

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**



CAUSE NO: FSD 314 OF 2020 (NSJ)

**IN THE MATTER OF SECTION 86 OF THE COMPANIES ACT (2021 REVISION)
AND
IN THE MATTER OF FREEMAN FINTECH CORPORATION LIMITED**

Appearance: Guy Manning of Campbells for the Company

Hearing: 3 February, 2021

Draft judgment
circulated: 3 February, 2021

Judgment Delivered: 4 February 2021

JUDGMENT

Introduction

1. This is my judgment dealing with the petition presented by Freeman FinTech Corporation Limited (the *Company*) with respect to, and the Company's application for sanction of, a scheme of arrangement (the *Cayman Scheme*) between the Company and its unsecured creditors, pursuant to section 86 of the Companies Act (2021 Revision) (the *Act*). The sanction application was heard today (3 February, 2021).
2. The Company is acting by and through its joint provisional liquidators (Ho Kwok Leung Glen (*Mr. Ho*) and Lai Kar Yan) (the *JPLs*) who were appointed by the Hong Kong Court and whose powers to promote a scheme of arrangement in this jurisdiction on behalf of the Company were recognised by this Court in an order made by me and dated 4 November 2020.
3. The Company has also promoted a parallel scheme of arrangement under the laws of Hong Kong (the *Hong Kong Scheme*). The Cayman Scheme and the Hong Kong Scheme are each conditional



upon the other receiving sanction from the court in their respective jurisdictions. They each contain the same terms. The majority of the Company's debts are governed by Hong Kong law. Prior to the hearing of the sanction application I was told that the sanction hearing in respect of the Hong Kong Scheme had taken place yesterday before Mr. Justice Harris and an order sanctioning the Hong Kong Scheme had been made (and a copy of Mr. Justice Harris' judgment in draft was very helpfully provided to me at the beginning of the sanction hearing, for which I am most grateful to Mr. Justice Harris).

The background

4. The background to the Company is set out in the petition dated 16 December 2020 and Mr. Ho's First Affirmation affirmed on 16 December 2020. In summary:
 - (a). the Company is an exempted limited liability company incorporated in the Cayman Islands on 14 August 1992.
 - (b). the Company has been registered in Hong Kong as a non-Hong Kong Company since 25 November 1992 and its shares have been listed on the Hong Kong Stock Exchange (*SEHK*) since 11 May 1998.
 - (c). the Company is an investment holding company and is part of a group of companies (the *Group*) whose subsidiaries are principally engaged in the provision of financial services to customers in Hong Kong and the People's Republic of China (the *PRC*).
 - (d). the Group booked losses during calendar years 2018 and 2019 of over HK\$2billion, causing significant cash flow problems.
 - (e). on 10 May 2019, a winding-up petition was presented against the Company in the Hong Kong Court on the grounds that, *inter alia*, the Company was insolvent.
 - (f). the JPLs were appointed on 28 February 2020 and, pursuant to an order extending their powers on 26 March 2020, are empowered to enter into discussions on behalf of the Company for the purpose of a restructuring. Subsequently, following a concern I had raised, the Hong Kong court made a direction permitting the JPLs to commence proceedings to introduce a scheme of arrangement in both this jurisdiction and Hong Kong.



- (g). trading of the Company's shares was suspended on 28 February 2020. The SEHK has mandated certain requirements and conditions the Company is required to meet prior to the trading of its shares being permitted to resume.
- (h). should the Company fail to comply with these requirements and conditions by 27 August 2021, the SEHK will cancel the Company's listing.
- (i). in addition to the suspension of trading in the Company's shares, both the SEHK and Securities and Futures Commission of Hong Kong have imposed various trading restrictions and limitations on the Company's key operating subsidiaries, which have had a significant impact on the ability of those subsidiaries to operate and, in turn, has significantly impacted the financial performance of their businesses.
- (j). the JPLs are of the opinion that an immediate winding-up of the Company (and the Group) would not be in the creditors' best interests as it would not maximize the value of the Company's assets and would therefore diminish creditor returns and that the interests of creditors will be better served through the Cayman Scheme and the proposed restructuring of which it is a part.

The Cayman Scheme

- 5. The Cayman Scheme proposes a compromise and arrangement between the Company and Scheme Creditors. The Scheme Creditors comprise all of the Company's creditors with unsecured claims (to include both the claims of its unsecured creditors and those of its secured creditors in respect of the portion of their claims which are not secured).
- 6. The purpose of the Cayman Scheme (and the Hong Kong Scheme) is to compromise the Company's existing unsecured indebtedness and return it, and the Group, to a position of solvency. The Cayman Scheme will principally involve a cash injection from an investor (to reduce the Company's secured debt and provide cash consideration for the benefit of the Scheme Creditors) and a debt for equity swap (which will necessitate a restructuring of the share capital of the Company). Following the Cayman Scheme becoming effective, the Company will continue as a going concern, trading of the Company's shares on the SEHK can resume and all outstanding debts owed by the Company will be discharged.

7. In essence, the Cayman Scheme provides for the full and final release of creditor claims in exchange for:

- (a). dividends pursuant to the Cayman Scheme, which will include a share in the cash consideration of HK\$80 million and other retained assets to be realised.
- (b). a share in 1,868,176,188 of the Company's shares, representing approximately 10% of the enlarged issued share capital of the Company.

8. No secured claim will be admitted into the Cayman Scheme and therefore no secured creditor (in its capacity as such) will be entitled to any distribution under the terms of the Cayman Scheme unless it has either (i) agreed the appraised value of its security with the Scheme Administrators and participated in the Cayman Scheme as a Scheme Creditor for the unsecured portion of its admitted claim; or (ii) released its security and participated in the Cayman Scheme as a Scheme Creditor for its entire admitted claim which will be treated as unsecured.

9. The JPLs have conducted a detailed analysis of the return that the creditors would likely receive pursuant to the Cayman Scheme (8.7 - 11.4%) compared with the return that they would likely receive in the alternative of an insolvent liquidation (2.7%). This enables, on an indicative basis, a comparison of the outcome for Scheme Creditors under the Cayman Scheme with that in liquidation. If the Cayman Scheme is not approved and implemented, the JPLs consider it to be inevitable that the Company (and the Group) will be placed into insolvent liquidation (presumably in Hong Kong and possibly in this jurisdiction).

The Convening Order

10. On 16 December 2020, the Company filed the petition and a summons seeking an order that the Company be given leave to convene a meeting of Scheme Creditors for the purpose of considering and, if thought fit, approving the Cayman Scheme.

11. On 31 December 2020, I issued an order (the ***Convening Order***) granting leave on the following terms:

- (a). that there be a single class of unsecured creditors, i.e. the Scheme Creditors.
- (b). that there be a meeting of Scheme Creditors (the ***Cayman Scheme Meeting***) at 10am (Hong Kong time) on 22 January 2021 in Hong Kong with a connection via video link to





the offices of the JPLs' attorneys in Cayman (to allow those in Cayman to hear and participate in the proceedings in Hong Kong). The Convening Order stated that it was permissible for the Cayman Scheme Meeting to take place at the same time and location as the meeting to consider the Hong Kong Scheme. Creditors were permitted to attend in person, in proxy, by a zoom remote link or telephone in the manner described and in accordance with the procedures set out in the explanatory statement (which were needed to comply with Hong Kong's COVID regulations). Documents filed were to be treated as filed for the purpose of both schemes and only one vote was required and was to be treated as a vote cast at both scheme meetings and for the purpose of both schemes.

- (c). that Scheme Creditors were to be sent a notice of the Cayman Scheme Meeting and the documents listed in paragraph 5 of the Convening Order (the *Scheme Documents*) by email or courier.
- (d). notice was also to be given by various methods of advertisement and publication.
- (e). within 7 days of the Cayman Scheme Meeting, the Chairman was to report the proceedings and result to the Court.

The Cayman Scheme Meeting

- 12. As was confirmed in Mr. Ho's Fourth Affirmation, all creditors were sent the Scheme Documents by email and/or courier on 30 December 2020. Notice was also given in accordance with the Convening Order by (i) an announcement to the SEHK; (ii) an advertisement in *The Standard*; (iii) an advertisement in *Sing Tao Daily*; and (iv) notice in the Cayman Islands Gazette.
- 13. The Cayman Scheme Meeting was held at the Hong Kong Management Association venue in accordance with the Convening Order with a connection via video-link to the offices of Campbells in the Cayman Islands at 9pm (Cayman time) on 21 January 2021 (which was 10am Hong Kong time on 22 January 2021). Mr Ho acted as the chairman of both scheme meetings.
- 14. Prior to the Cayman Scheme Meeting, the JPLs received a total of eight notices of claim for voting purposes and seven proxies. Ultimately only five Scheme Creditors participated in the Cayman Scheme Meeting (Prosper Talent Limited, Pure Virtue Enterprises Limited, China Huarong Macau (HK) Investments Holdings Limited, Robertsons and Crowe (HK) CPA Limited). The other three Scheme Creditors which had filed notices either chose not to attend the



Cayman Scheme Meeting or their notice was rejected in full by the chairman on the basis that their claim was secured and the estimated value of the security held exceeded the value of the claim. The notices filed by Prosper Talent Limited and Pure Virtue Enterprises Limited, two secured creditors, were allowed in part by the chairman, to the extent that the estimated value of relevant security interests held by these secured creditors was insufficient to satisfy their claims. The notice filed by China Huarong Macau (HK) Investments Holdings Limited was allowed in full by the chairman because he accepted that the value of security interest held by this secured creditor will be nil.

15. Accordingly, five Scheme Creditors attended the Cayman Scheme Meeting by proxy (and gave their proxies to different individuals so that five persons were in attendance at the Cayman Scheme Meeting). They voted unanimously in favour of the Cayman Scheme. No Scheme Creditor abstained or voted against the Cayman Scheme. The total value of the claims of the five creditors voting at the Cayman Scheme Meeting was HK\$2,992,628,293.18. The Cayman Scheme was therefore approved by a majority in number representing at least 75% in value of the creditors present and voting, in person or by proxy at the meeting, as required by section 86(2) of the Act. It appears that the amount owed to the creditors voting at the Cayman Scheme Meeting represented approximately 96% of the total estimated unsecured debt of the Company.

The law

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.

The statutory requirements and the Convening Order

18. The Cayman Scheme clearly falls within section 86 of the Act: it is an arrangement between the Company and a class of its creditors. The requirements of the Convening Order were also clearly complied with. The Cayman Scheme Meeting appears to have been properly conducted. The statutory majorities were also achieved. 100% of those present by proxy voted in favour of the Cayman Scheme.

Minority protection

19. On the evidence before me, it appears that the class of Scheme Creditors who were the subject of the Cayman Scheme Meeting was fairly represented by those who attended the meeting, and there is no evidence to suggest that the statutory majority was acting other than *bona fide*, or to suggest that they were coercing the minority in order to promote interests adverse to those of the class.

Rationality

20. The Cayman Scheme is obviously one that an intelligent and honest person, a member of the class concerned and acting in respect of his own interest, might reasonably approve. In particular, the commercial purpose of the Cayman Scheme was clearly explained in the explanatory statement and the Scheme Documents and it appears that the Cayman Scheme offered material benefits to Scheme Creditors (the return which the Scheme Creditors would likely receive pursuant to the Cayman Scheme of 8.7 to 11.4%, while not representing a substantial recovery, was considerably greater than the return of only 2.7% which they were expected to receive in the event that the Cayman Scheme was not approved or sanctioned and if an insolvent liquidation resulted). Furthermore, the Cayman Scheme was unanimously supported by the Scheme Creditors at the Cayman Scheme Meeting and it appears that, as noted above, the value of the



claims of the five creditors voting at the Cayman Scheme Meeting represents a very substantial proportion of the total unsecured liabilities of the Company (as estimated by the JPLs, recognising that there is some uncertainty as to the quantification of unsecured claims since this depended on the value and proceeds realised in respect of collateral held by the secured creditors). In such a case the Court will not readily differ from the commercial assessment of the creditors as to their own interests.

Blot on the Scheme

21. The evidence indicates that there were no defects which could constitute a blot on the Cayman Scheme.

Discretion – impact of a Scheme Creditor’s claim being governed by a law other than Cayman or Hong Kong Law

22. There is some debt which the Cayman Scheme purports to compromise that is not governed by Cayman Islands law. It is also not governed by Hong Kong law. The issue was identified at the convening hearing when the Company submitted and I accepted that the matter would fall to be considered at the sanction hearing in light of the action taken by the creditor concerned.
23. The JPLs are aware of one creditor, whose claim against the Company in the sum of approximately HK\$48m (approximately US\$6.2m) is governed by Macau law (the **Macau Creditor**). The Macau Creditor’s claim amounts to approximately 1-2% of the total debt of the Company.
24. The Macau Creditor was given notice of the Cayman Scheme Meeting and copies of the Scheme Documents were sent to him by email and courier. However, he did not make contact with the JPLs, did not return the forms, and did not seek to participate in or attend the Cayman Scheme Meeting.
25. The Company accepted that while the Macau Creditor was to be treated in this jurisdiction as bound by the Cayman Scheme (the discharge effected by the Cayman Scheme and the order sanctioning it will be effective as a matter of Cayman Islands law irrespective of the governing law of the debt – see the judgment of the Privy Council, on appeal from the Supreme Court of Victoria, in *New Zealand Loan and Mercantile Agency Company, Limited v Morrison* [1898] A.C. 349), since the Macau Creditor had not submitted to the jurisdiction of this Court and since the debt owed to him was not governed by Cayman law, there was a serious risk that the Cayman



Scheme and the sanction order could not be made effective and enforced against him in the PRC or other jurisdictions. This was the case in jurisdictions which refused to recognise foreign schemes or restructuring proceedings and those common law jurisdictions which followed the English Court of Appeal's decision in *Anthony Gibbs & Son v La Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399, to the effect that a discharge of a debt pursuant to a foreign bankruptcy or restructuring proceeding would only be recognised if the proceeding took place in the jurisdiction of the governing law of the debt or possibly in a place that would be recognised in the jurisdiction of the governing law of the debt. The same issue arose with respect to the Hong Kong Scheme, since the Macau Creditor had not submitted to the jurisdiction of the Hong Kong court and the debt owed to him was not governed by Hong Kong law.

26. The Company submitted that nonetheless the Court could and should sanction the Cayman Scheme provided that it was satisfied that the Cayman Scheme would achieve a substantial effect and that the Court would not be acting in vain or making an order which had no substantive effect or would not achieve its purpose. The Court needed to determine, in the exercise of its discretion, whether to sanction the Cayman Scheme on this basis.

27. As regards authorities dealing with the approach that the Court should adopt in a case such as this, the Company referred me to a decision of Mr. Justice Harris in Hong Kong in another case, *In the matter of China Lumena New Materials Corp (In Provisional Liquidation)* [2020] HKCFI 338 (*China Lumena*) (the Company originally only provided me with a copy of the judgment in *China Lumena* but I directed that the authorities referred to by Mr. Justice Harris also be filed and provided to me). In that case, the Hong Kong scheme purported to compromise debt governed by PRC law. 42% of the debt covered by the scheme was owed to a PRC creditor and was governed by PRC law. The PRC creditor did not vote at the scheme meeting although a letter had been sent by its Zhejiang branch to say that it supported the scheme but that its representatives had encountered difficulties in obtaining approval to leave the PRC to attend the scheme meeting and its Hong Kong branch which was also a creditor had voted in favour of the scheme. Mr. Justice Harris noted that there was no mechanism for enforcing or obtaining recognition of the scheme in the PRC. He considered that the key issue was whether in these circumstances the court should exercise its discretion to sanction the scheme having regard to the court's unwillingness to sanction a scheme which had no or only a limited utility, as he had explained in another decision of his, *Winsway Enterprises Holdings Ltd* [2017] 1 HKLRD 1 (*Winsway*). There he had noted (at [12]) that the utility of a scheme could be called into question:

“if there is a serious question over the extent to which a scheme will be enforceable against foreign creditors. However, it is well established that in assessing whether or not this is



the case the court takes a robust and practical approach. For example, in re Perusahaan Perseroan (Persero) PT Perusahaan Penerbangan Garuda Indonesia [2001] EWCA Civ 1696 at [27] an English scheme in respect of an Indonesian company was sanctioned despite the existence of dissenting creditors and despite the fact that there was no parallel scheme in Indonesia or formal recognition of the English scheme in Indonesia.”

He concluded (at [13]) that:

“Ultimately, the guiding principle is that the court should not act in vain or make an order which has no substantive effect or will not achieve its purpose. The principle does not require either worldwide effectiveness or worldwide certainty. Thus it does not require that the court must be satisfied that the scheme will be effective in every jurisdiction worldwide: its focus is on jurisdictions in which, by reason of the presence there of substantial assets or in which creditors might make claims, it is especially important that the scheme be effective. The court will sanction the scheme provided it is satisfied that the scheme would achieve a substantial effect: Re Lehman Brothers International (Europe) (No.10) [2018] EWHC 1980 (Ch.).

As there would appear to be no reason to think that there is a [PRC] creditor who is likely to try to enforce its claim in Hong Kong against the Company arguing that it is not bound by the scheme because [PRC] law governs its debt, it seems to me that this is a proper case for the court to proceed on the basis that the scheme will probably serve its purpose, has utility and should be sanctioned.”

28. In *Re Lehman Brothers* Mr Justice Hildyard had said as follows:

“187. Having regard to the general principle that the English court will not act in vain or make an order which has no substantive effect or will not achieve its purpose, and echoing Sampo Japan Insurance Inc v Transfercom Ltd [2007] EWHC 146 (Ch) at [18]- [20] and Rodenstock at paras. 73 to 77, in Re Magyar at [16], David Richards J said:

“The court will not generally make any order which has no substantial effect and, before the court will sanction a scheme, it will need to be satisfied that the scheme will achieve its purpose.”

188. However, the principle does not require either worldwide effectiveness, or certainty. Thus, it does not require that the Court must be satisfied that the scheme will be effective in every jurisdiction worldwide: its focus is on jurisdictions in which, by reason of the presence there of substantial assets to or because of which creditors might make claims, it is especially important that the scheme be effective. Further, and as Snowden J explained in Re [Van] Gansewinkel at [71],

“The English court does not need certainty as to the position under foreign law – but it ought to have some credible evidence to the effect that it will not be acting in vain.”

189. Thus, in Sampo, when sanctioning an insurance transfer scheme under the Financial and Market Act 2000 (which is analogous in the context), David Richards J said this:



“[17] My principal concern, when the application was first before me on 14th December 2006, was to understand the true impact, if any, of the proposed transfer on the business ... What, if any, effect will the transfer have if proceedings against Sompo were brought in those jurisdictions where it did have substantial assets? Would the transfer be recognised in those jurisdictions? If not, what purpose would be served by the transfer?”

[18] It was relevant, therefore, to have some evidence as to the proportion of the transferred policies which were governed by English law or other UK law and, particularly if the proportion were small, to have some evidence as to the effect of the transfer in Japan and perhaps other jurisdictions where Sompo has substantial assets.

[19] If it appeared that the transfer would have little or no significant effect, it raised an issue as to whether in its discretion the Court should sanction the transfer. It is established that, on comparable applications under the Companies Act 1985, the Court will not act in vain ...

[26] Overall this evidence leaves me less than convinced that the scheme once sanctioned will definitely be effective as regards proceedings in foreign jurisdictions to enforce claims under policies which are governed by foreign law, although I acknowledge that it provides a proper basis for concluding that it may well be so effective in Japan and the United States. More importantly, as I have mentioned, the evidence establishes that over 27% of the policies in number and by reference to reserves are governed by English law, and it is reasonable to suppose that the transfer will be effective in any relevant jurisdictions as regards those policies. The proposed scheme will therefore achieve a substantial purpose. The fact that the scheme also extends to a larger class of business not governed by English law is not, in my judgment, a good ground for refusing to sanction the scheme. Whether the scheme is recognised as effective in Japan or the United States or elsewhere will, if necessary, be tested in due course in proceedings in those jurisdictions.”

190. The Administrators submitted, and I agree, that the present case is stronger than Sompo: it is difficult to see how creditors could enforce their statutory interest entitlements in the English administration of an English company under English law in any jurisdiction other than England, and only a small proportion of the Surplus is situated outside of England.”

29. The Company noted that the evidence demonstrated that the Company’s assets were located in the Cayman Islands or Hong Kong, save for one asset, namely an inter-company receivable owed to the Company by a BVI subsidiary in the Group. The assets in the Cayman Islands would be protected as a result of the Cayman Scheme and the sanction order to be made by this Court which in this jurisdiction would be regarded as being effective against and binding the Macau Creditor. The assets in Hong Kong would similarly be protected by the Hong Kong Scheme and sanction order. The Company argued that while there was a risk that action could be taken by the Macau Creditor to obtain a judgment in a third jurisdiction which did not recognise either of the



schemes, for example Macau (and the Company was unable to explain whether there was a choice of courts and submission to jurisdiction clause in the Macau Creditor's contract with the Company) and to enforce that judgment in the BVI against the receivable, there was no evidence or indication from the Macau Creditor that he intended to do so (he had made no contact with or threats against the Company) and the Company might be able to take steps to prevent execution of such a judgment in view of the Cayman Scheme and the Hong Kong Scheme (although the Company at this stage had not determined what action was available or would be taken). The Company submitted that in view of the possibility that no action might be taken by the Macau Creditor, the relatively small amount owed to the Macau Creditor compared to the amounts owed to Scheme Creditors, the overwhelming support of Scheme Creditors and the fact that any action taken by the Macau Creditor would not adversely or materially affect the implementation of the Cayman Scheme, the Court should exercise its discretion and sanction the Cayman Scheme.

30. The Company also relied on the decision and reasoning of Mr. Justice Harris in his draft judgment in this case. He concluded, after citing passages from his earlier judgments in *China Lumena* and *Winsway* that:

“The Scheme if sanctioned in Hong Kong will prevent [the Macau Creditor] taking enforcement proceedings in Hong Kong. Accordingly, [the Macau Creditor’s] debt does not impact adversely on the utility of the Scheme. I will, therefore, make the order which has been handed to me sanctioning the Scheme.”

31. In my view, the following points summarise the approach which the Court should adopt in the present and similar cases:

- (a). the Court needs to take into account all relevant circumstances when deciding whether to exercise its discretion to sanction the scheme.
- (b). the Court needs to be provided with evidence as to the circumstances and in particular the realistic risks arising from and associated with the creditor not being bound by the scheme or the sanction order. This was why in this case I required further evidence to be provided as to whether the Company had considered whether the Macau Creditor could obtain a judgment in a jurisdiction in which the Cayman Scheme was not recognised and enforce that judgment or otherwise obtain execution in a jurisdiction in which the Company had assets and which would also not recognise the Cayman Scheme. I indicated that there should be evidence as to the nature and extent of the risks associated with having a creditor, who is owed a not insubstantial sum, left outside and not bound by the Cayman Scheme. In this connection, I note the following comments of Snowden J in *Van*

Gansewinkel Groep BV [2015] EWHC 2151 (Ch) at [71], after referring to *Sompo Japan* (underlining added):

“In cases such as the present, the issue is normally whether the scheme will be recognised as having compromised creditor rights so as to prevent dissenting creditors from seeking to attach assets of the scheme companies in other countries on the basis of an assertion of their old rights. The English court does not need certainty as to the position under foreign law—but it ought to have some credible evidence to the effect that it will not be acting in vain.”

- (c). the Court needs to consider whether on the evidence it is appropriate to sanction the scheme despite and having regard to the risks of enforcement action by creditors who are not bound and are likely to be able to take action in other jurisdictions. This assessment will be made in light of the location of the company’s assets and the impact of any enforcement action (including any winding up proceedings in other jurisdictions) on the implementation of the scheme and company in the future (in so far as that may impact the recovery and rights of creditors and others under the scheme). The Court will consider, as Lloyd J put it in his judgment at first instance in *Garuda* (2001 and WL 1171948, which was upheld by the Court of Appeal) the “risk of disturbance.” In appropriate cases, the fact that significant claims may not be bound by the scheme may not prevent the Court sanctioning the scheme where there are clear and real benefits that will be derived from the scheme and which are unlikely to be disturbed by hostile action following sanction. In *Sompo Japan*, a case involving an insurance business transfer scheme where what mattered most was the effectiveness of the transfer, the evidence established that only something over 27% of the policies in number and by reference to reserves were governed by English law. Nonetheless, since it was reasonable to suppose that the transfer would be effective in any relevant jurisdictions as regards those policies, the scheme would achieve a substantial purpose, irrespective of the fact that it also extended to a larger class of business not governed by English law. If the scheme is likely to be effective to a substantial extent and provide parties with the benefits they anticipated to a substantial or material extent, the Court will be likely to sanction the scheme despite some creditors not being bound and the risk of enforcement action by them. But the Court will wish carefully to consider the risks in each case. It will be relevant that the creditor or creditors in question had indicated support for the scheme and an intention not to take action, as was the case in *China Lumena*, or that there was evidence of foreign law that the courts in other relevant jurisdictions were unlikely to act inconsistently with the scheme, as in *Garuda*.



(d). it also seems to me that the Court needs to consider the issue of fairness in this context. If those who are bound by the scheme have accepted a haircut or other variation or discharge of their rights and claims, it may be unfair to sanction the scheme and hold them to the terms of the scheme if there is a serious risk that other creditors will be able to enforce their pre-scheme claims in full or to a substantial extent (or subsequently negotiate a payment or recovery above that received by Scheme Creditors under the scheme). It may be relevant in this context to have regard to the extent to which creditors were made aware of the risks in the explanatory statement before voting, as in *Garuda*.

32. I have concluded that in the present case, it is appropriate to exercise my discretion to sanction the Cayman Scheme. I accept the Company's submissions, as summarised in paragraph 29 above. This is not a case in which the creditor concerned has indicated a willingness to support the Cayman Scheme or given an indication that he will take no action to enforce his claim, nor is there evidence as to the extent to which the Company could prevent such enforcement or the likely impact of a successful enforcement action on the Company. However, I accept that in view of the Macau Creditor's complete radio silence and the absence of any indication from him that he intends to take any action, there is a real possibility that no action will be taken; that even if action is taken, the Company may be able to take some steps with a view at least to delaying or avoiding enforcement action and that even if enforcement action were successful in the BVI, the amounts involved are sufficiently small to avoid interfering with the implementation of and to undermine the benefits obtained by Scheme Creditors under the Cayman Scheme (I note that the risks were not mentioned in the explanatory statement but the issue was mentioned to me at the convening hearing and on the facts of this case I do not consider that this prevents me from or materially weakens the case for sanctioning the Cayman Scheme). I also consider that in this case it is right to give considerable weight to the judgment of Mr. Justice Harris and to follow the decision he has reached in relation to the Hong Kong Scheme.



Mr. Justice Segal
Judge of the Grand Court, Cayman Islands