IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 294 OF 2020 (NSJ)

IN THE MATTER OF SECTIONS 15 AND 86 OF THE COMPANIES ACT (2021 REVISION)

AND IN THE MATTER OF ORDER 102 OF THE GRAND COURT RULES 1995 (AS REVISED)

AND IN THE MATTER OF TONLY ELECTRONICS HOLDINGS LIMITED

Appearance: Jayson Wood of Harney Westwood & Riegels for the Company

Hearing: 2 March, 2021

Draft judgment circulated: 2 March, 2021

Judgment delivered: 9 March 2021

HEADNOTE

Application to sanction scheme of arrangement with shareholders – constitution of separate classes of shareholders – basis for sanctioning the scheme – basis for confirming the reduction of capital

JUDGMENT

Introduction

1. This is the hearing of an application by Tonly Electronics Holdings Limited (the ***Company***) for an order pursuant to section 86 of the Companies Act (2021 Revision) (the ***Act***) sanctioning a scheme of arrangement (the ***Scheme***) between the Company and its shareholders (the ***Scheme Shareholders***) and an order confirming a reduction of capital pursuant to sections 15 and 16 of the Act (the ***Capital Reduction***). The application was heard today (2 March, 2021). The Company was represented by Mr Jayson Wood of Harney Westwood & Riegels.

2. The purpose and intent of the Scheme is to privatise the Company by cancelling and extinguishing all of the shares held by the Scheme Shareholders (the ***Scheme Shares***) on payment of the Scheme Share Consideration by T.C.L. Industries Holdings (H.K.) Limited (the ***Offeror***) so that thereafter the Offeror, a Hong Kong incorporated company which already owns 61.25% of the issued shares in the Company, will own 100% of the Company's shares. The Capital Reduction is a necessary step in the implementation of the Scheme.

3. The convening hearing was held on 14 January 2021. On 26 January 2021, following the convening hearing and the filing of further written submissions by the Company, the order giving the requisite directions in relation to the Scheme was made (the ***Convening Order***). The Convening Order provided that there would be two classes of Scheme Shareholders. First, those Scheme Shareholders who were acting in concert, or presumed to be acting in concert, with the Offeror (the ***Concert Parties***) and secondly the other Scheme Shareholders (the ***Disinterested Scheme Shareholders***). The Convening Order directed that a meeting of the Disinterested Scheme Shareholders be held to enable them to vote on the Scheme. No other meeting was required. The Offeror's shares were not to be affected by and the Offeror therefore did not need to vote on the Scheme and the Concert Parties had undertaken to be bound by the Scheme.

4. The Convening Order also gave directions for the despatch of the scheme documentation to and notification of Disinterested Scheme Shareholders and for the holding and conduct of the meeting of Disinterested Scheme Shareholders (the ***Court Meeting***) including voting at the Court Meeting.

5. The Court Meeting was held on 23 February 2021 at which the Scheme was approved by Disinterested Scheme Shareholders holding 99.99% of the shares voted in person or by proxy. As regards the headcount test calculated in accordance with the Convening Order, seventy-one Disinterested Scheme Shareholders voted for the Scheme and one Disinterested Scheme Shareholder voted against.

6. An extraordinary general meeting (***EGM***) of the Company's shareholders was also held on 23 February 2021 at which a special resolution for the Capital Reduction was approved by shareholders holding 99.99% of the shares voted in person or by proxy. The other resolutions proposed at the EGM, which are ancillary to the Scheme and the Capital Reduction, were similarly passed by approximately the same majority vote.

The background

7. The Company is an exempted limited company incorporated in the Cayman Islands on 8 February 2013. Its registered office is situated at Maples Corporate Services Limited, PO Box 309, Ugland House, Grand Cayman.

8. The Company's shares are listed on the Main Board of the Hong Kong Stock Exchange (the ***SEHK***). The Company is principally engaged in the research and development, manufacture, and sale of audio-visual products (excluding TV sets) for third parties' brands on an ODM (original design manufacture) basis. The Company is also involved in software development through its subsidiaries.

9. The Company's shareholder profile is as follows: (a) the Offeror holds 167,452,239 shares representing approximately 61.25% of the Company's issued shares; (b) directors of the Offeror and the spouse of one such director (the ***Offeror Directors***) who hold 1,078,097 shares representing approximately 0.39% of the Company's issued shares; (c) persons involved in the management of the Company (the ***Management Shareholders***) who hold 32,277,094 shares representing approximately 11.80% of the Company's issued shares; (d) BOCI-Prudential Trustee Limited (the ***Trustee***) as the trustee for the administration of the Restricted Share Award Scheme which was adopted by the Company to allow employees to gain a financial stake in the Company, which holds 3,386,385 shares representing approximately 1.24% of the Company's issued shares; (e) Mr Liao Qian, a non-executive director of the Company, who holds 97,746 shares representing approximately 0.04% of the Company's issued shares (***Mr Liao***) and (f) the remaining shareholders who hold 69,147,318 shares representing approximately 25.29% of the Company's issued shares and are the Disinterested Scheme Shareholders. Of the total of 273,393,448 issued shares, 148,926,152 shares are held by HKSCC Nominees, representing approximately 54.49% of the Company's issued shares. HKSCC Nominees acts as common nominee for all securities held in Hong Kong's Central Clearing and Settlement System (***CCASS***). Some of those shares are held on behalf of the Offeror and the Concert Parties and so could not be voted at the Court Meeting. The vast majority of Disinterested Scheme Shareholders is located in Hong Kong and some others are located in Mainland China.

10. Under rule 2.10 of the Hong Kong Takeovers Code (***Rule 2.10***), only the Disinterested Scheme Shareholders, that is shareholders of the Company other than the Offeror and Concert Parties, are permitted to vote on the Scheme. The Concert Parties (being parties acting in concert with the Offeror according to the definition of "*acting in concert*" under the Hong Kong Takeovers

Code) are the Offeror Directors, the Management Shareholders, Vast Bright Investment Limited (a company owned by one of the Management Shareholders), Run Fu Holdings Limited (a company in which the Management Shareholders hold an interest); Mr Liao and the Trustee.

11. The Convening Order made provision for voting by HKSCC Nominees, both with respect to the majority in value and the majority in number (numerosity) requirements in section 86 of the Act. HKSCC was permitted to vote for and/or against the Scheme in accordance with instructions from persons admitted to participate in CCASS (a CCASS Participant) and the number of shares so voted was counted for the purpose of ascertaining whether or not the requirement for approval by seventy-five per cent in value of the Disinterested Scheme Shareholders voting in person or by proxy had been satisfied. For the purpose of ascertaining whether or not the requirement for approval by a majority in number of the Disinterested Scheme Shareholders voting in person or by proxy had been satisfied, HKSCC Nominees was to be treated as a representative of the CCASS Participants from whom it received instructions (and did not have the power to vote on its own absent instructions from CCASS Participants notwithstanding its status as a registered member of the Company) and as a "multi-headed" shareholder such that each of the CCASS Participants from whom voting instructions were received were to be counted as a separate shareholder and the number of such CCASS Participants would determine the number of "heads" attributable to HKSCC Nominees. This approach followed that approved in *In re Little Sheep Group Limited* [2012 (1) CILR 34] and *In re Alibaba.com Limited* [2012 (1) CILR 272] as sanctioned by Practice Direction 2/2010.

The Scheme and the two classes of shareholders

12. The commercial terms of the proposed Scheme are simple. As at the Last Trading Day (29 October 2020), the price of the shares on the SEHK was HK$10.08 per share. During the 180 trading days leading up to the Last Trading Day, the average price of the shares was less than HK$10.08 per share. The payment to Scheme Shareholders proposed by the Offeror is the Scheme Share Consideration of HK$12.00 per share which represents a premium on the current and recent trading price of the Scheme Shares. The independent non-executive directors of the Company, who formed the independent board committee, considered the restructuring to be fair and reasonable and recommended it to Scheme Shareholders. In addition, in a letter to the Disinterested Scheme Shareholders from the independent financial advisor, the independent financial advisor concluded that the Scheme and its associated transactions were fair and reasonable so far as the Disinterested Scheme Shareholders were concerned, and recommended that Disinterested Scheme Shareholders voted in favour of the Scheme.

13. At the convening hearing the Company initially submitted that the Court should order that the Scheme be treated as a scheme between the Company and all its shareholders (save for the Offeror), that there should be one class of shareholders (namely all shareholders who were parties to the Scheme) but that only a meeting of the Disinterested Scheme Shareholders be convened. The reason for this approach was to ensure that the requirements of Rule 2.10 were clearly satisfied by limiting the meeting to those permitted to vote on the Scheme by that rule. This approach had been followed in other shareholder schemes which needed to comply with Rule 2.10. I indicated at the convening hearing, as I have done when hearing similar schemes on previous occasions, that while I had no problem with convening a single meeting of the Disinterested Scheme Shareholders, I considered that this required either that the Disinterested Scheme Shareholders be constituted as a separate class or as the only parties to the Scheme. This is because of the wording of section 86 of the Act, which states that:

> *"Where a compromise or arrangement is proposed between ....the company and its members or any class of them the Court may.... order a meeting of the...members of the company or class of members, as the case may be to be summoned in such manner as the Court directs."*

14. The Court is therefore given the power to convene meetings either of all the shareholders who are parties to the scheme or a separate class of such shareholders. I was concerned that ordering a meeting only of the Disinterested Scheme Shareholders when they only represented a sub-set of the parties to the Scheme and were not treated as a separate class was impermissible.

15. It would of course have been permissible, and in my view more orthodox, to treat the Scheme as being between all the shareholders (save for the Offeror) and for the Court to convene a meeting of all such shareholders which the Concert Parties would agree not to attend. They would undertake not to attend and vote at the meeting of shareholders and the chairman of the meeting would produce appropriate evidence to the SEHK that they had not attended and voted.

16. Of course, it is accepted that the Court does not need to order a meeting of shareholders where a meeting would be redundant because the relevant shareholders have all agreed to support and be bound by the terms of the scheme. The Concert Parties had given an undertaking to be bound by the Scheme and so did not need to meet for the purpose of assenting to the Scheme. However, it is one thing for the Court to dispense with the need to convene a meeting of a class of shareholders and another for the Court to convene a meeting of only a subset of the shareholders who are parties to the Scheme, when the subset is not classified and treated as a separate class.

17. It also seemed to me to be strongly arguable that the Concert Parties and the Disinterested Scheme Shareholders should be treated as separate classes. It would not be appropriate for the Concert Parties to vote together with the Disinterested Scheme Shareholders (it is difficult to see how the Concert Parties could consult together with the Disinterested Scheme Shareholders with a view to their common interest) at a single meeting (see the discussion of this issue in *Jennifer Payne, Schemes of Arrangement* Cambridge University Press, 2014 at [3.5.2.6]). This concern is no doubt the reason for the introduction by the SEHK of Rule 2.10. However, I accept that it is also arguable, as Jennifer Payne points out, that where a bidder and its associates are to receive the same treatment under the scheme as other shareholders an application of *Hawk Insurance* and *Re BTR* principles would suggest that they be treated as being in the same class as other shareholders since they have the same rights as other shareholders (it is only their interests which are different, and any concerns about different interests would fall to be dealt with as a matter of the Court's discretion at the sanction hearing). However, in the present case, there was to be at least some difference of treatment under the Scheme for some of the Concert Parties. The Management Shareholders had been given the opportunity and had agreed to maintain their equity interest in the Tonly group of companies in the future by using the Scheme Share Consideration to acquire shares in another Tonly company. I indicated to the Company at the convening hearing that in the circumstances, even without further and full argument on the issue, I would be prepared in this case to order either that the Concert Parties and the Disinterested Scheme Shareholders be treated as separate classes (and that only a meeting of the Disinterested Scheme Shareholders be convened) or that there be one class of all scheme shareholders (that is all shareholders save for the Offeror) and that a meeting of all such shareholders be convened on the basis that the Concert Parties agreed not to attend and vote. I would certainly wish to assist and avoid creating difficulties for the SEHK to the extent that the scheme jurisdiction under the Act permitted.

18. After the convening hearing and at the time of filing further written submissions, the Company informed the Court that after having taken further advice from its Hong Kong counsel and Cayman attorneys, it had decided to proceed on the basis that there would be two classes of shareholder.

The Capital Reduction

19. On the Effective Date of the Scheme, immediately following the cancellation and extinguishment of the Scheme Shares, the issued share capital of the Company will be restored to its former amount by the issuance to the Offeror, credited as fully paid at par, of the same number of Scheme Shares as were cancelled and extinguished. The Offeror will then make an

application to the SEHK for the withdrawal of the listing of the Shares.

20. Accordingly, the Scheme will implemented by the Company reducing its share capital by the cancellation and extinguishment of all its issued shares other than those that are registered in the name of the Offeror; the Company, forthwith upon the Capital Reduction taking effect, increasing its share capital to its former amount by the issue of the same number of new shares to the Offeror as the number of the Company's shares cancelled and extinguished and the Company applying the credit arising in its books of account as a result of the Capital Reduction to pay up in full at par the newly issued shares to the Offeror.

The Composite Document

21. The Company prepared a composite document (the ***Composite Document***) containing the terms of the Scheme, relevant financial and other information relating to the Company, letters from the independent board committee and the independent financial advisor, an explanatory memorandum explaining the reasons for and operation of the Scheme, and the proposed notices and proxy forms relating to the Court Meeting and the EGM.

22. The Composite Document, which had been cleared by the Securities and Futures Commission of Hong Kong and the SEHK, provided a detailed explanation of the purpose, effect, mechanics, and efficacy of the proposed Scheme. Further, the explanatory memorandum set out clearly details of the offer being made and the implications of a decision to accept or reject it.

23. In accordance with the directions in the Convening Order:

(a). on 29 January 2021, the Composite Document, which included the notice of the Court Meeting, the notice of the EGM, and proxy forms for both meetings were delivered (i) to Hong Kong Post for dispatch by ordinary surface mail to the Shareholders of the Company resident in Hong Kong; (ii) to SF Express for dispatch by courier to the shareholders of the Company resident in Mainland China and (iii) to FedEx for dispatch by courier to the shareholders of the Company resident outside of Hong Kong and Mainland China. This complied with the requirement in paragraph 8 of the Convening Order that these documents be sent to shareholders at least 21 clear days prior to the holding of the Court Meeting on 23 February 2021. According to inquiries made on behalf of the Company, the preponderance of shareholders and CCASS participants would have received the Composite Document within 3 business days (i.e. by 3 February 2021) which was 20 days prior to the Court Meeting and the EGM. A CCASS participant located in Australia was expected to receive the Composite Document on around 8

February 2021 (15 days prior to the Court Meeting and the EGM).

(b). on 29 January 2021, the notice of the Court Meeting, in substantially the same form as that contained in the Composite Document (as directed by paragraph 12 of the Convening Order) was published in the South China Morning Post (in English), the Hong Kong Economic Journal (in Chinese), and the Cayman Islands Gazette. In addition, the Company announced the date of the Court Meeting on the SEHK website on 29 January 2021.

The Court Meeting

24. Mr Poon was appointed Chairman of the Court Meeting and has reported the result of the Court Meeting in, and exhibited the minutes of the Court Meeting to, his First Affirmation affirmed on 24 February 2021.

25. The result of the voting at the Court Meeting (after taking into account that 332,791 Scheme Shares inadvertently voted on behalf of one of the Concert Parties, as explained below, were to be ignored and that the Concert Party concerned was not to be counted for the "headcount test") was as follows:

No. of Disinterested Scheme Shareholders and CCASS Participants "For" the Scheme	71 (98.36%)
No. of Votes "For" the Scheme	44,754,149 (99.99%)
No. of Disinterested Scheme Shareholders and CCASS Participants "Against" the Scheme	1 (1.64%)
No. of Votes "Against" the Scheme	2 (0.01%)

26. The total number of shares held by Disinterested Shareholders was, as noted above, 69,147,318 shares. Accordingly, the votes cast at the Court Meeting (44,754,151) represented 64.72% of the total number of shares held by Disinterested Scheme Shareholders. No CCASS Participants voted by proxy and HKSCC Nominees voted directly on instructions from 13 participants and all votes were cast to approve the Scheme.

27. Two particular aspects of the Court Meeting were drawn to the Court's attention by the

Company.

28. First, as a result of an honest error by one of the Concert Parties, Li Dongsheng (***Mr Li***), Mr Li voted in favour of the resolutions to approve the Scheme. Due to a miscommunication, Mr Li's broker, UBS Securities Hong Kong Limited (***UBS***), had instructed HKSCC Nominees to vote his shares in favour of the Scheme and subsequently the votes cast by HKSCC Nominees at the Court Meeting (and the EGM) included Mr. Li's shares. They were also recorded in the scrutineer's certificate as voting in favour of the Scheme. The Company had only been informed by Mr Li of his error on the day before the Court Meeting and the EGM and despite efforts to withdraw Mr Li's voting instructions it had proved impossible to do so. However, when tabulating the voting results for the Court Meeting and the EGM, the shares voted on behalf of Mr. Li were not taken into account. In addition, the Company took further steps to ensure that no other Concert Party had made a similar error and voted at either the Court Meeting or the EGM. Following the meetings, UBS confirmed to the Company that the only shares it voted through HKSCC Nominees were the shares held by Mr. Li. For the purpose of determining the result of the voting at the Court Meeting, the number of "heads" of HKSCC Nominees for the purposes of the "majority in number" test for the Scheme was reduced by one. At the end of the day, the fact that Mr Li's shares had been voted did not affect the outcome of voting on any of the relevant resolutions since the votes were ignored when tabulating the results.

29. Secondly, at the Court Meeting one of the Disinterested Scheme Shareholders in attendance (Mr Yuen) during the Q&A session raised a number of objections regarding the Scheme. These were recorded in the minutes of the meeting and described by Mr Poon in his First Affirmation filed in support of the sanction application. Mr Poon described what happened as follows (at [19] – [25]):

> *"19. I invited questions concerning the Scheme from the floor and an individual (who was subsequently identified by the Company's branch Share Registrar to be named Mr Yuen Yat Hang, a Disinterested Scheme Shareholder whose name was entered in the Registrar holding 2 shares in the Company (Mr Yuen)) made the following statements to the following effect without announcing himself or formally taking the floor:*
>
> *(a). Mr Yuen alleged that the content of the Composite Document did not contain comprehensive financial information on the Group, as Mr Yuen considered that the Company was still holding, at the time of the Court Meeting, certain real properties and factories in the PRC as disclosed in the Company's prospectus allegedly published in 2014 (which however was actually published or dated 17 July 2013) and other publicly available documents, but these real properties and factories were not specifically set out in the Composite Document.*

(b). *Mr Yuen alleged that the Composite Document did not contain disclosure regarding potential re-listing of the Group in the PRC securities and the implications thereof on the interest of the Disinterested Scheme Shareholders, as he believed that was the reason why the Management Shareholders were given opportunity to retain interest in the Group (through Huizhou Tonly).*

(c). *Mr Yuen alleged that the Independent Financial Adviser, Somerley, did not consider all Comparable Companies to the Company in its financial analysis in the Letter from Somerley. Mr Yuen was concerned that only two Comparable Companies were identified in the Composite Document he said that there were other companies listed on the Main Board of the SEHK which carried out similar businesses to the Company and which should have also been taken into account by Somerley.*

20. *In light of the above, Mr Yuen alleged that the disclosure in the Composite Document did not fulfil the requirements under the Takeovers Code, the Listing Rules and the SFO.*

21. *Mr Yuen stated that the persons on the panel did not need to respond to his enquiries because he would be raising them with the regulators directly.*

22. *Nevertheless, in response to the queries raised by Mr Yuen:*

(a). *Ms Choy Fung Yee, as the company secretary to the Company, responded to Mr Yuen's first statement by saying that the Composite Document was prepared in accordance with the Takeovers Code, the Listing Rules and the SFO and had been approved by the SFC and SEHK, and as such, the disclosures were considered adequate and in accordance with the Takeovers Code, the Listing Rules and the SFO. Mr Yuen stated that he was not satisfied with the statutory regime on disclosure.*

(b). *Ms Chow Chung Yan Stephanie, a director of Somerley responded to Mr Yuen's second statement and explained that Somerley, in identifying companies comparable to the Company, conducted a search on Bloomberg adopting a systematic approach based on appropriate selection criteria. Given there were only two companies available for comparison under such selection criteria, Somerley did not consider this a sufficient sample to form a meaningful analysis on peer company comparison. Therefore, such analysis did not form a basis of their view on the fairness and reasonableness of the Scheme Share Consideration.*

23. *Whilst the Company was trying to further address his enquiries, Mr Yuen refused to listen to the explanations to be provided and he then left the Court Meeting at 10.37a.m.*

24. *Mr Yuen had cast a proxy to vote his two Shares "AGAINST" the Scheme and, although he left the Court Meeting before the voting took place, this proxy was counted when tabulating the votes.*

25. *Based on the Company's record and recollection of the Company's management, I can confirm that neither Mr Yuen nor any other Disinterested Scheme Shareholder have raised any similar objections before. Further, no other questions were received from Disinterested Scheme Shareholders or their proxies at the Court Meeting."*

30. At the hearing, Mr Wood told me that he had been informed by the Company shortly before the hearing that they had not been notified by any regulator of a complaint filed by Mr Yuen and were not aware of Mr Yuen having taken any further action following the Court Meeting. Mr Wood submitted that there was nothing of substance in Mr Yuen's comments that should prevent the Court from sanctioning the Scheme. Mr Yuen's first question concerned the alleged omission of certain unidentified properties from the Company's financial statements (both audited and unaudited) provided with or referred to in the Composite Document based on an out of date prospectus. The Composite Document made it clear that the information on which it was based including the information concerning the value of its assets was complete and correct and this was the answer to this question raised by Mr Yuen (which was at least implicit in the response given at the Court Meeting by Ms Choy Fung Yee). Mr Yuen's second question concerned a possible re-listing of the Company's shares on a PRC exchange. However, Mr Wood submitted, there was no evidence of or suggestion that the Offeror intended to seek such a listing. Nor would such a listing affect the assessment of the fairness and reasonableness of the Scheme Share Consideration, which had been explained and justified in the Composite Document. Mr Yuen's third question involved an unjustified and in any event unparticularised challenge to one aspect of the methodology used by the independent financial advisor to assess the fairness and reasonableness of the Scheme Share Consideration.

The EGM

31. At the EGM the following resolution concerning the Capital Reduction was put to the shareholders as a special resolution (the ***Capital Reduction Resolution***):

> *"THAT:*
>
> *(a). pursuant to a scheme of arrangement dated 29 January 2021 (the "Scheme of Arrangement") between the Company and the Scheme Shareholders (as defined in the Scheme of Arrangement) in the form of the print thereof, which has been produced to the EGM and for the purposes of identification signed by the chairman of the EGM, or in such other form and on such terms and conditions as may be approved or imposed by the Court, on the Effective Date (as defined in the Scheme of Arrangement), the issued share capital of the Company shall be reduced by the cancellation and extinguishment of the Scheme Shares (as defined in the Scheme of Arrangement);*
>
> *(b). any one of the directors of the Company be and is hereby authorised to do all acts and things considered by him to be necessary or desirable in connection with the implementation of the Scheme of Arrangement and the reduction of the issued share capital of the Company pursuant to the Scheme of Arrangement, including (without limitation) giving consent to any modification of, or addition to, the Scheme of Arrangement or the reduction of the issued share capital of the Company which the Court may see fit to impose; and*

(c). *subject to the Scheme becoming effective, the withdrawal of the listing of the Shares of the Company from The Stock Exchange of Hong Kong Limited be and is hereby approved, and any one of the directors of the Company be and is hereby authorised to apply to The Stock Exchange of Hong Kong Limited for the withdrawal of the listing of the Shares of the Company."*

32. In respect of the Capital Reduction Resolution, a total of 212,658,355 votes (representing approximately 77.78% of the Company's total issued shares) were cast at the EGM. Shareholders representing a total of 212,658,353 shares (approximately 99.99% of the total votes cast) voted in favour of the Capital Reduction Resolution and only one shareholder representing two shares (approximately 0.01% of the total votes cast) voted against the Capital Reduction Resolution. The Capital Reduction Resolution was therefore approved as a special resolution by an overwhelming majority of shareholders voting either in person or by proxy representing more than 75% in value of the shares voted.

Issues relevant to and my decision on whether to the sanction of the Scheme

33. In his skeleton argument, Mr Wood referred to my recent summary in *In re Freeman FinTech Corporation Limited* (Unreported, Segal J, 4 February 2021) of the role of and issues for the Court on a sanction application. I said as follows (at [16] – [17]):

> *"16. The function of the Court at the sanction hearing of a scheme of arrangement under the Act is well-known. It is set out in a frequently cited passage from Buckley on the Companies Act, and was neatly summarised by Morgan J in the Business and Property Courts in London in Re TDG plc [2009] 1 BCLC 445 at [29] as follows:*
>
> (a). *the Court must be satisfied that the provisions of the statute (and the order convening the scheme meeting of creditors) have been complied with.*
>
> (b). *the Court must be satisfied that the class of creditors the subject of the court meeting was fairly represented by those who attended the meeting, and that the statutory majority are acting bona fide and not coercing the minority in order to promote interests adverse to those of the class they purport to represent.*
>
> (c). *the Court must be satisfied that an intelligent and honest person, a member of the class concerned and acting in respect of his own interest, might reasonably approve the scheme.*
>
> (d). *there must be no "blot" on (i.e. a defect in) the scheme.*
>
> *17. I would add a fifth matter for consideration at the sanction hearing, which may only be an amplification of the others mentioned above but which I consider helpful to identify separately, namely that there must be no other reason which*

would preclude the Court from exercising its discretion to sanction the scheme. One such reason which is frequently referred to in the authorities and which arises for consideration in this case is the principle that the Court must be satisfied that the scheme will achieve a substantial effect and that it is not acting in vain."

34. I would add that I note that Mr Justice Snowden in *Re KCA Deutag UK Finance plc* [2020] EWHC 2977 (Ch) at [16] summarised the fifth point as follows:

> *"In the case of a scheme with international elements there is also the question of whether the court will be acting in vain if it sanctions the scheme. This requires some consideration of whether the scheme will be recognised and given effect in other relevant jurisdictions."*

35. Mr Wood also noted that the Court has a discretion whether or not to sanction a scheme of arrangement, and in exercising that discretion, the approval by Plowman J *in Re National Bank Ltd* [1966] 1 WLR 819 at 829 of the following statement from *Buckley on the Companies Act* provided some useful guidance:

> *"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."*

36. Mr Wood submitted that each of these requirements was satisfied in the present case.

37. Mr Wood submitted that the Court Meeting had been properly convened and held in accordance with the Convening Order and the requisite statutory majorities had been obtained. I agree. I accept Mr Wood's submission that the difficulties relating to Mr Li and his voting at the Court Meeting did not taint or undermine the validity of the meeting, the vote or the statutory majority obtained at the Court Meeting (the position might have been different had Mr Li turned up and actively participated in the Court Meeting).

38. He also submitted that the class of Disinterested Scheme Shareholders was fairly represented by those who attended the Court Meeting, and that the statutory majority was acting bona fide and not coercing the minority in order to promote interests adverse to those of the class whom they purported to represent. The Scheme received overwhelming approval by a substantial percentage of the Company's shareholders. Again I agree.

39. Mr Wood further submitted that the commercial terms of the Scheme were such that an intelligent and honest member of the class of Disinterested Scheme Shareholders acting in respect of his interests might reasonably approve it. The effect of the Scheme was clearly explained in the Composite Document and the Scheme Share Consideration offered

Disinterested Scheme Shareholders a commercially fair and reasonable price for their shares which was demonstrably above the average market price of the shares during the past 12 months. Once again, I agree.

40. Mr Wood further submitted that there was no blot on or defect in the Scheme which precluded the Court from sanctioning it and no other reason which might preclude the Court from sanctioning the Scheme, having regard to the interests of both the Disinterested Scheme Shareholders and the Concert Parties. Again I agree.

41. In reaching these conclusions, I have noted the comments and concerns expressed by Mr Yuen at the Court Meeting. Even though he did not indicate that he opposed the sanction of the Scheme and did not file any objections or appear to oppose the sanction of the Scheme at the hearing, I consider that issues raised by an objecting shareholder should at least be recorded and reviewed by the Court. As I pointed out to Mr Wood at the hearing, were it the case that the Offeror had decided to list the Company's shares on a PRC exchange shortly after the implementation of the Scheme that *might* have been a matter that should have been disclosed to the Disinterested Scheme Shareholders to the extent that it could have been relevant to and impacted on their assessment of whether the Offer was paying enough for their shares. However, in this case there was no evidence that the Offeror had any such intention or whether there would be a PRC listing, and if so when and at what price. Furthermore, Mr Yuen's concerns were not particularised or supported by evidence or argument (or it appears pursued) and therefore deserved to be given very little weight.

Issues relevant to and my decision on whether to confirm the Capital Reduction

42. The statutory provision permitting a reduction of capital is contained in Section 14 of the Act which provides that:

> "subject to …… confirmation by the Court, a company limited by shares … and having a share capital may, if so authorised by its articles, by special resolution reduce its share capital in any way…".

43. Section 16(1) of the Act provides:

> *"The Court, if satisfied with respect to every creditor of the company who under section 15 is entitled to object to the reduction, that either his consent to the reduction has been obtained or his debt or claim has been discharged or has determined, or has been secured, may make an order confirming the reduction on such terms and conditions as it thinks fit."*

44. Mr Wood submitted that the matters that the Court will take into account when exercising its discretion under section 16(1) were explained by the Hon. Justice Jones in *In re Santiago Pipelines Company & New Santiago Pipelines Company* [2012 (2) CILR 343] (***Santiago Pipelines***) as follows:

> *"12 … The statutory purpose of ss. 15 and 16 of the Companies Law (which are based upon ss. 66 and 67 of the English Companies Act 1948) is creditor and shareholder protection. It was well established that an English court should exercise its discretion in favour of confirming a special resolution for a reduction of share capital if the following three criteria were satisfied. First, the shareholders (or different classes of shareholders) must be treated equitably, although equitable treatment does not necessarily mean equal treatment. Secondly, in circumstances where the company must convene an extraordinary general meeting of its shareholders, the purpose and effect of the proposed capital reduction must be properly explained to them in a circular letter or explanatory memorandum delivered with notice of the meeting, such that they are able to make an informed decision about the merits of the proposal. Thirdly, the court must be satisfied that the interests of creditors are unaffected or properly safeguarded. In the circumstances of these cases the question of shareholder and creditor protection does not arise...*
>
> *13. Based upon two judgments of Harman, J. in Re Ratners Group Plc (4) and Re Thorn EMI Plc (5), it is now accepted, both as a matter of English law and Cayman law, that there is a fourth criteria. I have to be satisfied that the capital reduction is being done for a "discernible purpose" but this court has never explained exactly what this means …*
>
> *14. It is now said, as a matter of general principle, that the court must be satisfied in every case that a special resolution to reduce share capital has been passed for a "discernible purpose" (see In re ING Secs. (Japan) Ltd. [2004-5 CILR 308] and In re China.Com Inc. [2009 CILR 384]). In the Cayman context, this means more than merely satisfying the court that the Petitioner has some actual objective in mind and that the capital reduction is not merely an academic exercise which might or might not serve some useful purpose in the future. It means that the court must have a proper understanding of the commercial rationale for the overall transaction of which the capital reduction forms part. Clearly, it is no part of the court's role to second guess the commercial judgment of a company's directors and shareholders but the evidence must demonstrate that they are seeking to achieve some legitimate commercial purpose …" (emphasis added)*

45. Mr Wood submitted that the requirements for confirmation of the Capital Reduction have been made out. Proper notice of the EGM was given to shareholders in accordance with the Company's articles of association and at the EGM the Capital Reduction Resolution was passed by an overwhelming majority. Furthermore, the criteria prescribed by Jones J in *Santiago Pipelines* had been satisfied:

(a). the Capital Reduction related only to ordinary shares and applied to each Scheme Shareholder equally. It treated all affected shareholders fairly.

(b). the shareholders were provided with a detailed explanation of the terms and effect of the Scheme and the Capital Reduction, along with recommendations from the Independent Board Committee and the Independent Financial Advisor. The Shareholders were provided with the Composite Document which included an Explanatory Statement which clearly explained the purpose and effect of Scheme and the Capital Reduction, along with financial information concerning the Company to assist Shareholders in their decision. It is submitted therefore that the Shareholders were properly advised of the terms and effect of the Capital Reduction and were in a position to make an informed decision about its efficacy.

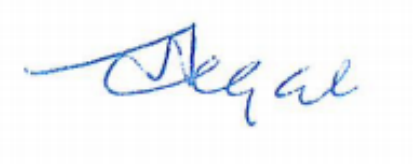
(c). the Company's creditors were unaffected by the Capital Reduction which will not alter the underlying assets, business operations, management, or financial position of the Company. It is only the ownership of the share capital which will change. There will be no return of capital to shareholders, and given that the underlying value of the Company's assets will suffer no detriment, the Company's creditors will similarly not be adversely impacted by the Capital Reduction. Furthermore, the reduction in the Company's share capital will only be a momentary event until the reissuance of new shares so as to return the share capital to its original level. As a result, capital of the Company will not be lost.

(d). the Capital Reduction is for a discernible purpose which is to facilitate the Scheme and the privatisation of the Company so that it becomes owned by the Offeror and its shares are removed from trading on the SEHK.

46. I accept the Company's submissions on these points.

Conclusion

47. Accordingly, and for the reasons I have given above, I shall sanction the Scheme and confirm the Capital Reduction.



Mr. Justice Segal
Judge of the Grand Court, Financial Services Division
9 March, 2021