication before the panel are:

(i) Whether the composition of the Scheme Creditors was unfair;

(ii) Whether there was non-disclosure of material needed; and

(iii) Whether the scheme of arrangement was reasonable.

[87] On 2 March 2022, the Court of Appeal dismissed MDSA Resources' appeal and affirmed the learned High Court Judge's decision premised on the following grounds:

a) The composition of the class of creditors, comprising the Third-Party Creditors and the MDSA Resources' creditors to constitute a single class of the scheme creditors, was unfair, uneven and downright lop-sided. They should not have been lumped together in a single group. The composition of the Scheme Creditors could not be regarded as fairly representative of the class in question.

b) The Hatten Group Creditors which formed the dominant group, were all related to MDSA Resources as they comprised MDSA Resources' ultimate holding companies, subsidiaries, directors and related parties with common directors. The Hatten Group Creditors would obviously be in favour of the scheme of arrangement. On the other hand, the Third-Party Creditors, were not related to MDSA Resources and they had disparate and distinct interests from Hatten Group Creditors. The Third-Party Creditors would obviously be keen to safeguard their interest, including preserving their right to recover maximum debts owed to them by MDSA Resources compared to MDSA Resources' creditors. The MDSA Resources' creditors outnumbered the Third-Party Creditors who, because of their relative number to the former, would not effectively be able to challenge the MDSA Resources' creditors. The MDSA Resources' creditors, because of their sheer number, would decisively be in a position to vote in favour of the scheme of arrangement.

c) MDSA Resources failed to explain sufficiently the full effect of the arrangement and the difference in effect, to the Third-Party Creditors as against the other creditors. MDSA Resources had not been transparent about the circumstances giving rise to the related party debts. There was, therefore, a material non-disclosure of the information needed.

d) The scheme of arrangement required RM167.4 million of debts to the scheme creditors by MDSA Resources to be waived. However, there was no indication in the books of MDSA Resources as to how this large amount was derived at. The Proposed Scheme also required that MDSA Resources shall be irrevocably, permanently, unconditionally, completely and absolutely released and discharged from all claims and liabilities to all the scheme creditors. The Third-Party Creditors, including the respondent, would be left in a bind if the proposals above were accepted. They could no longer claim their money in full from MDSA Resources.

e) Furthermore, the scheme of arrangement provided for the undertaking by MDSA Resources to inject assets of RM64.2 million but there was no explanation how this huge amount would be raised. There was no reason to disagree with the findings of fact by the High Court that the sanction for the scheme of arrangement should not be given as the same was unreasonable, unfair and not equitable.

f) The panel of the Court of Appeal found that the High Court did not err in refusing the sanction, as such there was no reason to disturb the High Court's decision in disallowing to extend the Restraining Order. The latter must be contingent upon the former. As the application for sanction was rightly dismissed, the Restraining Order could not be sustained and be allowed to continue. Likewise, there was absolutely no reason for the High Court to allow RRSB's application to intervene as the SPV, once the applications for sanction and approval of the scheme of arrangement were dismissed.

Proceedings At The Federal Court

[88] Dissatisfied with the decision of the Court of Appeal, the Appellant now appeals to the Federal Court premised upon the aforesaid questions of law.

[89] After hearing and giving due consideration to submissions, both oral and written, from both parties and also the grounds of the High Court and Court of Appeal and the Records of Appeal, I am satisfied that there are merits in MDSA Resources' appeal. It is my finding that the High Court and the Court of Appeal had erred. The following are my reasons in so deciding.

The Mechanism And Requirement In A Scheme Of Arrangement

[90] A scheme of arrangement is an agreement between a financially distressed company and its creditors to assist the company to fulfil its debts obligations. This scheme of arrangement operates by restructuring the debts of the company and varying the creditors' debts, as opposed to immediate liquidation. It is one of the corporate rescue mechanisms provided under ss 366 and 368 of the CA 2016 which involved a Court-sanctioned process. It involves a 3-stage process before a scheme of arrangement is considered to be successful, namely:

a) The 1st stage — Convening stage:

This is where the company, creditor, member, liquidator (if the company is being wound up), or the judicial manager (if the company is under judicial management) makes an application to the Court under s 366(1) of the CA 2016 for leave to convene a meeting between the creditors and the members (scheme meeting).

This is the initial early stage where the Court in granting leave will consider and determine, *inter alia*, the correct classification of creditors, and how the Scheme Creditors' Meeting is to be conducted. Any issue in relation to a possible need for separate meetings for different classes of creditors ought to be raised at the application hearing. The company is also required to submit an outline of the scheme in the form of a draft ES which would adequately justify the Court granting leave to convene a scheme meeting.

Unless the applicant applies for a restraining order at the convening stage itself, there is no automatic moratorium for creditors to commence legal proceedings against the company,

After the Court grants permission for the applicant to convene the meeting, the applicant will continue to engage with its creditors to negotiate the terms of the scheme before the meeting.

b) The 2nd stage is the Court-approved meeting:

Prior to the Court-approved meeting, a notice of the same will have to be advertised and served pursuant to ss 366 and 369 of the CA 2016. In the Court-approved meeting, proposals for the scheme are presented. In this meeting, the proposed scheme must

be approved by a majority of 75% of the total value of creditors present and voting, either in person or by proxy.

c) The 3rd stage: The Court's Sanction:

Once the 75% approval has been granted for the proposed scheme, the applicant will then make a second application to Court to sanction the approved scheme of arrangement.

The 3rd stage is the stage where the Court will scrutinise the scheme to ensure that the statutory provisions has been complied with, taking into account the following factors:

i) Whether the class was fairly represented at the meeting;

ii) Whether there was coercion of the minority by the majority to approve the scheme of arrangement;

iii) Whether the scheme was a fair scheme, one which an intelligent and honest man, being a member of the class concerned and acting in respect of his interest would reasonably approve; and

iv) Whether there is any 'taint' or defect in the scheme (See *Re Sateras Resources (Malaysia) Bhd* [2005] 2 MLRH 131; *Re Noble Group Ltd* [2018] EWHC 309 (Ch)).

[91] Once satisfied that the statutory provisions have been complied with, the Court may grant the sanction, subject to additional conditions and alterations where it sees fit. Upon sanction being granted by the Court, the scheme of arrangement will bind the company, its members, liquidators and contributories of all classes of creditors, including the minority creditors who may have opposed the scheme. Unanimous approval of the scheme is not a requirement for the sanction to be granted. A copy of the sanction order shall be lodged with the Companies Commission of Malaysia and annexed to every copy of the company's constitution issued after the order was made.

Decision And Analysis

[92] What is of much concern, is the decisions of both the High Court and the Court of Appeal on the application of the law in relation to scheme of arrangement, to the facts of the present case. In addressing the leave questions posed, this judgment will answer those questions under the following issues/ headings and the application of the law to the facts herein:

a) Whether the creditors were rightly classified;

b) The weight to be given to the votes of related party creditors;

c) Can the Court depart from its earlier decision in the initial stage on the classification of creditors; and

d) Whether the disclosure in the ES is adequate.

A) Whether The Creditors Were Rightly Classified

[93] The Courts below held that the Hatten Group Creditors and the Third-Party Scheme Creditors should not be classed together in a single class, as it does not provide a fair representation of the class of creditors. In this respect, it is crucial to determine whether the creditors were rightly classified. Essentially this will address leave Questions 1,2 and 9.

In the present case, the Scheme Creditors consist of the following:

i) The Hatten Group Scheme Creditors:

- these are holding companies, subsidiaries and directors of MDSA Resources; and

ii) Third -Party Scheme Creditors of MDSA Resources:

- these are creditors under the GRR arrangement and non Hatten Group Trade Creditors.

[94] These 2 groups of Scheme Creditors are grouped into one single class of unsecured creditors in the Proposed Scheme. MDSA Resources' stand is that the Third-Party Scheme Creditors and the Hatten Group Scheme Creditors all have the same legal rights against MDSA Resources, and hence they should be classified under the same class. The respondent, the High Court and the Court of Appeal have taken the position, that related party creditors, *vis-à-vis* the Hatten Group Scheme Creditors can never be classified and vote in the same class as other creditors, due to the considerable influence and significant role played by the Hatten Group of Creditors in securing the majority vote of 75% favouring the scheme.

[95] As far as the CA 2016 is concerned, there is no definition of related party creditors in the scheme of arrangement provisions and neither is there any distinction between such creditor and creditors. Therefore, there is no statutory basis in the CA 2016 for a scheme of arrangement to split the classification of "related party creditors" from that of other creditors. This is unlike other jurisdictions' corporate rehabilitation provisions which incorporate wordings to make a distinction between mere creditors and "related party creditors" (section 249 of the UK Insolvency Act 1986; ss 64(4) (d) and 65 of the Singapore Insolvency Restructuring and Dissolution Act 2018).

[96] Although we have references in the CA 2016 as to when corporations are deemed to be related, associated or connected to one another, these references within the CA 2016 have never been incorporated into the scheme of

arrangement provisions in the same, which can justify the statutory distinction between "creditors" and "related party creditors" in a scheme of arrangement (refer to ss 7, 8(5), 197, 59, 225, 228, 229 of the CA 2016).

[97] Hence, in the absence of such express wordings in the CA 2016, this Court ought to exercise caution in upholding a finding by the Court of Appeal in the present case that unsecured creditors and related party creditors "to constitute a single class of the scheme creditors is unfair, uneven and downright lopsided" and the High Court judgment which held that related party creditors "should not even be allowed to vote".

[98] There is yet to be a Federal Court decision on the approach to be taken on the issue of classification of scheme creditors in a scheme of arrangement. Our High Courts have 2 divergent approaches, which are either based on:

a) interests; or

b) legal rights against a company and not interest outside of legal rights.

[99] The High Court case of *Re Sateras Resources (Malaysia) Bhd*, adopted the application of the first approach, when there was only one group of creditors (secured, unsecured and subsidiaries), the Court refused to grant sanction. It was held to be manifestly unfair to group subsidiaries within the same class of creditors with petitioner's unsecured creditors as there was a divergence of interest and no community of interest.

[100] The second approach was taken by the recent High Court decision of *AirAsia X Bhd v. BOC Aviation Ltd & Ors* [2021] MLRHU 2008 which held that there is nothing to suggest that their rights as unsecured creditors are any different from other creditors in its class to warrant putting them in a different class.

[101] The English case of *Sovereign Life Assurance Co v. Dodd* [1892] 2 QB 573 enunciated the test to determine which creditors fall into a separate class. It ruled that "a class must be confined to those persons whose rights are not so dissimilar as to make it impossible to consult together with a view to their common interest".

[102] Other jurisdictions like Hong Kong, through the decision of Lord Millet NPJ in the Court of Final Appeal in *Re UDL Holdings & Ors* [2002] I HKC 172, preferred to classify creditors based on legal rights of the creditors against the company, not based on interests outside of these legal rights. He explained that although the internal creditors in the proposed schemes of arrangement undoubtedly had a special interest in promoting the schemes, this does not disqualify them from being treated as ordinary creditors. Lord Millet NPJ explained the test for the classification of creditors in a scheme (p 180) as follows:

> "(3) The test is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights. The fact that individuals may hold divergent views based on their private interests not derived from their legal rights against the company is not a ground for calling separate meetings."

[103] The test in *Sovereign Life Assurance Co v. Dodd* has been referred to, by this Court in *Francis Augustine Pereira v. Dataran Mantin Sdn Bhd & Ors And Other Appeals* [2013] 6 MLRA 443 which ruled that:

> "A class of creditors is determined by their common interest, such interest separating them from other creditors with whom they are unable to consult together in respect of that common interest."

An illustration of "common interest" test is that unsecured creditors should not be classified with secured creditors like Banks with financing facilities and a charge over the company's land because both parties have different interests as to whether the Scheme should be approved.

[104] Our High Court in *Transmile Group Berhad & Anor v. Malaysian Trustee Bhd & Ors* [2013] 2 MLRH 427, adopted the test by the Hong Kong Court of Final Appeal in *Re UDL Holdings* and allowed the application for sanction of the scheme of arrangement in the case. It held that the possibility that the same creditors may procure an advantage from additional benefits does not, *ipso facto*, necessitate separate classification. In this case, there were objections raised in relation to related corporations who were scheme creditors who voted in the scheme of arrangement and their votes were sought to be disregarded or discounted. It was held that the legal rights and benefits enjoyed by each of them as members within a class were the same, justifying the test that it was possible for them as class members to consult together with a view to their common interests.

[105] The learned Ong Chee Kwan JC in the case of *Top Builders Capital Bhd & Ors v. Seng Long Construction & Engineering Sdn Bhd & Ors* [2022] 3 MLRH 262, dealt extensively with the issue of whether 3rd party creditors and related party unsecured creditors could be classified together in a scheme of arrangement and whether there should be discounting or disregarding of the related party creditors' votes. His Lordship maintained his stand as in *AirAsia X,* namely that all unsecured scheme creditors and the related company creditors should be classified into the same class as both have the same legal right of recourse against the appellants. There was nothing to suggest that the related company creditors' rights are any different from other creditors in its class to warrant placing them in a different class. The determination of the classification is that both groups of creditors must have the same legal rights to claim payment of debts owed under the scheme. Even if the related company creditors had chosen to waive their entitlement to the adjudicated debts under the scheme for the benefit of the scheme companies, did not mean that their legal rights under the scheme were dissimilar to the legal rights of the other unsecured creditors.

They should not be placed in separate classes of creditors, even though their personal or subjective interests in the scheme may differ, for example, the related company creditors had a subjective interest in ensuring the continuity of the business of the scheme companies, whereas the non-related creditors were only interested in recovering their debts owed to them by the scheme companies.

[106] The Singapore Court of Appeal in *Wah Yuen Electrical Engineering Pte Ltd v. Singapore Cables Manufacturers Pte Ltd* [2003] SGCA 23, after referring to the test classification in the decision of the Court of Final Appeal in *Re UDL Holdings* had confirmed that related party creditors do not have to vote as a separate class just because they are related party creditors.

[107] Case law authorities from the United Kingdom, Hong Kong and Singapore hold a common stand, namely, the test for classification of creditors is based on similarity or dissimilarity of legal rights of the creditors against the company, although "special interests" of the creditors may affect the Court's decision on whether to sanction the scheme. Where related company creditors are concerned, these commonwealth jurisdictions have classified creditors based on creditors' strict legal rights rather than their subjective interests or benefits claimed from the proposed scheme.

[108] Applying the principles of law from the various jurisdictions as aforesaid to the present case, the High Court and the Court of Appeal erroneously held that the Hatten Group of Scheme Creditors and the Third-Party Scheme Creditors of MDSA Resources should not be classified together in one class. Case law authorities and the development of the law from the various jurisdictions on scheme of arrangement speak with one voice with regards to the classification of creditors.

[109] The focus of the respondent herein, the High Court and the Court of Appeal is on the "special or subjective interests" of the Third-Party Creditors, which is contrary to the decisions of the aforesaid case law authorities. In addition, the respondent applies the concepts of "rights" and "interests" interchangeably when it states that "it would be impossible for the Hatten Group creditors to consult with the unrelated Third-Party Creditors as their interests were not common and distinctly dissimilar...the Third-party Group especially the GRR creditors including the Respondent are in a different position from the Hatten Group Creditors as the Respondent suffered an additional variation of rights not suffered by the Hatten Group Creditors such as to pay the service charges, advertising funds and sinking fund of the units leased under the GRR". The respondent also states that "since the related unsecured creditors and the Third-Party Creditors have different rights and interest, they should have been separately classed."

[110] The respondent further relied on the judgment of Hildyard J in *Re Lehman Brothers International Europe (In Administration)* [2018] EWHC 1980 (Ch) which states "the Court had declined to engage with the issue of classification of creditors until the final sanction hearing..." as authority for the proposition that

the Court in the said case declined to engage with the classification of creditors as paperwork had been done at the leave stage and the administrators of the scheme had submitted that 4 scheme meetings would be held for each group of creditors. Whereas, in the present case, there is only one single meeting held for the unsecured creditors. However, such reliance by the respondent on the said case was misconceived, as a perusal of the relevant excerpts of para [71] of the judgment of Hildyard J were in relation to the change in the practice of English Courts from its earlier stance, where the Courts would now deal with the issue of classification of creditors at the first stage of leave to convene the meeting of creditors. The full text of the relevant excerpts is as follows:

> "[71] In parallel with this development of the Court's approach to this issue of jurisdiction, the Court has also changed its practice and accepted that the identification of proper class composition is one to be addressed at the time of the Convening Hearing. **Prior to *Re Hawk Insurance Company Ltd* [2002] BCC 300 the Court had declined to engage with the issue until the final (sanction) hearing**, leaving it to the proponents of the scheme to live with their choices until the potential sudden death of disapproval at the final hurdle."
>
> [Emphasis Included]

[111] The case of *Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd* [1989] 2 MLRH 800 relied on by the High Court and referred to by the respondent where the respondent states that "a closer reading' of the aforesaid case shows that the scheme in that case was rejected by the Court "for the reason that the scheme was solely for the benefit of one class of creditors only'. However, the facts of the said case are unlike the facts of our present case. There, the success of the implementation of the scheme depended on the active participation of 4 other parties. They were First Pacific, who are the developers, Bovis, the construction manager, and the financier who was to provide RM40 million credit facilities and the working committee. Should any of these 4 parties default in their respective obligations, there is no way by which a creditor can legally proceed against them to have the scheme implemented. An undertaking to be given by First Pacific alone can only be enforced by the applicant and not by the creditors, and hence, was held to be not good enough (refer to p 34 para I, left of the judgment). Hence, it is no surprise that the High Court held that the interests of the creditors were not safeguarded.

[112] The Court of Appeal misinterpreted the decision of the Court of Final Appeal in *Re UDL Holdings* in relation to the issue of classification of creditors when it ultimately held that "the composition of this class of creditors, comprising the Third-party creditors and the [Hatten Group Scheme Creditors] to constitute a single class of the scheme creditors is unfair, uneven and downright lopsided and they should not have been lumped together in a single group".

[113] The Court of Appeal when referring to *Re UDL Holdings* and to the test on similarity or dissimilarity of legal rights against the company, failed to appreciate the next paragraph of Lord Millet's judgment, which states that the test "is not based on similarity or dissimilarity of interests not derived from such legal rights".

[114] Hildyard J in *Re Lehman Brothers* referred to this 'modern approach' in *Re UDL Holdings* and stated that it is "fundamental" to "distinguish between the legal rights which the scheme creditors have against the company, and their separate commercial or other interests or motives (whether or not related to the exercise of such rights)" (see [69]).

[115] The High Court and Court of Appeal failed to appreciate the fundamental difference between legal rights against the company and commercial or other interests not derived from such legal rights. This was the erroneous basis in which the Courts below went on to adopt the rigid Singapore Courts' approach to disregard totally the votes of the related party creditors solely on the basis that they were related party creditors. Both the Courts below failed to realise the impracticality in many cases of constituting classes based on similarity of interest as distinct from similarity of rights.

[116] It cannot be denied that in a scheme of arrangement, not only is there the risk of empowering the majority to oppress the minority, but there is also the risk of enabling a small minority to thwart the wishes of the majority. Both of these concerns on the risks must be balanced. Grouping creditors into different classes gives each class the power to veto the Scheme and may deprive a *bona fide* scheme of arrangement of much of its value. The first risk can be averted by requiring those whose rights are so dissimilar that they cannot consult together with a view to their common interest to have their own separate meetings; while the second risk is avoided by requiring those whose rights are sufficiently similar, that they can properly consult together to do so.

[117] Therefore, a company can be regarded as entering into separate but linked arrangements with groups whose members have different rights or who are to receive different treatment. It cannot sensibly be regarded as entering into a separate arrangement with every person or group of persons with his or their own private motives or extraneous interests to consider.

[118] The High Court further erroneously held that it must "take into consideration the connection between the company and other companies and information about persons closely connected with the company, as well as the motives of such parties and ignore the fact of separate personality... See *Re Halley's Departmental Store Pte Ltd* [1996] 2 SLR 70". This holding by the High Court was affirmed by the Court of Appeal in its entirety. This part of the decision of both the Courts below failed to take into account the doctrine of separate corporate personality as enshrined in *Salomon v. Salomon* [1897] AC 22. The mere fact of corporate shareholding does not entitle the Court to make

a finding that entities are closely connected and then to impugn the motives of such parties.

[119] Thus, there should only be one class of unsecured creditors for the Proposed Scheme. Any issues on the treatment of the votes of the Hatten Group Scheme Creditors would only come into play at the third stage of sanction.

[120] Given the aforesaid, although there is no rule of law in classifying creditors, the emphasis is on rights, which are not dissimilar, and the rights in question are the rights against the company with respect to the shares or debts in question. Extraneous interests ought to be disregarded. The test is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights. Therefore, the classification of the creditors in this case was correctly based on the similarity of legal rights. In a liquidation scenario of MDSA, the rights of the related party creditors and the other unsecured creditors are similar, namely, these creditors would only be paid "*pari passu*" from the surplus funds of the wound-up company.

[121] However, this is far from saying that equal weight must be given to votes cast by related companies' creditors with "special interests" for a proposed scheme as compared to unrelated creditors with no such "special interests" shown.

B) The Appropriate Weight To Be Given To Votes

[122] There is no universal law that stipulates that the votes of related party creditors should be discounted totally or that they must not be allowed to vote. The English Courts provides a guide, by introducing and applying the "but for" test. In this "but for" test, what must be shown is that an intelligent and honest member of the class, without these collateral interests, could not have voted in the way that he did. Hildyard J addressed the "but for" test in the English High Court case of *Re Apcoa Parking Holdings GmbH And Others* [2015] 2 BCLC 659, 695 where the learned Judge said:

> "[130] In particular, if an allegation is made that a creditor had improper regard to interests other than those of the class to which he belonged, it is necessary for there to be a "but for" link between the collateral interest and the decision to vote in the way that he did. **The person challenging the relevant vote must therefore show that an intelligent and honest member of the class without those collateral interests could not have voted in the way that he did. It is not sufficient to show that the collateral interest is an additional reason for voting in the manner in which he would otherwise have voted.**"
>
> [Emphasis Included]

[123] Hildyard J repeated the aforesaid in *Re Lehman Brothers* which held that if it is shown that the creditors had some "special interests different or adverse to" the other creditors of the same class, the Court has a discretion whether

to disregard or discount the votes of such creditor/creditors, and thereafter consider what effect that should have in terms of whether or not the Court should sanction the scheme. It also held that there must be a direct causal link between special interests and the related party creditors' decision to support the scheme where these interests are adverse to the interests of other creditors in the class. The concern is whether the relevant creditors have a special interest which is adverse to, or clashes with, the interests of the class as a whole. Special interest which merely provides an additional reason for supporting the scheme (without clashing or conflicting with the interests of the class as a whole) does not undermine the representative nature of the vote. It was further emphasized that "there must be a strong and direct causative link between the creditor's decision to support the scheme and the creditor's adverse interest such that it is the adverse interest which drives the creditor's voting decision. In the absence of such a link, there is simply no sufficient reason to treat the creditor's vote any differently from those of the rest of the class". Hidyard J refused to disregard the votes of the majority creditors and proceeded to sanction the scheme mainly on the basis that the creditors' voting was motivated by the objective of ensuring speedy distribution of the surplus to creditors and a majority of independent creditors had voted in favour of the scheme.

[124] In the English High Court case of *Re Linton Park Plc* [2008] BCC 17, there was a challenge made, in that a vote by a scheme member was for a collateral motive and that the vote should be discounted or disregarded. However, Lewison J declined to discount or disregard the vote and held at para [12] that the "serious allegation of collateral motive must in my judgment be backed by proper evidence" and the evidence must be "cogent and strong before the Court should countenance its disfranchising one of the shareholders entitled to vote".

[125] The Hong Kong Courts take a similar stance as the English position. The pertinent question to ask is; is there a reason for disregarding the votes of related party creditors? The scheme sanction Court ultimately exercises discretion and applies the "but for" test for the relationship between the related party creditors and the scheme company; would the related party creditors have voted differently?

[126] The decision of the Hong Kong Court of first instance in *Re UDL Holdings Ltd & Ors (No 3)* [2000] 3 HKC 405 (which was upheld by the Court of Final Appeal in *Re UDL Holdings Ltd & Ors* [2002] 1 HKC 172), illustrates where there was only one class of unsecured creditors where it includes the subsidiaries of the scheme company (ie internal or related party creditors) with the other unsecured creditors. The opposing scheme creditors asked for the votes of the related party creditors to be disregarded. However, the Court declined to uphold the objection. The learned Doreen Le Pichon J asked a very pertinent question, namely, what is the rationale for disregarding the votes of non-scheme subsidiaries (refer to p 424 of the judgment):

> "In deciding how their votes should be cast, their respective boards must consider what would be in their best interest as creditors. Unless I am to assume that the directors of the non-Scheme subsidiaries were all acting in breach of their fiduciary duties and voted in a manner that was not in the best interest of the relevant non-Scheme subsidiary as creditors, their votes should not be discounted. **There is no evidence before the Court to warrant such an inference, much less conclusion.** Therefore, I see no basis for making the assumption that I am implicitly invited to make. It must follow that no valid reason exists for disregarding the votes of non-Scheme subsidiaries."
>
> [Emphasis Included]

[127] Lord Millet NPJ in the Hong Kong Court of Final Appeal in *Re UDL Holdings & Ors*, held that related party creditors, although having a special interest in promoting the schemes, were not disqualified from being treated as ordinary creditors. The internal creditors and particularly the companies which were putting their own schemes forward undoubtedly had special interest in promoting the schemes, but this did not disqualify them from being treated as ordinary creditors. The Court was bound to take their presence into account and was not debarred from doing so, when considering whether to exercise its discretion to sanction the scheme.

[128] In *Re Century Sun International Ltd* [2021] HKCFI 2928, a decision of the Hong Kong Court of first instance, which involved related party creditors which accounted for 67% of the debt of the scheme. The opposing scheme creditors argued that the related party creditors were motivated by additional reasons such as advancing the wider business plan of the group of companies. The Hong Kong Court declined to apply any different treatment or to discount the votes of the related creditors. The test is whether there is anything that suggests if the creditor whose motive is impugned had not had the "special interest" in question, he would have voted differently. But what is important to take note of, is that the opposing creditors have not pointed out anything which suggests that the group creditors would have voted differently "but for" their relationship with the company.

[129] Singapore takes the narrow approach in fully discounting and disregarding the votes of related party creditors. Related party creditors can vote but the weightage of the vote would be discounted to zero. It is in direct contrast to the stand taken in the United Kingdom and Hong Kong. In *Wah Yuen Electrical Engineering Pte Ltd,* the Singapore Court of Appeal held that the Courts have consistently attributed less weight to related party votes. Although related party votes are counted for purposes of determining whether the statutory majority has been reached, the Courts have attributed less weight to such votes when asked to exercise their discretion in favour of a scheme. The Singapore Court of Appeal went a step further in *The Royal Bank of Scotland NV And Others v. TT International Ltd And Another Appeal* [2012] 2 SLR 213 when it held that the votes of creditors which are wholly owned subsidiaries of the scheme company should be discounted to zero and held that:

> "[158] In our view, the votes of wholly-owned subsidiaries are entirely controlled by their parent company, ie the Respondent in this case. Indeed, we view the Respondent's wholly-owned subsidiaries as extensions of the Respondent itself. If the Respondent were to wind up any of its wholly-owned subsidiary creditors, the debts owing to those wholly-owned subsidiary creditors (save for those debts owed by the wholly-owned subsidiary creditors to genuine Third-Party Creditors) would be extinguished and the assets would be the Respondent's. Significantly, the votes of the wholly-owned subsidiary creditors at creditors' meetings are undoubtedly entirely controlled by the Respondent."

[130] The Singapore Court in *Wah Yuen* concluded that it is the norm for the votes of related party creditors to be discounted in light of their special interests or personal interests to support a proposed scheme by virtue of their relationship with the company.

[131] The Singapore Court of Appeal in *The Royal Bank of Scotland NV* applied a partial discounting of the votes of two other related scheme creditors who were not subsidiaries of the company. One was a shareholder owed a debt by the scheme company under a shareholder loan and the other was a Bank with security over the shares in the scheme company. The votes were discounted by the value of the shareholding and the shares under the security respectively. However, the Court of Appeal in *SK Engineering & Construction Co Ltd v. Conchubar Aromatics Ltd & Another Appeal* [2017] 2 SLR 898 disagreed with the partial discounting approach as it would amount to an arbitrary and subjective exercise. In any event, the decision is merely obiter because in *SK Engineering & Construction Co Ltd v. Conchubar Aromatics Ltd & Another Appeal* there were no related party creditors and hence there is no necessity to determine if there was to be any discounting or disregarding of the creditors' votes.

[132] After discounting *SK Engineering & Construction Co Ltd v. Conchubar Aromatics Ltd & Another Appeal*, the Singapore Courts took a more principled and certain approach to wholly discount the votes of creditors once they are found to be related to the scheme company; if the position of a creditor is in any way tainted, it should follow that the creditors' votes on the scheme should be entirely disregarded.

[133] Discerning the decisions of the Singapore Courts above, nowhere did it address the issue of whether the voting by the subsidiaries was motivated by any special interest (being adverse to or in conflict with that of the other creditors voting for the scheme) due to the relationship between the subsidiaries and the scheme company. The Singapore Courts did not decide in terms of whether these interests disregarded the interests of the class as a whole and motivated the related party to vote as it did. The Court held that requiring a separate class for one of the creditors was justified on the basis that the particular creditor was a wholly owned subsidiary of the scheme company. The discounting of the votes by the Singapore Courts was solely because the creditor is a related party. The narrow approach adopted by the Singapore Courts removes all discretion

from the scheme Court and is not in line with the approach taken by Hong Kong and the English Courts and the developing jurisprudence in Malaysia.

[134] The treatment on the appropriate weight of votes to be given has not been determined by this Court. The High Court in *Top Builders* premised its decision on the seminal decision of Bowen LJ in *Sovereign Life Assurance Co v. Dodd*, refined by Chadwick LJ in *Re Hawk Insurance Co Ltd* [2002] 2 BCC 300. The High Court in *Top Builders* declined to follow the Singaporean narrow approach and preferred to adopt the approach similar to Hong Kong and the English counterpart, namely that the scheme sanction Court exercises discretion on whether the votes of intercompany creditors and/or related party creditors are to be discounted/disregarded, is premised on particular facts of the case. In carrying out its discretion, the Court will consider various factors, amongst others, whether:

a) the benefits that the creditors would likely derive from the scheme be clearly better than the alternative liquidation scenario;

b) there is any clear and obvious likelihood of the creditors achieving a better scheme;

c) the exercise of the votes by the intercompany creditors and or related party creditors was driven by any special or ulterior interest that was "adverse" to the interests of the creditor;

d) the opposing creditors pressing for the votes of the intercompany creditors and or related party creditors to be discounted or disregarded have any self-interest and/or ulterior motive;

e) the adjudicated debts of the intercompany creditors and or related party creditors are genuine or questionable; and

f) the percentage of independent creditors who had voted in the scheme is such that it reflects a desire on the part of an overwhelming majority in value and in number of the scheme creditors wanting the scheme.

[135] Given the aforesaid, it is my considered view that the preferred approach to accord the appropriate weight to votes would be similar to the Hong Kong and the English approach. That is, in dealing with related parties whose rights are not *prima facie* dissimilar to those of the ordinary creditors, the approach is to allow the related parties to vote at the same meetings as the other creditors but the Court is given the discretion at the sanction hearing whether to discount or disregard entirely the votes of the related party for the purpose of determining whether the scheme was approved by the requisite majorities. The "but for" test is a useful guide to determine if there were adverse interests of the related party creditors which had driven their votes. The approach should not be too rigid a rule which circumscribes the discretion of the Court as adopted by the

Singapore approach. This was aptly put by Hildyard J in *Re Lehman Brothers* at paras 96 and 103:

> "[96] I unhesitantly agree that the discretion of the Court should not be circumscribed by inflexible rules and certainly that was not my intention in adopting a "but for" test in *Apcoa*. Rather, I intended to illustrate that to show that the vote was the product of a creditor's special adverse interest such as to make the result unrepresentative of the class the creditor's adverse interest must be shown to be what impelled it to vote as it did.
>
> ...
>
> [103] In summary, and whilst wary of any exclusive or binary test and not intending to suggest any mechanistic restriction on the discretion of the Court at each stage, I continue to think that with suitable caution or nuance in its application, the "but for" test may be helpful in conveying the extent to which the special interest must be demonstrated to be an adverse one before the vote of a member of a class at a duly constituted class meeting is to be discounted or even disregarded. As it was put in the Administrator's skeleton argument, the "but for" test is a useful heuristic for determining whether the causal link exists."

[136] Therefore from the aforesaid authorities, it is my view that:

(i) Firstly, on the issue of classification of creditors, the authorities speak with one voice, ie that related party creditors who have similar legal rights against the company as other creditors, not based on interests. If they are all unsecured creditors, generally they should all be grouped within the same class; and

(ii) Secondly, on the appropriate weight to be given to the votes, it is an exercise of discretion by the Court at the sanction stage, to determine whether the class was fairly represented. The "but for" test provides a useful guide to determine whether there were adverse interests of the related party creditors which had driven their votes.

[137] With the 2 different stages which entail the Court to determine, firstly, the classification of creditors and secondly, the appropriate weight to be given to the votes of the creditors, the High Court and the Court of Appeal in the present case had conflated both the 2 stages in determination of the classification and the appropriate weight to be accorded to the votes. In this respect, both the Courts had erred. The High Court held that the Hatten Group of Unsecured Creditors "cannot be regarded as fairly representative of the class in question" and therefore should be disregarded totally and that "the Hatten Group Creditors should not even be allowed to vote". This decision was upheld by the Court of Appeal when it held that "the composition of this class of creditors, comprising the Third-Party Creditors and the Hatten Group Scheme Creditors to constitute a single class of the scheme creditors is unfair, uneven and downright lopsided".

[138] These pronouncements by both of the Courts below, in conflating the determination of the classification of creditors and the determination on the weight to be accorded to the votes (in the present case, disregarding the votes), are contrary to established case laws from the various jurisdictions. Both Courts, had erred in their findings in conflating the 2 stages of determination.

[139] Therefore, in answering Questions 1 and 2; at the sanction stage, ultimately the Court has the discretion to determine whether the related party creditors had interests which are adverse to the class as a whole which were directly linked to their votes. There is no absolute rule on whether to discount or disregard certain scheme creditors' votes, especially where they are related party creditors in a scheme of arrangement. It is better to adopt the flexible approach by applying discretionary factors depending on the facts of each case. This scheme framework which gives the Court the discretion and flexibility to discount creditor's votes at the sanction stage enables the Court to adequately consider issues of varying creditors' interests (and not rights) without having to limit such considerations to the principles of classification.

Question 1 is answered in the negative.

Question 2 is irrelevant in view of the answer to Question 1.

Question 9 is therefore answered in the negative.

C) Can A Court Depart From Its Earlier Determination On Classification Of Creditors

[140] This will address Questions 3 and 4.

[141] Any issue with regard to a possible need for separate meetings for different classes of creditors ought to have been raised at the application hearing. In the present case, the High Court agreed with MDSA Resources at the initial application stage that there should be a single class of creditors, namely unsecured creditors, and that there should be a meeting of a single class of creditors. Thereafter, on 10 September 2020, the learned High Court Judge granted leave for the convening of the scheme meeting of creditors.

[142] On 23 November 2020, the learned High Court Judge made an order granting MDSA Resources the liberty to issue notice of the scheme meeting and approved the issuance of the ES. Again the learned High Court Judge agreed to a meeting of a single class of creditors (all are unsecured creditors). The respondent opposed this Order and argued for a different classification, which the learned High Court Judge overruled.

[143] However, the learned High Court Judge subsequently departed from his earlier determination in the classification of creditors when rejecting the scheme sanction on 29 November 2020. The learned High Court Judge in his oral grounds held that the Hatten Group Scheme Creditors should not have been classified or categorised together with the Third-Party Scheme Creditors.

In the written grounds, the High Court emphasized that this is not a question of merely a wrong classification but also that "Hatten Group Scheme Creditors should not even be allowed to vote". This decision of the High Court was affirmed by the Court of Appeal.

[144] Two issues arise as a result of both of the Courts' decisions below:

(i) When is the correct stage to determine the classification of creditors, is it at the initial stage of leave or the 3rd stage of sanction; and

(ii) Can the Court depart from its earlier determination on the classification of creditors.

C)(i) When Is The Correct Stage To Determine The Classification Of Creditors

[145] As far as case laws are concerned, there are 2 approaches adopted by the different jurisdictions on the appropriate stage of determination of the classification of creditors, ie:

i) At the initial stage of leave; and

ii) At the 3rd stage of sanction.

[146] The English, Singapore and the Malaysian Courts follow the 1st approach ie at the initial stage of leave. Whereas the Hong Kong Courts follow the 2nd approach.

[147] In *Re Hawk Insurance Co Ltd* [2001] 2 BCLC 480 Chadwick J held that "Leaving the question of classification to the 3rd stage of sanction would mean that a "wrong decision" (on the classification) by the applicant at the onset would have led to a considerable waste of time and expense. This was unacceptable and this would lead to the Court (at the 3rd stage) reviewing its earlier order made at the 1st stage". As a result of *Re Hawk Insurance*, the Chancery Division of the English High Court issued *The English High Court Practice Statement (Companies Scheme of Arrangement)* [2002] 1 WLR 1345 (Ch) which codified the preferred English approach to enable issues concerning the composition of classes of creditors and the summoning of meetings to be identified and if appropriate, resolved early in the proceedings. This makes it clear as to the Court's function at the convening stage to deal with any question of jurisdiction.

[148] The Singapore Court of Appeal in *The Royal Bank of Scotland* considered *The English High Court Practice Statement (Companies Scheme of Arrangement)* contrasted with the Hong Kong approach in *Re UDL Holdings*. The Singapore Courts follow *The English High Court Practice Statement* for the determination of classification of creditors at the 1st stage of leave.

[149] As far as Malaysia is concerned, the High Court case of *AirAsia X* follows the English approach which can be discerned at paras 33, 39, 46 and 49 of the judgment. The High Court did not follow the Hong Kong approach in *Re UDL Holdings*, which leaves the question of proper classification of creditors to the 3rd stage of sanction. Although the Hong Kong Court in *Re UDL Holdings* took note of *Re Hawk Insurance* and *The English High Court Practice Statement (Companies Scheme of Arrangement)*, it refused to follow the English approach. The Hong Kong Court expressed its concern about having to determine at the first stage of leave that the "only alternative would be to require the initial application to be made *inter partes*", with the risk of incurring costs of a contested hearing and possible appeals to attract sufficient support in any event. If the question is to be left to the third stage of sanction, the outcome of the meeting would be known and the question of classification would no longer be hypothetical and can be argued between the appropriate parties (p 224).

[150] I agree with the submission by the appellant which is consistent with *Re Hawk Insurance* and *The English High Court Practice Statement (Companies Scheme of Arrangement)*; the correct approach to take, is to have the question of classification of creditors determined at the first stage of leave for the following reasons.

[151] The question of proper classification of creditors goes towards the jurisdiction of the Court to sanction a scheme, where, if the classes are not properly constituted, the Court has no jurisdiction to sanction the scheme. Therefore, it is pertinent that there be certainty in navigating the rights/interests distinction. Hence, if the class of creditors is not determined at the outset, the convening of the meetings of the creditors may be an exercise in futility if it were later determined that there was some error in classification. This can result in the Scheme Company having to restart the entire process again. VK Rajah JA in *The Royal Bank of Scotland* aptly put it in the proper context when he said that: "without a preliminary determination of the correct classification of creditors, how can it be known whether a scheme is likely to attract sufficient support and subsequently pass muster".

[152] VK Rajah JA in *The Royal Bank of Scotland* also addressed the concerns raised by the Hong Kong Court in *Re UDL Holdings* when he said that:

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

[153] The Malaysian High Court in *AirAsia X* adopted the views expressed by VK Rajah JA in the *Royal Bank of Scotland* (at para 48 of the judgment).

However, it was emphasized by the Court, which I truly agree, that the decision taken by the Court as to the classification of the classes at the convening stage is not to be treated as final and the Court is not bound by this decision (see para 49 of the judgment). This will be addressed in detail in the later paragraphs of this judgment.

[154] Further, as part of the flexibility of the Scheme of Arrangement as a debt restructuring mechanism, MDSA Resources, as a Scheme Company, is free to choose the group of creditors with whom it wishes to enter into a scheme of arrangement. (Refer to this Court's decision in *Francis Augustine Pereira v. Dataran Mantin Sdn Bhd & Ors And Other Appeals*). There can be a scheme of arrangement for one distinct class of creditors. The applicant company has the discretion not to compromise with all creditors, and "the mere exclusion of a certain creditor does not give rise to the imputation of *mala fide* or abuse of process" (paras 46-51 of the judgment).

[155] This freedom of choice given to the applicant company was also approved in *Re Bluebrook Ltd And other Companies* [2009] EWHC 2114 (Ch). The English Court of Appeal in *Sea Assets Ltd v. Perusahaan Perseroan (Persero) PT Perusahaan Penerbangan Garuda Indonesia* [2001] EWCA Civ 1696 aptly described the position accurately. It was argued by the opposing creditor that, allowing the scheme company to select the members of the class of creditors to be brought within the scheme, would enable the company to pick a class as it would outvote an opposing creditor. The Court held that this argument ignores the commercial realities where the scheme company has to procure the approval of 75 % of the class and the Court said that:

> "But such an example to my mind ignores the commercial realities. No company proposing a scheme will want to leave out of the scheme creditors other than those with whom they have reached an agreement with or those with whom agreement is impossible but have to be paid in full if the company is to survive. **Nor will it want to put forward a scheme with an arbitrary selection of creditors to be bound by it when it has to procure not only the approval of 75% of the scheme creditors subject to the scheme but also the sanction of the Court.**"
>
> [Emphasis Included]

[156] Therefore, MDSA Resources has discretion on which creditors to include or exclude from the Proposed Scheme.

[157] To summarise, the correct approach to take, on the determination of classification of creditors is at the first stage of leave.

C)(ii) Can The Court Depart From Its Decision At The Initial Leave Stage On Classification Of Creditors

[158] Next we come to the issue of whether the Court can depart from its decision at the initial leave stage on classification of creditors. The development

under English law is that when the Court determines the classification of creditors at the 1st stage of leave, the Court at the third stage should be slow to depart from its earlier determination. Malaysian High Court case of *Top Builders* has referred to this English law development. There is no Federal Court decision on this point. Our Singapore counterpart has not canvassed this issue.

[159] The English High Court in *Re Apcoa Parking* has this to say with regard to departure from its earlier decision on the classification of creditors:

> "[43] It is however, important to emphasize that the function of the Court at the Convening Hearing is a limited one; and its decision, even on the question as to the composition of classes is not final, **even though the Court can be expected not to change its mind, of its own motion, at the third stage on matters it decided at the first stage (since to do so would tend to subvert the purpose of the revised practice)**"
>
> [Emphasis Included]

[160] Further in *Re Lehman Brothers,* the English High Court emphasized the issue of legitimate expectation on the part of the applicant company:

> "whilst the Court's decision at that stage is not final, the applicant has a legitimate expectation that, **unless circumstances materially alter or fresh considerations are put before it which the Court accepts should be addressed, the Court will not of its own motion change its mind.**"
>
> [Emphasis Included]

[161] The English High Court decision in *Re Stronghold Insurance Co Ltd* [2019] 2 BCLC 11 at para 32 held that:

> "[32]... a decision at the first stage does not bind the Court at the 3rd stage, though of course **the Court is unlikely to depart from a reasoned conclusion at an earlier stage without change of circumstance or very good reason.**"
>
> [Emphasis Included]

[162] Our High Court in *Top Builders* adopted the approach by the English Courts in *Re Apcoa Parking* and *Re Lehman Brothers*, which I view as being the sound approach, namely the Court should be slow to depart from its earlier decision on classification of creditors made at the 1st stage of leave unless there is a change of circumstances or other fresh evidence placed before the Court. This approach would complement the determination on the issue of classification being at the 1st stage. If this were not the case, it would subvert the practice of early determination and result in a tremendous waste of time and costs as identified in *Re Hawk Insurance*.

[163] In the present case, the High Court had fully addressed its mind at the 1st leave stage on the proper classification for a single class of creditors as the creditors were all unsecured creditors who shared similar legal rights. The High Court at the 3rd stage of sanction ought not to have departed from its earlier

determination on the classification of creditors, as there is nothing placed before the Court of any change in circumstances or fresh evidence.

[164] The answers to Questions 3 and 4 are both in the affirmative.

D) Whether The Disclosure In Explanatory Statement (ES) Is Adequate

[165] The question to be asked is, to what extent of disclosure is necessary for the ES in relation to the creditors' debts? This relates to the Questions of law in Nos 5, 6 and 7.

[166] These questions arise from the High Court findings which were affirmed by the COA of alleged non-disclosure in the sanction application and accompanying documents on the related party debts. The High Court held that there was no indication as to the nature of the debts owing to the Hatten Group Scheme creditors (being related party creditors). In addition, there was no reason given for the increase in the total current liabilities or whether the increase was the increase in "trade and other payables" (para 65 of the High Court grounds).

[167] However, it was submitted by MDSA Resources that this was only raised by the learned High Court Judge in his written grounds which was provided after the sanction hearing. This is rather odd in view of the fact that His Lordship had earlier granted an Order that MDSA Resources was at liberty to issue the ES which was before His Lordship together with the extension of the restraining order and leave to hold the scheme meeting. As a result of the said Order, the ES and the notice of the scheme meeting were then issued to the creditors which subsequently led to the scheme meeting being held on 13 January 2021. Clearly, the High Court had addressed its mind on the adequacy of disclosure of the contents of the ES at that stage.

[168] Despite the aforesaid, the HC chose to depart from its earlier decision and raised completely new issues of non-disclosure only in its grounds of judgment at the sanction stage. In affirming the judgment of the High Court, the Court of Appeal said that there was thus a "material non-disclosure" of the information needed in relation to the related party debts (p 44 in encl 31).

[169] As to what the required content of the ES is, one can discern from s 369(1)(a) of the CA 2916 which provides:

> "(1) If a meeting is summoned under this Subdivision, every notice summoning the meeting:
>
> (a) which is sent to a creditor or member shall be accompanied with a statement explaining **the effect of the compromise or arrangement** and in particular stating **any material interests of the directors**, whether as directors or as members or as creditors of the company or otherwise, and the effect of the compromise or arrangement so far as it is different from the effect on the similar interests of other persons." [Emphasis Included]

[170] Essentially, s 369(1)(a) of CA 2016 states that, the ES must explain the effect of the scheme and in particular any material interests of the directors. In situations where there are material interests of the directors, and where the effect of the scheme is different in relation to these interests compared to similar interests of other persons, this should be disclosed in the ES. However, the said section is silent on disclosure in relation to debts of the scheme company.

[171] In this regard, case laws like *Wah Yuen*, expressed its view that if it were a condition precedent that a company had to satisfy each creditor of the genesis and extent of all its debts before the scheme could be put to vote, the entire process would be cumbersome, and administratively inconvenient:

> "[18] Nevertheless, as much as we shared Singapore Cables' concern over Wah Yuen's lack of transparency over its related party debts, we were of the opinion that it was better dealt with when the *bona fides* of the related parties' votes or the merits of the proposed scheme were assessed. If it were a condition precedent that a company had to satisfy each creditor of the genesis and extent of all of its debts before the scheme could be put to the vote, the entire process would be cumbersome and administratively inconvenient, especially when the scheme might itself already provide for a procedure for the adjudication of claims for voting purposes (as it did in this case). Any remaining concerns, therefore, were better dealt with on a discretionary basis.

[172] The above passage in *Wah Yuen* was also referred to by the Singapore Court of Appeal in *The Royal Bank of Scotland* when it dealt with the issue of whether scheme creditors are entitled to examine the proofs of debt submitted by other creditors in respect of a proposed scheme. The Court in *The Royal Bank of Scotland* held that, in principle, a creditor has no legal right to have access to proofs of debt of other creditors, except where his voting rights have been or are likely to be affected. This access to proofs of debts is only available to the creditor upon *prima facie* evidence of impropriety in the admission or rejection of such proofs of debt.

[173] *Top Builders* dealt with this issue of disclosure in the ES, when certain creditors in a scheme of arrangement alleged that there was insufficient disclosure in the ES in relation to the details of the intercompany and related company creditors; debts filed in support of the sanction application in that this was inconsistent with the sums stated in the list of creditors attached to the ES. The learned JC found that the applicants had replied to the opposing creditors by way of a letter, stating that intercompany creditors had filed their proofs of debt with the necessary ledgers to support their claims, where the figures matched the existing books and records. Referring to *The Royal Bank of Scotland*, the learned JC held as follows in relation to disclosures:

> "In any case, it is not a precondition for the applicants to satisfy each creditor of the extent of its debts and liabilities owed by the applicants to other creditors unless the opposing creditors have shown some *prima facie* impropriety in the admission of these debts."

[174] *Top Builders* also dealt with the complaint that the financial records submitted in support of the sanction application did not reflect the value of the intercompany creditors and/or the related company creditors' debts as stated in the list of creditors in the ES and that the audited financial statements of the applicants had not been finalised. *Top Builders* referred to the English High Court decision in *Re Sunbird Business Services Ltd* [2020] EWHC 3459 (Ch) and held at para 150 that the test was:

> "[150]...whether any defects that have been shown to exist in the scheme documentation would be likely to have made any difference to the particular scheme creditors affected by the scheme."

In other words, the crucial issue to decide is whether the omitted information would have changed any of the creditors' views on the merits of the scheme. The Court in *Top Builders* held that:

> "[155] Notwithstanding the complaints raised on the inconsistencies between the financial records and the value of the intercompany and or related company debts as listed in the list of creditors in the ES. **SESB has not demonstrated that any of the creditors who had voted on the schemes was under "any serious misapprehension of the risks and rewards.**"
>
> [Emphasis Included]

[175] Gleaning from the aforesaid authorities, the following principles can be distilled, on the extent of disclosure of information required in the ES:

(i) The applicant company for the scheme is not required to provide the genesis and extent of all debts owed to each creditor, unless there is evidence of some *prima facie* impropriety in the admission of these debts. The terms of the ES should be sufficient to enable the Scheme Creditors to arrive at a commercial decision on a fully and properly informed basis.

(ii) Where there is any omission of information, the test is whether the omitted information would have changed any of the creditors' views on the merits of the scheme.

[176] In any event, even if the Court finds that there is any omission of information which would have the effect of changing any of the creditors' views on the merits of the scheme, authorities from the various commonwealth jurisdictions have shown that the Court may order for remedial measures to be taken, like a re-issuance of the ES and re-voting of the creditors at a re-convened meeting. Although there are no Malaysian authorities on this specific point, the Courts in Singapore, UK and Hong Kong have dealt with this issue when they held that further meetings may be ordered by the Court as part of the remedial measures where the Court declines to sanction the scheme.

[177] Illustrations can be found in *Re Century Sun International Ltd* [2022] HKCF 1237, a decision of the Hong Kong Court of 1st instance which dealt

with instances where the Court found that the ES was too brief and was lacking the standard of disclosure required. The Court did not dismiss the sanction outright, as the Court found that the scheme company had put forward the proposed scheme in good faith. Instead, the Court made an order for the scheme company to convene a further meeting after producing an adequate ES and addressing the issues and concerns which were identified by the Court and the opposing creditors, before ultimately sanctioning the scheme. The Court held that:

> "[3] The petition is unopposed before me today. I am satisfied that the concerns that I explain in my reported decision about the adequacy of the information provided to scheme directors in the original ES have been resolved. It is permissible for the Court to direct a second scheme meeting and to sanction a scheme at a petition presented relying on the statutory majority achieved at the second scheme meeting."

[178] Similarly, in the English High Court case of *Re Smith & Williamson Holdings Ltd* [2020] EWHC 3931 (Ch), a members' scheme of arrangement had been duly approved by the shareholders on 13 November 2019. Despite such approval, when the matter was before the Court on 30 June 2020, the Court issued directions for the convening of a further meeting because the terms of the scheme had changed drastically since the first Court hearing to convene the meetings. After the second meeting had been convened and the necessary requirements had been met, the Court then sanctioned the scheme.

[179] The Singapore Court of Appeal in the case of *The Royal Bank of Scotland* held that the meetings convened had not been properly constituted. The Court set aside the sanction of the scheme of arrangement and ordered further meetings to be called for the same scheme to be put to a re-vote, subject to certain directions given by the Court in relation to the voting rights of the creditors. The Court then subsequently sanctioned the scheme, with further alterations of the judgment (Para 178).

[180] Given the aforesaid authorities, in a situation where the Court finds that there had been inadequate disclosure or some material particulars which are clearly wanting in the ES, the Court is vested with the power to order further meetings of the creditors to be held with an amended ES to be circulated where necessary.

[181] MDSA Resources had always maintained its financial disclosures to the High Court, as illustrated in its applications for a restraining order, where MDSA Resources had filed three Statements of Affairs dated 29 June 2020, 28 October 2020 and 17 January 2021. MDSA Resources also disclosed its Audited Financial Statements for 2018 and 2019 in its Affidavit dated 7 August 2020.

[182] Further disclosures were made by MDSA Resources of its Audited Financial Statements for 2018 and 2019, and its Unaudited Statement of

Financial Position as of 30 June 2020 compared to the Audited Statement of Financial Position as at 30 June 2019 in the ES which was sent out to the Scheme Creditors.

[183] The total current liabilities did not show much change from the 30 June 3019 Unaudited Statement to the 30 June 2020 Audited Statement (RM361,127,853.00 v. RM333,452,617.00). In any event, the respondent had never questioned these amounts nor questioned the debt amounts.

[184] Neither did the learned High Court Judge and the respondent raise the issue of an alleged non-disclosure by MDSA Resources in the sanction application and accompanying documents regarding the debts of the Hatten Group Scheme Creditors at any time during the proceedings. The learned High Court Judge only raised it in his written grounds of judgment, namely:

a) "There was also no indication in the Unaudited Report up to June 2020 nor the Audited Report up to June 2019 as to the nature of the RM276,084,693.78 debts due to the 19 related parties to the Applicant."

b) "In this regard this Court observes a significant increase of RM27,674,236.00 from RM333,453,617.00 to RM361,127,853.00 in the Applicant's Total Current Liabilities as shown in the Audited Account as at 30 June 2019 and the Unaudited Account as at 30 June 2020. There is no explanation as to why there was an increase or whether this increase was associated with the related parties' claims"

c) "More specifically there was no reason attributed the increase in respect of "Trade and other payables" under "Current liabilities" whereas of year ended 30 June 2018 the sum was RM190,108,926.00...As at end of June 2020 however the "Trade and other payables" had increased to RM277,527,829.00. This amounted to an increase of RM87.463,903.00."

[185] The respondent had accepted these figures and had never raised any challenge of non-disclosure. In fact, the respondent had relied on the figures as set out in MDSA Resources' ES in his affidavits.

[186] The learned High Court Judge relied heavily on the analysis in the Singapore case of *Wah Yuen*, stating that there was a "significant increase" in the applicant's total current liabilities. *Wah Yuen* was an authority that the learned High Court Judge raised himself for the first time in his written grounds of judgment.

[187] *Wah Yuen* is premised on different facts; the Singapore Court of Appeal held that the related party debts deserved "close scrutiny" because of the extent to which the quantum of these changed within a short period of time (see [14] and [34] of the judgment) The "dramatic increase" was specifically in relation to the debts of the directors, where this was a drastic 1208% increase from $161,188.00 to $2,109,390.00 from 1999 to 2000.

[188] Compared to the present case, where the increase referred to by the learned High Court Judge at para 65 of the written grounds of judgment is a small increase of RM27,674,236.00 (8%) in the total current liabilities from 2019 to 2020, bringing this from RM333,453,617.00 to RM361,127,853.00. The increase in "Trade and other payables" mentioned by the learned High Court Judge was an increase of 46% in 2 years, from 2018 to 2020, ie from RM190,108,926.00 to RM277,527,829.00. This does not provide a ground to question the financial statements.

[189] There was no query by the learned High Court Judge on the financial statements or figures in the ES throughout the proceedings. In fact, on 23 November 2020, the learned High Court Judge had granted liberty to issue the ES where this was the final ES with the same figures. These findings of the High Court were then erroneously affirmed by the Court of Appeal when it held that based on s 369(1)(a) of the CA 2016, "explanation must also be given to show the difference in effect to the Third-party creditors as against the other creditors".

[190] If one is to refer to the requirements under s 369(1)(a) CA 2016, ie the phrase "to show the difference in effect to the Third-party creditors as against the other creditors", this only applies to the material interests of directors. As far as the material interests of the directors, it had been set out in the ES. The English High Court case of *Re Sunbird* affirmed this point, where there was a challenge regarding the omission in the explanatory statement of interests of 4 scheme creditors who were the family of one of the directors. The English High Court referred to s 897 of the UK Companies Act 2006 which is similar to s 369(1)(a) of our CA 2016. The Court held that the omission "did not amount to a failure to make disclosure of the interests of the directors contrary to s 897 CA 2006, because the persons omitted from the table were not themselves directors".

[191] The respondent in his submissions alleges MDSA Resources failed to disclose Hatten Land Limited's (being the Singapore-listed ultimate holding company in the Hatten Group) responses to queries from the Singapore Exchange where Hatten Land Limited stated that: "Total debt owing to the scheme creditors under the proposed scheme of MDSA Resources is approximately RM322 million, out of which approximately 79% of the debt is owing to entities within the Group, which will be eliminated at consolidation". The respondent interpreted this to mean that "the entire debt inclusive of outstanding sum due and owing to the Respondent and other non-Hatten related creditors shall be deemed as bad debts and to be written off".

[192] The elimination of debts of the Hatten Group entities for consolidation of the Group financial statements would not have been affected by the Proposed Scheme and would not have changed any of the creditors' views on the scheme (applying the test in *Re Apcoa* and *Re Lehman Brothers*). At the MDSA Resources level, the debts would still be a liability. It is not a matter

of pre-empting the approval of the Proposed Scheme which would always be subject to the approval by the Scheme Creditors and sanction by the Court.

[193] The respondent further alleges that there was a "preconception among the Hatten Group Creditors that the scheme had to be voted in so as to eliminate [MDSA Resources'] debt'. This is a misinterpretation of the usage of the term "eliminate" in light of the accounting procedure outlined above. In any event, there would have to be the requisite statutory approval of the Proposed Scheme at the Scheme Meeting and subsequent approval of the Proposed Scheme by the Court.

[194] Given the aforesaid, on the issue of non-disclosure by MDSA Resources, it is a non-starter. In any event, even assuming that there was such an omission of this information (which was never proven), such information would not have changed any of the creditors' views on the merits of the scheme.

[195] Be that as it may, even if the Courts below were to find that there is any omission in the ES, the Court may make orders for the Scheme Meeting to be reconvened with an updated Explanatory Statement, especially where the scheme is *bona fide*. In the present case, nowhere did the Courts below make any findings that the scheme was not *bona fide*.

[196] Applying the principles of the law to the facts of our present case, it is my considered view that there was sufficient disclosure in the ES in relation to the Proposed Scheme and disclosure of MDSA Resources' financial circumstances and debts to the Scheme Creditors and to the Court. MDSA Resources is not required to provide the genesis and extent of all the debts owed to each creditor. Further, there is no evidence adduced by the respondent of any *prima facie* impropriety in the admission of the Hatten Group Scheme Creditors' debts.

[197] Going back to the Questions, in answering Question 5, the challenge to the adequacy of disclosure in the ES issued under s 369(1)(a) of the CA 2016 should be at the stage before the Court approves the issuance of the ES.

For Question 6 the answer is a Yes.

For Question 7 the answer is a No.

Courts' Role In Granting Sanction Of The Scheme Of Arrangement

[198] Essentially, this area will address Questions 8 and 10.

[199] These questions arise from the findings of the Courts below where both the High Court and the Court of Appeal questioned the commercial viability of the scheme despite 90.4 % of the scheme creditors voting in favour of the Proposed Scheme. The Court of Appeal held that they found no reason to disagree with the "finding of fact" made by the High Court that the scheme is "unreasonable, unfair and not equitable". In this regard, both the Courts below had substituted their view with that of the view of 90.4% of the Scheme

Creditors who voted in favour of the Proposed Scheme. With due respect, both Courts erred in this area.

[200] In addressing both Questions 8 and 10, it is important to look at the role of the Court at the sanction stage. In this respect, Buckley on *Companies Act*, 14 Edition 1981 quoted the English High Court case of *Re Apcoa Parking* which held that:

> "In exercising its power of sanction the Court will see, first, that the provisions of the statute have been complied with, second, that the class was fairly represented by those who attended the meeting and that the statutory majority were acting *bona fide* and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve. **The Court does not sit merely to see that the majority are acting *bona fide* and thereupon to register the decision of the meeting, but, at the same time, the Court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme.**"
>
> [Emphasis Included]

[201] The Court in *Re Apcoa Parking* further explained the Courts' role at the sanction stage:

> "[128] **The Court's role is not to substitute its own assessment of what is reasonable for that of the creditors.** They are much better judges of what is in the commercial interests of the class they represent than the Court.
>
> [Emphasis Included]
>
> [129] These authorities make clear that the **Court must give full weight to the decision of the creditors. acting in their capacity as members of the class in which they are voting.** It is not sufficient for the Court to determine that it would have reached the same decision as the creditors themselves reached. In the absence of some procedural or jurisdictional hurdle (or some blot on the face of the scheme itself). the Court should only decline to sanction the scheme if an intelligent and honest member of the relevant class acting in respect of his interest could not reasonably have approved it."
>
> [Emphasis Included]

[202] The Malaysian High Courts and the other Commonwealth jurisdictions weave a common thread in their stand that the Court should not substitute its own assessment of what is reasonable for that of the creditors, as can be seen from decided cases in the subsequent paragraphs.

[203] Our High Court in *Transmile* (paras [103]-[104]) is such a case, where the opposing creditor wanted to withhold sanction on the ground that the scheme creditors would benefit more from a winding up of the scheme company rather

than implementation of the scheme. After setting out an analysis of the cases of the Commonwealth jurisdictions in relation to the role of the Courts at the sanction stage, Nallini J (as she then was) held that such a finding would be a commercial assessment of the relative merits of the scheme, and the Court is not to substitute its judgment on the affairs of business for the judgment of the scheme creditors.

[204] The High Court case of *TH Heavy Engineering Berhad & Ors* [2018] MLRHU 2016 and Ramli Ali J in *Re Sateras Resources (Malaysia) Bhd* also echoed the same principles as set out in Buckley on *Companies Act*, 14 Edition 1981.

[205] As far as Singapore is concerned, Judith Prakash J in the High Court case of *Re Reliance National Asia Re Pte Ltd* [2007] SGHC 206, held that the Court would be reluctant to substitute its own commercial judgment for that of the creditors as to the fairness and reasonableness of the scheme (para 35 of the judgment).

[206] The Supreme Court of Victoria in *Re Axa Asia Pacific Holdings Ltd* [2011] VSC 4, held in relation to the Courts' role in sanctioning the scheme of arrangement, that:

> "[13] It is clear that the role of the Court is supervisory, but that this does not involve the "second guessing" of the commercial judgment of the shareholders or to substitute its own commercial judgment. The nature of the jurisdiction was described by Emmet J in *Re Central Pacific Minerals NL* as follows:
>
> "[13] The jurisdiction of the Court in relation to an arrangement is supervisory, in the sense that the Court is concerned to be satisfied that there has been an absence of oppression and that the arrangement is one that is capable of being accepted. For example, the Court will withhold its approval where a majority is shown to be acting in bad faith or where a majority's acceptance is in the nature of a fraud on the minority. The Court will, of course, generally take the view that the shareholders are the best judges of whether an arrangement is to their commercial advantage and will be reluctant to make decisions contrary to the views of the security holders expressed at the meetings. The function of the Court does not extend to usurping the views of the relevant security holders."

[207] Contrary to this principle, the learned High Court Judge in his written grounds of judgment questioned several aspects of the commercial viability of the Proposed Scheme, despite 90.4 % of the Scheme Creditors voting in favour of the said Scheme. The learned High Court Judge set out, among others, the following main "unsatisfactory features" at [69] to [83] of the judgment for finding that the Proposed Scheme was "unreasonable":

(i) The Proposed Scheme requires that RM167.4 million owing to the Scheme Creditors are to be waived in the books of MDSA Resources, however, "there was nevertheless nothing to indicate how such a large sum of RM167.4 million was derived".

(ii) The waiver and release of all debts owed to the Scheme Creditors was done "merely to perpetuate the existence of MDSA Resources to the detriment of the Third-Party Scheme Creditors in particular", where these creditors "would no longer have an avenue against [MDSA Resources] if the Court sanctions the scheme".

(iii) How the undertaking of RM64.2 million would be raised was not explained, and most of the assets of MDSA Resources consist of fixed assets which may have to be sold to raise that amount.

(iv) There are various eventualities to overcome with the earmarked properties such as the release of the charge on the properties by Haitong International Financial Products (Singapore) Pte Ltd, and the sale of the Earmarked Properties depending on property market conditions.

[208] The Court of Appeal in turn affirmed the findings of the High Court above, and held that:

(v) The Proposed Scheme "proposes huge MDS Resources' debts to be largely written off with little benefit to the stakeholders, especially the Third-party creditors."

(vi) The Third-Party Scheme Creditors will be "left in a bind" if the Proposed Scheme is accepted, and that "they could no longer claim their money in full" from MDSA Resources.

(vii) "On top of that, the learned [High Court Judge] also found the total liabilities of [MDSA Resources] had exceeded its total assets".

[209] I will address these alleged "unsatisfactory features" of the proposed scheme.

[210] On the issue that RM167.4 million owing to the Scheme Creditors are to be waived in the books of MDSA Resources; this waiver of debt has been explained in the ES where it states that the Third-party creditors will recover 70% of their debts (being RM68.6 million) and the Hatten Group Scheme Creditors will recover 50% of their debts (being RM138 million). The remainder amount amounting to RM167.4 million (ie RM374.2 million — (RM68.6 million + RM138 million) would be waived under the scheme of arrangement. This is part of the deal to be made by MDSA Resources with its creditors, where this is the compromise/haircut to be taken by the Scheme Creditors on their debts. The total debt of the Proposed Scheme is approximately RM374.2 million.

[211] It is to be borne in mind that a scheme of arrangement necessarily involves a 'compromise of debt' by the company's creditors. A scheme of arrangement is a rehabilitation process where creditors compromise in accepting less than the full amount in final satisfaction of their debts, rather than enforcing their full claim on the debts or winding up the company.

[212] Similarly, in our case, the waiver, release and discharge of all debts owed to the Scheme Creditors is part of the restructuring of debt under the scheme of

arrangement. It would not make commercial sense of entering into a scheme of arrangement where the Scheme Creditors, after agreeing to a compromise of their debt, could then continue to claim their money in full from MDSA Resources.

[213] On the argument regarding the uncertainty in the sale of the earmarked properties, they are mere speculation, bare unsubstantiated averments and are devoid of merits. In any event, MDSA Resources had taken advice on the restructuring and prepared the ES with its financial advisors, KPMG who have taken the view that the scheme is more viable to MDSA Resources and the creditors, as opposed to liquidation.

[214] The Court of Appeal further supported the so-called High Court findings of fact that MDSA Resources' total liabilities exceeded its total assets; this decision shows that both the Courts below misunderstood the purpose of a scheme of arrangement. A Scheme of Arrangement is for the restructuring of the financial affairs of a company heavily burdened with debt, and is usually resorted to when the company is insolvent but there is some possibility of avoiding liquidation. This Court in *Primus (Malaysia) Sdn Bhd v. Rin Kei Mei & Ors* [2012] 1 MLRA 581, at [43], as per Mohd Ghazali Yusoff FCJ explained the previous s 176 of the CA 1965:

> "The common use of such a scheme is the restructuring of the financial affairs of a company heavily burdened with debt. Section 176 is usually resorted to when the company is insolvent but there is some possibility of avoiding liquidation. Such a scheme may be able to save viable businesses resulting ultimately in a benefit to the creditors. **Through such schemes, the company may be able to reach a compromise with creditors where the creditors agree to accept less than the amounts owed to them.**"
>
> [Emphasis Included]

[215] In the present case, a total of only 294 out of the 1636 Third-Party Scheme Creditors attended the Scheme Meeting. This amounts to just 38.6% of the total value of the Third-Party Scheme Creditors' debts, which effectively swayed the vote towards approval of the Proposed Scheme.

[216] As far as the law and the historical development of scheme of arrangement it is Parliament's intention that when scheme creditors absent themselves from the scheme meeting, it is taken to be a neutral or positive vote in favour of the proposed scheme. Non-presence at the meeting of scheme creditors is no longer treated as a vote against the scheme, effectively lowering the approval threshold. (See Jennifer Payne (2014) '*Schemes of Arrangement — Theory, Structure And Operation*' (1st edn) Cambridge University Press, p 9). This wording of "present and voting" was adopted even under the original s 176 of the Companies Act 1965 and was retained in s 366 of the CA 2016.

[217] The Third-Party Scheme Creditors who opted not to show up at the Scheme Meeting effectively allowed the affirmative votes by the majority. In

the present case, it cannot be said that this is a lop-sided outcome but a natural result of the effect of the statutory provision that has been adopted in Malaysia and other jurisdictions for scheme of arrangement.

[218] On the facts, on the issue of whether the Proposed Scheme is reasonable and fair; a perusal of the main terms of the same which were set out in the ES shows that the Proposed Scheme is one that an honest and intelligent person would reasonably approve, as can be seen from the following:

(i) The Scheme Creditors would take a total haircut of approximately RM167.4 million of the total debts owing to them. This would be waived in MDSA Resources' books. The net debt amount of approximately RM206.6 million would be transferred and vested in the SPV; and

(ii) MDSA Resources would inject assets into the scheme as follows:

a. Certain units in Elements Mall in Malacca of an approximate value of RM142.2 million ("earmarked properties"). These earmarked properties would be earmarked to the SPV to be sold.

b. MDSA Resources would give an undertaking to inject further assets of up to RM64.4 million.

(iii) The SPV would be placed under Creditors' Voluntary Liquidation (CVL) whereby the partners of KPMG will be appointed as liquidators of the SPV. This is to allow for a finite life of the existence, to ensure that the earmarked properties are disposed of by way of open tender or private treaty, and for the proceeds to be paid out to the Scheme Creditors ("proceeds"). After taking into account variables, the earmarked properties may be sold within three (3) to five (5) years;

(iv) The proceeds from the disposal of the earmarked properties would be used to pay the Third-Party Scheme Creditors in priority to the Hatten Group Scheme Creditors. This would be a sum equivalent to a 70% recovery of their debts in the Proposed Scheme, ie RM68.6 million. Thus, the estimated disposal proceeds of the earmarked properties of RM142 million is more than 2 times the value of the Proposed Scheme pay-out. This gives the Third-Party Scheme Creditors an incredibly large amount of security and buffer for payment under the Proposed Scheme.

(v) The Hatten Group Scheme Creditors would only receive an anticipated 50% recovery of their debts in the Proposed Scheme.

(vi) In relation to the creditors under the GRR ("GRR Creditors"), the completed units would be returned immediately to the GRR Creditors upon the sanction of the Proposed Scheme. GRR Creditors would then be able to rent out or utilise these units immediately upon the sanction of the Proposed Scheme, enabling them to derive some income and/or benefit from these units, pending recovery of monies under the Proposed Scheme.

(vii) Taking into account practical considerations that the earmarked properties may not be able to be sold effectively in the current economic conditions, it

makes commercial sense to wait a few more years for the property market to recover so as to obtain the best possible outcome from the sale of the earmarked properties.

(viii) The Proposed Scheme ensures that the Hatten Group Scheme Creditors are not unduly penalised in the outcome, so that MDSA Resources is able to continue its business of operating the hotel, service residences and shopping malls for the collective benefit of all parties, including the Third-Party Scheme Creditors.

[219] In contrast to a liquidation scenario of MDSA Resources, all the Scheme Creditors would have a lower maximum recovery of only 44.9%.

Should The Court Hearing The Scheme Sanction Base Its Decision On Issues Not Raised Nor Addressed By Parties

[220] This issue arises from the learned High Court Judge's judgment which covered a vast majority of findings and authorities which were never addressed by the parties during the hearing or oral decision of the learned High Court Judge, where the parties were not accorded the opportunity to address these issues.

[221] The issue of the undertaking of MDSA Resources to inject further assets of RM64.2 million is one such instance. The respondent states that it was never explained how this amount would be raised by MDSA Resources. However, this issue was never raised by the respondent in any of his affidavits. In any event, the ES has set out that the Third-Party Scheme Creditors will be paid first from the proceeds of sale of the earmarked properties where the estimated disposal proceeds are more than twice the proposed pay-out under the Scheme to the Third-Party Scheme Creditors.

[222] The respondent also raised in his submissions on the issue of the declaration of dividends by MDSA Resources; again this was never raised in the affidavit by the respondent, hence depriving MDSA Resources the opportunity to respond to this on affidavit. Be that as it may, this issue is irrelevant to the assessment of the merits of the Proposed Scheme by the Scheme Creditors.

[223] The respondent also refers to an event whereby Hatten Group provided a response on 5 April 2022 to the Singapore Exchange's query in relation to entering into a "Crypto Mining Facility and Support Services Agreement" with a new partner. The respondent alleges that MDSA Resources is "trying to siphon out the cash of the...company under the pretext of 'a new business'". This query and response occurred after the decisions of the High Court on 29 January 2021 and the Court of Appeal on 2 March 2022, and is therefore equally irrelevant. Again, this is not on affidavit and the allegation that MDSA Resources is "trying to siphon out the cash" is a bare allegation, devoid of merits and evidence.

[224] For the aforesaid allegations which were never raised in the affidavits of the respondent, MDSA Resources has been deprived of the opportunity to defend those allegations. On this issue this Court in *Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor* [2009] 2 MLRA 471 held that "it is dangerous and totally unadvisable" for the Court to consider any point without reliance on the pleadings or submissions by the Counsel appearing before them. If the Judge thinks that there are points which are relevant to the case before him and were not raised by either party, the Judge has a duty to highlight that to the parties and give both parties an opportunity to further submit on those points. It has a detrimental effect as explained by this Court in para 17:

> "[17] The effect of a Judge making a decision on an issue not based on the pleadings and without hearing the parties on that particular issue would be in breach of the latin maxim *audi alteram partem*, which literally means, to hear the other side, a basic principle of natural justice."

[225] A party cannot raise a new argument on appeal unless the Court is satisfied that it has before it all the facts bearing upon the new contention.

[226] This Court has also emphasized this principle of natural justice, *vis-à-vis,* the right to be heard in *Dato' Tan Chin Woh v. Dato' Yalumallai @ M.Ramalingam V Muthusamy* [2016] 5 MLRA 613. The Federal Court held that "whenever the Court proposes to consider a fresh issue which the Court considers to be pertinent to the case before it, it should give the parties the right to make submissions on the proposed issue before arriving at its finding".

[227] I take note that the principles in *Pacific Forest* were decided in the context of the matter was an adversarial process whether through trial or OS, nevertheless in a scheme of arrangement proceedings, it becomes more pertinent for the Court to give the scheme company a chance to address issues which the Court considers relevant before coming to a finding. In *Re Hawke Insurance* the English High Court granted leave at the 1st stage. The scheme passed the voting at the 2nd stage. At the third stage, none of the Scheme Creditors intervened in the Court proceedings and there was no opposition. Nevertheless, Arden J at the sanction stage raised the Court's objections that the creditors should not have been classified in a single class as well as other concerns. Arden J said that the Court could not sanction the scheme with those concerns but then adjourned the sanction hearing. This would allow the applicant's Counsel to further address the issue.

[228] Thus the principle in *Pacific Forest* applies that the Court should only decide on any scheme of arrangement based on pleadings and after hearing parties on the objections.

[229] The answer to Question 8 is in the affirmative.

Conclusion

[230] Given the aforesaid, to summarise, the answers to the Questions are as follows:

- Question 1 the answer is a No.
- Question 2 is irrelevant in view of the answer to Question 1.
- Question 3 the answer is 'at the leave stage''.
- Question 4 the answer is a yes.
- Question 5 the answer is: the adequacy of disclosure in the ES issued under s 369(1)(a) of the CA 2016 should be at the stage before the Court approves the issuance of the ES.
- Question 6 the answer is a Yes.
- Question 7 the answer is a No.
- Question 8 the answer is a Yes.
- Question 9 the answer is a No.
- Question 10 the answer is a Yes.

[231] It is not sufficient for the Court only to ascertain that the statutory conditions have been complied with, in approving a scheme of arrangement: the Court must go further than that. In going the distance, I am satisfied that the statutory majority which is to bind the dissentient minority have acted *bona fide*, they have not acted adversely to those whom they professed to represent, and, ultimately, the proposed scheme of arrangement is a fair one, which an intelligent and honest man being a member of the class concerned and acting in respect of his interest would reasonably approve. The Court must give full weight to the decision of the Scheme Creditors (in this case 90.4 % voting in favour of the Scheme), acting in their capacity as members of the class in which they are voting. The percentage reflects a desire on the part of an overwhelming majority in value and in number of the scheme creditors wanting the scheme. It is not for the Court to determine that it would not have reached the same decision as the creditors themselves reached.

[232] Given the aforesaid, in the absence of some procedural or jurisdictional hurdle or some taint on the face of the Proposed Scheme itself, I allow the application for sanction for the scheme of arrangement. The High Court and the Court of Appeal had erred in dismissing the application for sanction.

[233] I therefore allow the appeal of the appellant with costs.

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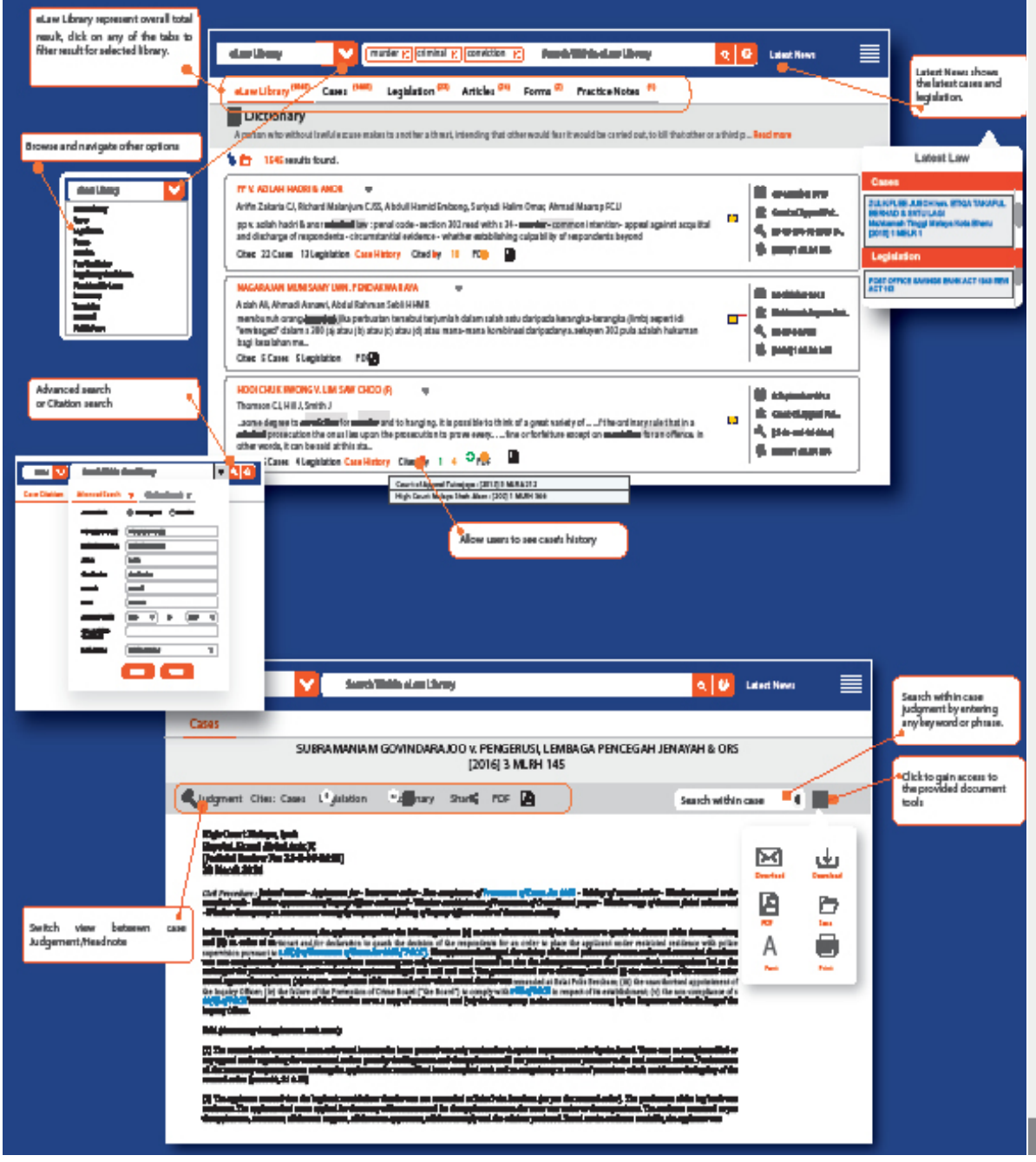

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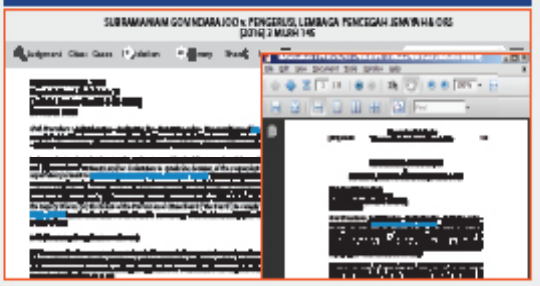

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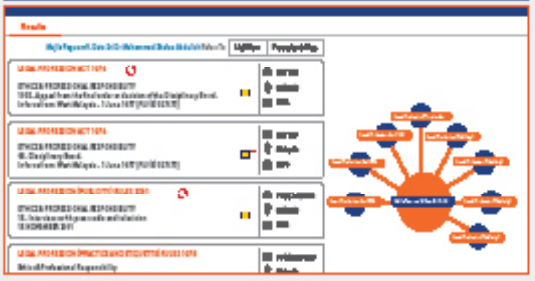

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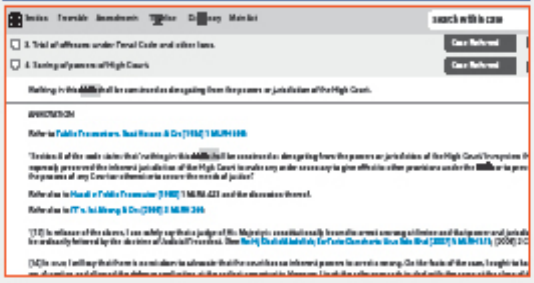

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