SLAUGHTER AND MAY/

CLIENT BRIEFING

DECEMBER 2020

TWO HEADS ARE BETTER THAN ONE:

CA SANCTIONS *ALLIED PROPERTIES* SCHEME OF ARRANGEMENT

Summary

On 23 November 2020, the Court of Appeal (**CA**) overturned a decision of the Court of First Instance (**CFI**), in which the CFI declined to sanction a scheme of arrangement to implement the privatisation of Allied Properties (H.K.) Limited, a Hong Kong incorporated company listed on the Hong Kong Stock Exchange. The CA decision is welcome. It corrects an error of law of the CFI in applying the headcount test to a Hong Kong company, and provides reassurance that the court will be reluctant to overturn a scheme approved by shareholders. But the original decision of the CFI not to sanction the scheme – for the first time in a decade – should remind parties of the importance of satisfying procedural and statutory requirements applicable to a scheme and that the court will not be a mere “rubber stamp”.

The Headcount Test

The CFI judgment stated that, as a matter of company law, the scheme needed to be approved by (i) shareholders representing not less than 75 per cent. of the voting rights present and voting (the value test); and (ii) the majority in number of shareholders present and voting (the headcount test). The CA confirmed that the headcount test no longer applies to Hong Kong incorporated companies, and that the judge had erred at first instance. Instead, under the Companies Ordinance, in addition to the value test, the votes cast against the scheme must not exceed 10 per cent. of the total votes attaching to “disinterested shares”.

Special Dividend

The terms of the scheme provided that for each share in Allied Properties a shareholder would receive, in addition to the offer price from the offeror, a special dividend from Allied Properties. The CFI found the explanation of the special dividend and the fact that it was to be funded out of the profits of Allied Properties so unsatisfactory as to mean that insufficient explanation of the scheme as a whole had been given to shareholders. In particular, the judge found that shareholders should have been informed that they could expect that the available profits would be distributed to them even if the scheme was not approved.

The CA disagreed; it was not for the court to impose its own views on the directors’ dividend policy or operate on the basis that shareholders would receive any dividend if the scheme was not implemented. In fact, the scheme documentation was clear that Allied Properties’ existing dividend policy would be maintained in the event that the scheme was not approved, thereby giving shareholders sufficient information to take a view on the merits of the proposal.

Key takeaways

The CA’s decision provides a welcome correction in respect of the headcount test and clarifies that, where a special dividend forms part of the scheme, directors neither need to agree to distribute available profits even if the scheme fails nor present that as the comparison to the offer price. More fundamentally, the judgment also affirms the key principle that the court will be reluctant to interfere with a scheme with overwhelming shareholder support or, as the court put it, “businessmen are much better judges of what is to their commercial advantage that the court could be”. That said, the case serves as a reminder that the courts will closely examine the substantive and procedural components of a scheme – and, in particular, the sufficiency of the disclosure made to shareholders in the scheme documentation – in exercising their discretion as to whether it should be sanctioned.

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