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Case Comment

THE ADOPTION OF LOCK-UP AGREEMENTS IN SCHEMES OF ARRANGEMENT AND PRE-PACKAGED SCHEMES

Re Brightoil Petroleum (S'pore) Pte Ltd [2022] SGHC 35

[2022] SAL Prac 22

Whilst the adoption of lock-up agreements in corporate restructurings has gained prevalence in recent times, there has, until recently, been no local judicial guidance on the principles governing their usage. The case of *Re Brightoil Petroleum (S'pore) Pte Ltd* [2022] SGHC 35 represents the first reported decision by the General Division of the Singapore High Court which provides such guidance. This article aims to provide an overview of that case and explore the issues which arise therein.

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I. Introduction

1 *Re Brightoil Petroleum (S'pore) Pte Ltd*[2] ("*Re Brightoil*") is the first reported decision by the General Division of the Singapore High Court (the "High Court") dealing with the issue of whether creditors who enter into "lock-up agreements" (or otherwise known as "lock-in agreements") for a scheme of arrangement should be placed in a separate class when voting on a scheme. Concurrently, it is also the first reported decision

1 The article is written in the author's personal capacity and does not reflect the views of the Supreme Court of Singapore. All errors remain the author's own.
2 [2022] SGHC 35.

to apply the new framework laid down in *Re DSG Asia Holdings Pte Ltd*[3] ("*Re DSG Asia*") relating to the sanction of pre-packaged schemes of arrangement where no meetings of creditors are held under s 71 of the Insolvency, Restructuring and Dissolution Act 2018[4] ("IRDA").

2 Garnering the support of creditors is pivotal to the success of any scheme of arrangement promulgated in the context of a corporate restructuring. One way to ensure that a scheme of arrangement will not fall through is to incentivise creditors to commit themselves to voting favourably in advance of the relevant class meeting by offering lock-up agreements. Lock-up agreements, if appropriately employed, can be a crucial tool in the restructuring arsenal and provide the scheme company comfort that there is sufficient creditor support before embarking upon a court application for sanction.[5] This ensures that it is worthwhile to undertake the significant work involved in the scheme process.

3 However, the unanswered question hitherto was whether creditors who enter into lock-up agreements would constitute a separate class when voting on a scheme. *Re Brightoil* is thus a welcome addition to Singapore jurisprudence as it clarifies that lock-up agreements are generally permissible in a restructuring and will not require locked-up creditors to be placed in a separate class for voting (subject to certain requirements). The court's willingness to endorse the use of lock-up agreements will undoubtedly strengthen Singapore as a debt restructuring hub.

4 This article seeks to provide a comprehensive breakdown of the principles concerning lock-up agreements and flesh out the court's reasoning in arriving at its decision. While *Re Brightoil* also dealt with the perennial issue of how the votes of related creditors should be discounted, that was a subsidiary point and will not be discussed here.

3 [2022] 3 SLR 1250.
4 Act 40 of 2018.
5 *Re ColourOz Investment 2 LLC* [2021] 1 BCLC 55 at [97].

II. Brief facts of the case

5 Brightoil Petroleum (S'pore) Pte Ltd ("BPS") was a Singapore-incorporated company. BPS was one of the indirect wholly owned subsidiaries of Brightoil Petroleum (Holdings) Ltd ("BOHL") – a company listed on the Hong Kong stock exchange. Due to financial difficulties, BPS was unable to continue its operations since 2019. BOHL, together with its other subsidiaries, embarked on a complex debt-restructuring exercise and BPS was able to successfully resolve a significant portion of its liabilities through restructuring. The scheme of arrangement proposed by BPS (the "BPS Scheme") was the penultimate step in restructuring the outstanding debts due to its unsecured creditors.

6 The key terms of the BPS Scheme provided that there would be a single class of unsecured creditors for restructuring, that the scheme creditors would receive US$6 million on a *pari passu* basis, and that BPS would be released from the creditors' claims. The potential recovery for scheme creditors was estimated to be 12.0% of the debt value, as compared to just 0.2% in a liquidation scenario.

7 A voting form was circulated amongst the scheme creditors who were eligible to vote to tabulate what the notional votes in favour of the BPS Scheme would have been had a creditors' meeting been held. Ten of the scheme creditors (out of 11) representing 94.26% in value (US$47,269,535.04 of US$50,143,082.20) voted in favour of the BPS Scheme. BPS then sought the court's sanction of the pre-packaged scheme.

8 Crucially, three of the scheme creditors (collectively, the "Locked-in Creditors") had provided undertakings to vote in favour of the BPS Scheme in exchange for a consent fee of 1.0% of their admitted debt. BOHL had, prior to the distribution of the explanatory statement and the BPS Scheme, offered to all scheme creditors an opportunity to enter into the lock-up agreements. The issue which arose was whether these Locked-in Creditors should have been placed in a separate class when voting instead of being allowed to vote in a single class with the others.

9 Further, one of the Locked-in Creditors, TransAsia Private Capital Limited ("TPCL"), had entered into a modified lock-up agreement. In addition to the consent fee offered, TPCL's support for the BPS Scheme was also conditional upon BOHL making a separate payment to TPCL in part satisfaction of BOHL's guarantee obligations (the guarantee was linked to loan facilities extended by TPCL to BPS).

III. Commentary

A. Approval of pre-packaged schemes of arrangement under s 71 of the Insolvency, Restructuring and Dissolution Act 2018

10 The pre-pack provision under s 71(1) of the IRDA allows the court to make an order approving the compromise "even though no meeting of the creditors or class of creditors has been ordered under section 210(1) of [the Companies Act] or held".

11 There are two elements essential to obtaining the court's approval under s 71 of the IRDA as laid down in *Re DSG Asia*:[6] (a) sufficient disclosure of information, and (b) satisfaction of the statutory majority requirements in the notional counting of votes – *ie*, a majority in number representing three-fourths in value of those present and voting in each class of creditors. It is implicit in the latter requirement that the creditors be properly classified for the notional counting of votes.[7] The court considers how the creditors would have been classified as it affects how the votes would be tallied.

12 The notional statutory majority requirements appear to be satisfied in *Re Brightoil* as the BPS Scheme had received strong support from the scheme creditors as observed from the voting form results.[8] A majority in number of the voting Scheme Creditors (ten out of 11), representing 94.26% of the total value, had cast their votes in favour of the proposed scheme.

6 *Re DSG Asia Holdings Pte Ltd* [2022] 3 SLR 1250 at [28].
7 *Re DSG Asia Holdings Pte Ltd* [2021] [2022] 3 SLR 1250 at [29].
8 *Re Brightoil Petroleum (S'pore) Pte Ltd* [2022] SGHC 35 at [24].

13 It is apposite to note at this juncture that the language of s 71(*d*) of the IRDA does not stipulate the evidence that is necessary to demonstrate that the statutory majority requirements would have been satisfied. In *Re DSG Asia*, a vote solicitation exercise was carried out by the scheme manager who accepted the ballot forms.[9] In *Re Brightoil*, a voting form was distributed amongst the scheme creditors who were eligible to vote.[10] The goal of these voting exercises was to ascertain the actual intention of creditors as to how they would have voted notionally and this serves as a useful proxy.

14 According to the *Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring*[11] at para 3.41(a), the pre-pack regime was meant to permit a debtor to solicit votes from creditors before filing the application for scheme sanction, and allows the court to count these votes *as if* they were given after the application was filed.[12] This was inspired by the Chapter 11 regime within the United States Bankruptcy Code[13] which permits the US bankruptcy courts to count the votes solicited prior to the filing of the Chapter 11 application as if such votes were given after.[14] Of particular note is that the US Bankruptcy Court for the Southern District of New York has adopted specific guidelines for pre-packaged cases.[15] Given the strong influence of the US Bankruptcy Court (SDNY), the guidelines are also persuasive for other courts throughout the US[16] and provide for a standard ballot form (in Exhibit "B" of the guidelines) for accepting a pre-packaged plan or reorganisation.

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9 *Re DSG Asia Holdings Pte Ltd* [2021] [2022] 3 SLR 1250 at [9].
10 *Re Brightoil Petroleum (S'pore) Pte Ltd* [2022] SGHC 35 at [9].
11 20 April 2016 (Co-chairpersons: Indranee Rajah & Kannan Ramesh).
12 *Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring* (20 April 2016) at para 3.41(c) (Co-chairpersons: Indranee Rajah & Kannan Ramesh).
13 11 USC (US) (1978).
14 *Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring* (20 April 2016) at para 3.35 (Co-chairpersons: Indranee Rajah & Kannan Ramesh).
15 Amended Procedural Guidelines for Prepackaged Chapter 11 Cases in the United States Bankruptcy Court for the Southern District of New York, General Order No. M-387 s II (Bankr SDNY, 24 November 2009).
16 Christopher Mallon & Shai Y Waisman, *The Law and Practice of Restructuring in the UK and US* (Oxford University Press, 2011) at pp 62–63.

The ballot form includes details such as, *inter alia*, instructions on how to cast the vote, how the plan could be confirmed by the US Bankruptcy Court and how further information may be obtained.

15 Thus, practically speaking, utilising ballot forms or voting forms to solicit the votes would ordinarily suffice as good evidence for the purpose of s 71(*d*) of the IRDA to show that the statutory majority would have been met had the hypothetical meeting been held.

16 However, the issue which remained in *Re Brightoil* was whether the votes of the Locked-in Creditors (constituting 57.32% of total debt value[17]) gathered via the voting forms were fairly representative of the class of creditors to which they belong, or whether they should be classed separately from the other creditors who did not enter into the lock-up agreements.

B. Survey of foreign authorities

17 On the issue of classification, the High Court first undertook a comparative analysis of the position abroad.

18 The court noted that the use of lock-up agreements in England was also in its nascent stages and the issue had only been dealt with in first-instance decisions.[18] Despite this, the first-instance cases such as *Re DX Holdings Ltd*[19] ("*Re DX Holdings*") seem to speak with one voice and hold that the existence of lock-up agreements will not fracture the class composition of creditors where all scheme creditors were offered an equal opportunity to enter them and where the creditors would not have voted any differently. The more recent decision of *Re ColourOz Investment 2 LLC*[20] ("*Re ColourOz*") was cited and was helpful in its comprehensive survey of the various English cases, and formulated the key test as such: "… a consent fee … will not fracture a class provided that it is *made available to all scheme creditors*, and provided also that it *does not induce creditors*

17 *Re Brightoil Petroleum (S'pore) Pte Ltd* [2022] SGHC 35 at [25].
18 *Re Brightoil Petroleum (S'pore) Pte Ltd* [2022] SGHC 35 at [31].
19 [2010] EWHC 1513 (Ch).
20 [2021] 1 BCLC 55.

to commit to vote in favour of a scheme which they might otherwise reject" [emphasis added].[21]

19 As noted elsewhere,[22] there is a slight divergence in some of the English authorities insofar as *Re Codere Finance 2 (UK) Ltd (No 1)*[23] ("*Re Codere*") seemed to suggest that the requirements mentioned in cases like *Re ColourOz* were disjunctive in nature instead of being conjunctive – *ie*, the class of creditors is not fractured if the lock-up agreement was made available to all creditors (the "Equal Opportunity" requirement) *or* the consent fee proposed did not exert a material influence on the voting decision (the "Immaterial Influence" requirement). It appears that the High Court did not explicitly consider this issue in *Re Brightoil* and this remains an area for clarification. What can be observed, however, was that the High Court did seem to take the view that these two requirements were conjunctive in its application to the facts. The High Court tackled each requirement sequentially without expressing the view that these were alternative justifications as to why there was no need to place the Locked-in Creditors in a separate class.[24] Nevertheless, as the legal test in Singapore was framed more like a basket of factors to be considered (described as "non-exhaustive" principles which are "relevant"[25]), it remains to be seen whether the requirements are conjunctive, disjunctive, or perhaps even *sui generis* as a wholistic inquiry.

20 The High Court then looked briefly to the Hong Kong authorities (which appeared more scant) and found that the twin requirements of Equal Opportunity and Immaterial Influence were also endorsed as factors controlling whether creditors who enter lock-up agreements should be classed separately when voting on a scheme.[26]

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21 *Re Brightoil Petroleum (S'pore) Pte Ltd* [2022] SGHC 35 at [35].
22 Stephanie Yeo, "Class Composition in Schemes of Arrangement" [2022] SAL Prac 13 at paras 33–35.
23 [2021] 2 BCLC 396.
24 *Re Brightoil Petroleum (S'pore) Pte Ltd* [2022] SGHC 35 at [48]–[50] and [53]–[55].
25 *Re Brightoil Petroleum (S'pore) Pte Ltd* [2022] SGHC 35 at [46].
26 *Re Brightoil Petroleum (S'pore) Pte Ltd* [2022] SGHC 35 at [39]–[41].

21 To complete the comparative analysis, whilst not considered in *Re Brightoil*, it is apposite to note that the Australian position in this regard is also consistent with that in England and Hong Kong. In *Re Wiggins Island Coal Export Terminal Pty Ltd*,[27] it was held that "the [Australian court] would take the same approach as has been taken in the English case law" and permit the use of lock-up agreements where the consent fee is relatively small and not likely to influence the view of a creditor with substantive objections to the scheme on commercial grounds.[28] The Australian court also noted that the opportunity to receive the consent fee was offered to all relevant scheme creditors.

C. Position in Singapore

22 Distilling the principles from the foreign jurisprudence, the High Court laid down the following non-exhaustive principles which were relevant in determining whether creditors who enter into lock-up agreements should be classed separately for the purposes of voting on a scheme of arrangement:[29]

> (a) The court will assess whether the benefit conferred in the lock-up agreement is so sizeable that it would have a significant influence on the decision of a reasonable creditor when voting for the proposed scheme.
>
> (b) The lock-up agreement must have been made available to all scheme creditors within the relevant class.
>
> (c) The use of the lock-up agreement must be done *bona fide*.

23 What can be observed is that the High Court essentially transplanted the twin requirements of Immaterial Influence and Equal Opportunity from the foreign case law into the domestic legal framework. Additionally, it was emphasised that the use of the lock-up agreements must be done *bona fide* (the "*Bona Fides*" requirement). However, as alluded to above,[30] it is ambiguous

27 [2018] NSWSC 1342.
28 *Re Wiggins Island Coal Export Terminal Pty Ltd* [2018] NSWSC 1342 at [33].
29 *Re Brightoil Petroleum (S'pore) Pte Ltd* [2022] SGHC 35 at [46].
30 See above at para 19.

whether these are conjunctive requirements or a basket of non-exhaustive factors for the court to weigh and consider. Nevertheless, each factor will be assessed in turn.

(1) The Immaterial Influence requirement

24 On the Immaterial Influence requirement, the High Court stated that in assessing whether there would be a significant influence exerted on the voting decision of a creditor, one must compare the *relative* size of the benefit conferred when compared to forecasted returns in the appropriate comparator scenario (such as a liquidation).[31] However, the assessment is "not one that is based purely on numerical comparison but must be done contextually",[32] by considering other reasons why a creditor might enter into the scheme.

25 On the facts of *Re Brightoil*, it was found that the consent fee of 1.0% of the scheme creditor's admitted debt was not so significant as compared to the potential recovery of 12.0% under the BPS Scheme and a 0.2% recovery in liquidation.[33] The High Court also referenced the size of the consent fee in foreign cases when making the comparison. It was held that even without the consent fee of 1.0% being offered, a reasonable creditor would have voted in favour of the scheme as there was a potential "60-fold recovery".[34]

26 This factor shades into the court's consideration of the fairness of the scheme and whether the votes obtained were fairly representative of the class of creditors.[35] Linking the concept back to the dissimilarity principle,[36] the benefit provided in the lock-up agreement should not be so material such that it creates an additional non-private interest for creditors to vote in favour of the scheme. The reason why the 1.0% fee was likely considered by the court to be "not so significant" could be viewed from

31 *Re Brightoil Petroleum (S'pore) Pte Ltd* [2022] SGHC 35 at [46(a)].
32 *Re Brightoil Petroleum (S'pore) Pte Ltd* [2022] SGHC 35 at [50].
33 *Re Brightoil Petroleum (S'pore) Pte Ltd* [2022] SGHC 35 at [48].
34 *Re Brightoil Petroleum (S'pore) Pte Ltd* [2022] SGHC 35 at [49].
35 *Re DSG Asia Holdings Pte Ltd* [2022] 3 SLR 1250 at [53].
36 See *The Royal Bank of Scotland NV v TT International Ltd* [2012] 2 SLR 213 at [140]–[141].

two perspectives: (a) for creditors who were inclined to reject the scheme and accept a recovery of 0.2% in liquidation, the additional 0.8% from the consent fee was unlikely to induce them to vote otherwise; and (b) regarding creditors who wanted to support the scheme and receive recovery of 12.0%, the additional 1.0% consent fee would be relatively immaterial.

27 The analysis is a *relative* one, and one cannot merely look at the absolute value of the consent fee being offered. For example, in *Re Da Sen Holdings Group Ltd* ("*Re Da Sen*"),[37] the Hong Kong court found that a consent fee of 5.0% was not unusually large in the context where the unsecured creditors' recovery under the scheme was about 50.0% to 60.0% and the recovery in a liquidation scenario was no more than 32.0%.[38] What is pertinent to note is that while a consent fee of 5.0% in *Re Da Sen* is somewhat larger than usual in absolute terms (as compared to the consent fee between 0.5% and 1.0% in *Re Codere*[39] and 0.5% to 2.5% in *Re DX Holdings*[40]), it was acceptable *relative* to the specific context of that case.

28 There is also the question of whether the difference in language adopted by the High Court in setting out the Immaterial Influence requirement in *Re Brightoil*, as compared to English cases such as *Re ColourOz*, is of any consequence. To recapitulate, in *Re ColourOz*, the English court focused on whether the consent fee will "induce creditors to commit to vote in favour of a scheme *which they might otherwise reject*" [emphasis added].[41] This suggests that the court should ascertain that there is no causative link between the offering of the lock-up agreement and the favourable votes cast. Indeed, some academic texts echo this sentiment.[42] In

37 [2022] HKCU 324; [2022] HKCFI 185.
38 *Re Brightoil Petroleum (S'pore) Pte Ltd* [2022] SGHC 35 at [41], citing *Re Da Sen Holdings Group Ltd* [2022] HKCU 324; [2022] HKCFI 185.
39 *Re Codere Finance 2 (UK) Ltd (No 1)* [2021] 2 BCLC 396 at [26].
40 *Re DX Holdings Ltd* [2010] EWHC 1513 (Ch) at [7].
41 *Re ColourOz Investment 2 LLC* [2021] 1 BCLC 55 at [98].
42 See *Palmer's Company Law* vol 3 (Geoffrey Morse gen ed) (Sweet & Maxwell, Looseleaf Ed, 2022) at para 12.049.1: "It is clear that the existence of such agreements do not as such affect the composition of the classes of creditors unless there is evidence that the creditors concerned would have voted differently in the absence of the agreement …".

contrast, in Singapore, the threshold is whether there would be a "significant influence" on the creditors' voting decision (which may not be causative). Nevertheless, the difference in language is likely inconsequential. The High Court essentially concluded that there was no causative link on the facts when applying the Immaterial Influence requirement: "a reasonable creditor would have voted in favour of the scheme regardless"[43] – suggesting that both standards are normatively aligned.

(2) The Equal Opportunity requirement

29 Next, in applying the Equal Opportunity requirement, it was uncontroversial that the lock-up agreements were made available to all scheme creditors and were drafted on the same terms.[44] However, the more contentious issue before the High Court was whether the entering into of a modified lock-up agreement with TPCL would affect the analysis.

30 The modified agreement provided that BOHL would make a *separate* payment of US$1.25 million in part satisfaction of BOHL's obligations under a guarantee. At first blush, this seems to have exalted TPCL over the other creditors and afforded an added incentive for TPCL to vote in favour of the scheme – putting in doubt the reliability of its vote. However, the High Court found that "TPCL's legal rights against BOHL … is distinct and independent from TPCL's legal rights against BPS" and that "payment to TPCL in part satisfaction of its outstanding guarantee obligations will not change substantively TPCL's legal rights *vis-à-vis* BPS".[45] BOHL's part payment was *genuinely* independent of the scheme as those obligations would not be waived even if the BPS Scheme were sanctioned.[46] Thus, this requirement was met.

31 From this, it can be discerned that it is possible for a scheme company to enter into a modified agreement with some creditors without fracturing the classification of creditors

43 *Re Brightoil Petroleum (S'pore) Pte Ltd* [2022] SGHC 35 at [49].
44 *Re Brightoil Petroleum (S'pore) Pte Ltd* [2022] SGHC 35 at [53].
45 *Re Brightoil Petroleum (S'pore) Pte Ltd* [2022] SGHC 35 at [54].
46 *Re Brightoil Petroleum (S'pore) Pte Ltd* [2022] SGHC 35 at [55].

so long as the rights in question are genuinely independent of the scheme.[47] Indeed, the High Court had assiduously phrased the Equal Opportunity requirement as only necessitating that the lock-up agreements made with each creditor be on "substantially the same terms".[48] This provides some wiggle room.

32 The rationale for this is sound and harks back to the key inquiry in classifying creditors: creditors whose rights are so dissimilar to each other's that they cannot sensibly consult together with a view to their common interest must vote in different classes.[49] If the rights conferred are not conditional on the scheme being implemented and are genuinely distinct, then those are irrelevant for classification. As explained in *Re Noble Group Ltd (No 1)*[50] at [131]:

> As regards the class question, subject to an important caveat, I accept in general terms the proposition that payments made by a company to some creditors independently of a proposed scheme and its associated restructuring agreements, which are *not dependent upon the scheme taking effect*, ought not to come into the equation for class purposes. The *simple reason is that they would not be part of the scheme proposal* which all scheme creditors have to consider at the relevant meetings. … [emphasis added]

The burden of proof (to show that the rights conferred are indeed independent) is on the scheme company and bare assertions will generally not suffice.[51]

33 However, the courts will be cautious of any backdoor attempt to confer preferential rights to creditors. There cannot be disguised benefits offered under the scheme.[52] As noted in *Re DSG Asia*, rights that were technically not conditional on the scheme being implemented, but were commercially part of the same transaction and were highly unlikely to be conferred unless

47 *Re DSG Asia Holdings Pte Ltd* [2022] 3 SLR 1250 at [58].
48 *Re Brightoil Petroleum (S'pore) Pte Ltd* [2022] SGHC 35 at [46(b)].
49 *Re Brightoil Petroleum (S'pore) Pte Ltd* [2022] SGHC 35 at [27].
50 [2019] 2 BCLC 505.
51 *Re Noble Group Ltd (No 1)* [2019] 2 BCLC 505 at [133].
52 *Palmer's Company Law* vol 3 (Geoffrey Morse gen ed) (Sweet & Maxwell, Looseleaf Ed, 2022) at para 12.051.1.

the scheme was implemented, are relevant to classification.[53] Otherwise, creditors could negotiate for preferential rights in their favour but artificially engineer them in such a way to seem independent. Thus, in *Re DSG Asia*, while a potential white knight investor's rights under the term sheet did not expressly stipulate that the injection of investment was conditional on the scheme being implemented, the court took a realistic commercial view and found that it was effectively conditional upon closer inspection.[54] Its interest as a potential investor was thus relevant for classification and rendered it unable to consult with other unsecured creditors with a view to their common interest.

(3) The Bona Fides *requirement*

34 Lastly, the High Court examined whether the lock-up agreements were offered as a *bona fide* attempt at restructuring. Scrutinising the information provided in the lock-up agreements, the court found that the scheme company acted *bona fide* as the scheme creditors were not misled as to the expected recovery that could be obtained.[55]

35 It is interesting to note that there is no *Bona Fides* requirement in the foreign jurisdictions which have also endorsed lock-up agreements, as mentioned above.[56] But as astutely recognised by some commentators,[57] it is unlikely that the court considered this as falling within the classification framework *per se*. Rather, this requirement should be rationalised as part of the overall discretion that the court exercises in sanctioning a scheme of arrangement and is not a discrete requirement to be examined in every situation.

36 Instead, the emphasis of this requirement (which is merely a non-exhaustive factor) could signal that the Singapore court is still cautious about endorsing the use of lock-up agreements.

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53 *Re DSG Asia Holdings Pte Ltd* [2022] 3 SLR 1250 at [58].
54 *Re DSG Asia Holdings Pte Ltd* [2022] 3 SLR 1250 at [59]–[60].
55 *Re Brightoil Petroleum (S'pore) Pte Ltd* [2022] SGHC 35 at [51].
56 See paras 17–20 above.
57 See Stephanie Yeo, "Class Composition in Schemes of Arrangement" [2022] SAL Prac 13 at fn 25.

In assessing the usage of lock-up agreements and sanctioning the scheme, the court is not involved to simply rubber-stamp the wishes of the majority.[58] Within the survey of foreign authorities, the High Court referred to the case of *Re Sunbird Business Services Ltd*[59] ("*Re Sunbird*") and alluded to the fact that whilst there is good commercial sense in offering lock-up agreements, the "court must be cognizant of the attendant risks as well".[60] This was the likely impetus for the court to lay down the *Bona Fides* requirement, perhaps as a reminder to scheme companies to not act beyond the pale.

37 A greater understanding of the factual matrix in *Re Sunbird* serves to flesh out the concomitant risks. In that case, the scheme company misled some scheme creditors into agreeing to the lock-up agreements to obtain the requisite approval. Those scheme creditors were not told that they could await the formal circulation of an explanatory statement, but were sent an email which pressured them to sign the lock-up agreement "straight away" and were given the wholly misleading impression that this was in a form required to "satisfy the court".[61] As a result, the English court could not place reliance on the votes. This was a rather blatant example of a scheme company trying to strong-arm its way to obtain the necessary approval and treating the creditors as mere obstacles. Such an unfortunate circumstance must be eschewed.

38 In relation to the *Bona Fides* requirement, it is also relevant to point out the High Court's *obiter* comments on how a scheme creditor could demonstrate good faith in one aspect. The High Court noted that some English authorities suggest that a provision allowing a signatory to terminate the agreement and cease support for the scheme in the event of a "material adverse change" to the company's financial position should be included for lock-up agreements.[62] The High Court did not conclude that this was a mandatory requirement in Singapore, but gave the

58 *Re Sunbird Business Services Ltd* [2021] 2 All ER (Comm) 1019 at [127].
59 [2021] 2 All ER (Comm) 1019.
60 *Re Brightoil Petroleum (S'pore) Pte Ltd* [2022] SGHC 35 at [36]–[38].
61 *Re Sunbird Business Services Ltd* [2021] 2 All ER (Comm) 1019 at [121].
62 *Re Brightoil Petroleum (S'pore) Pte Ltd* [2022] SGHC 35 at [52].

tentative view that the presence of such a provision demonstrates *bona fides*. Hence, it would be wise for future scheme companies to consider including such a provision.

39 There is good sense in doing this. Scheme creditors made the decision to lock themselves in at an early stage on the basis of projections concerning the company's financial state, but should these change materially, then they should be permitted to revoke their intention to support the scheme.[63] This prevents any notion that the locked-up votes invariably "belong" to a company,[64] and gives the court some assurance that an independent choice was exercised.

IV. Concluding remarks

40 Whilst lock-up agreements in restructuring have gradually become more commonplace in schemes of arrangement, the principles which govern their usage appear to be in a fledgling state. Indeed, even in England, only first-instance courts have dealt with the issue.[65] Undoubtedly, lock-up agreements can provide significant savings of time and costs for scheme companies. The flipside of this is to ensure that newfound tool is not abused. The challenge then is to find the appropriate middle ground and there is still room for clarification by the Singapore courts on various issues.

41 Nevertheless, the High Court's willingness to cross the Rubicon in *Re Brightoil* and endorse the usage of lock-up agreements is commendable despite the inherent risks. It is foreseeable that this would conduce to Singapore's long-term plans of establishing itself as a restructuring hub,[66] and serves as an important stepping stone.

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63 *Re Telewest Communications plc* [2005] 1 BCLC 752 at [52]. See also Philip Wood, *Principles of International Insolvency* (Sweet & Maxwell, 3rd Ed, 2019) at para 41-048.

64 *Re Sunbird Business Services Ltd* [2021] 2 All ER (Comm) 1019 at [94].

65 *Re Brightoil Petroleum (S'pore) Pte Ltd* [2022] SGHC 35 at [31].

66 See generally, *Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring* (20 April 2016) (Co-chairpersons: Indranee Rajah & Kannan Ramesh).