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# DETERMINING COURTS' JURISDICTION TO SANCTION SCHEMES OF ARRANGEMENT INVOLVING THIRD PARTY RELEASES: A POLICY ANALYSIS

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It is often necessary for a company to reach a compromise with its creditors, and where necessary, third parties. A useful tool for facilitating such a compromise is the scheme of arrangement, a court-controlled procedure for restructuring the relationship between the company and its members or creditors. The scheme provisions are, however, silent on whether a third-party release may be incorporated into a scheme. Since the mid 2000s, the Australian and UK courts have developed two different tests, namely the nexus test and the necessity test, to fill this statutory gap. This paper discusses policy concerns, if any, that the alternative tests have given cause to, and if the answer is 'yes', how these concerns should be addressed. The paper concludes that the necessity test does, and the nexus test does not, give cause for concern and that the latter should be adopted for determining scheme jurisdiction in all cases.

## I. Introduction

This paper discusses whether two judge-made rules for deciding the courts' jurisdiction to sanction a scheme of arrangement (SOA) involving third-party releases (TPR) give cause for concern, and if so, how the problems may be addressed. Typically provided in Anglo-commonwealth jurisdictions, the SOA is a court-sanctioned procedure for restructuring a company's relationship with its shareholders or creditors. TPRs are often required for a company to reach a compromise with its creditors for the purpose of a restructuring. They may also be necessary for settling litigations arising from a liquidation of the company involving multiple parties.[1] Third parties in this context include guarantors of the company's debt[2] or parties against whom the creditors may (potentially) have a claim on other grounds.[3]

The SOA is not the only available procedure to accomplish these tasks, and whether a TPR is permitted in a given situation is determined by, *inter alia*, the wording of the governing provisions. The wording of restructuring provisions

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1 See the comments by Chisholm J in *Te Runanga O Ngai Tahu v Glenharrow Holdings Ltd HC Christchurch* CIV-2005-409-15 (12 August 2005) (NZ) at [14] and the discussion in Part III.

2 *Daewoo Singapore Pte Ltd v CEL Tractors Pte Ltd* [2001] 2 SLR(R) 791 [*Daewoo*]; *Re La Seda De Barcelona SA* [2010] EWHC 1364 (Ch) [*La Seda*].

3 *Re T&N Ltd and others (No 4)* [2006] EWHC 1447 (Ch) ([*T&N (No 4)*]; *Re Opes Prime Stockbroking Ltd* [2009] 258 ALR 362 [*Opes*]; *Re Far East Capital SA* [2017] EWHC 2878 (Ch) [*Far East Capital*].

varies across juridictions, unsurprisingly. The wording in an insolvency/restructuring regime may leave room for different understandings on the permissibility of a TPR. Chapter 11 of the U.S. Bankruptcy Code is such a regime.[4] A restructuring statute may expressly permit TPRs but prescribe a scope within which a release may be granted, provided that the requisite conditions are satisfied. Examples include the recently enacted Dutch and German restructuring provisions.[5] A restructuring statute may expressly prohibit TPRs too. China's Enterprise Bankruptcy Law, for example, prohibits the release of a given type of third party *(eg,* the guarantors).[6] In the case of SOA provisions, the wording does not say whether, or the circumstances under which, a TPR mechanism can be incorporated into a scheme.[7]

The silence of the SOA provisions just mentioned requires the court, in deciding whether the proposed project involving a TPR is within the definition of a 'scheme', to fill the statutory gap.[8] Courts in the UK and Australia have, since the second half of the 2010s, developed two different tests for deciding the circumstances under which a TPR may be incorporated into a scheme. The merits of the two tests have been commented on in cases recently decided in the UK and a couple of other jurisdictions.[9] An issue that requires further consideration is whether either test gives cause for concern, and if so, how this should be addressed. This paper makes an attempt to answer these questions in the hope of aiding the further development of jurisprudence on TPR within the context of the SOA and beyond.

This paper will carry out its task through an assessment of the two tests under the lens of the pertinent legal policies. The concept of 'legal policy' adopted for this paper is the one formulated by Justice Barak, who says that legal policy refers to "the goal of legal norms – the principles, social goals, and standards that the legislated

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4 *Opes, supra* note 3 at [49]; Eamonn O'Hagan, "On a "Related" Point: Rethinking Whether Bankruptcy Courts Can "Order" the Involuntary Release of Non-Debtor, Third-Party Claims" (2015) 23 Am Bankr Inst L Rev 531; Dorothy Coco, "Third-Party Bankruptcy Releases: An Analysis of Consent Through the Lenses of Due Process and Contract Law" (2019) 88(1) Fordham L Rev 232.

5 For example, a release in a prescribed context is permitted, where the required conditions are satisfied, under art 327 of the Dutch restructuring regime, the Wet homologatie onderhands akkoord 2020 (The Netherlands) (WHOA), and s 4(1) of the German Act on Stabilisation and Restructuring Framework (StaRUG). See Allen & Overy, "WHOA report" at https://www.allenovery.com/global/-/media/allenovery/2_documents/news_and_insights/publications/2019/7/whoa-report.pdf (18 March, 2023); Allen & Overy, "The German StaRug-Scheme" at <https://www.jdsupra.com/legalnews/the-german-starug-scheme-act-on-the-19931> (18 March 2023); Thomas Bil, "An overview of the upcoming Dutch scheme" (2020) 33 Insolvency Intelligence 99.

6 For example, Enterprise Bankruptcy Law of People's Republic of China 2006, art 92.

7 For examples, see Corporations Act 2001 (Australia) s 411; Companies Act 2006 (United Kingdom) Parts 26 and 26A.

8 In the absence of such a scheme, the court does not have jurisdiction: *Re A & C Constructions Pty Ltd* [1970] SASR 565 at 573 [*Re A & C*]; *T&N (No 4), supra* note 3; R P Austin & I M Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (17th ed) (Sydney: LexisNexis, 2018) at [24.040].

9 *Re Empire Capital Resources Pte Ltd* [2018] SGHC 36 [*Empire Capital*]; *Pathfinder Strategic Credit LP and another v Empire Capital Resources Pte Ltd and another appeal* [2019] 2 SLR 77 (CA) [*Pathfinder*]; *Re Ballantyne Re Plc* [2019] IEHC 407 (HC, Ireland) [*Ballantyne*]; *Re Nordic Aviation Capital Designated Activity Company* [2020] IEHC 445 (HC, Ireland) [*Nordic*]; *Re Swissport Fuelling Ltd* [2020] EWHC 3413 (Ch) at [73] [*Swissport*]; *Re Port Finance Investment Ltd* [2021] EWHC 378 (Ch) [*Port Finance*].

or judge-made legal norm is intended to attain."[10] The remainder of the paper is organised as follows. Part II outlines the function and mechanics of the scheme procedure. Part III discusses the various contexts in which a TPR is required. Part IV examines the alternative jurisdictional tests. Part V debates the potential concerns, if any, arising from either of the two tests, and Part VI concludes.

## II. The Scheme of Arrangement

As noted, the SOA is a procedure for restructuring a company's relationship with its members or creditors. A members' scheme may be used, among other things, to reorganise a company's share capital, change the members' class rights, transfer control of a company, or redomicile the company.[11] A creditors' scheme allows the scheme company to restructure its debt relations with its creditors. The SOA is a majority-rule based collective decision-making device. Its main function is to bind the dissentients to the decision of the majority claimholders. In other words, it is a cramdown tool.[12] Without such a device, a rights-holders' decision will have to be made through unanimous consent, which may be difficult and costly to obtain.[13] The claimants make their decisions through meetings convened pursuant to a court order. In the context of a creditors' scheme, the level of majority required for passing a resolution is typically a majority in number representing 75% in value of the creditors present and voting.[14] A scheme becomes binding on all parties when it is sanctioned by the court and registered with the companies regulator.[15]

The shapes of all SOA provisions in various jurisdictions of British abstraction are not identical.[16] This notwithstanding, given the common rudimentary ancestor, namely, the Joint Stock Companies Arrangement Act 1870 (United Kingdom),[17]

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[10] Aharon Barack, *Judicial Discretion* (New Haven: Yale University Press, 1987) at 222. See also the text accompanying note 58 for the definition provided by authors of *Bennion on Staututory Interpretation*.

[11] Jennifer Payne, *Schemes of Arrangement: Theories, Structure and Operation* (Cambridge: CUP, 2014) at 151 [Payne]; Austin & Ramsay, *supra* note 8 at [24.020].

[12] Jennifer Payne, "Debt Restructuring in English law: Lessons from the United States and the Need for Reform" (2014) Law Q Rev 282 at 291 ("A cramdown enables the restructuring to be imposed on dissenting creditors.")

[13] Charles Z Qu, "Towards an Effective Scheme-Based Corporate Rescue System for Hong Kong" (2012) 12(1) Journal of Corporate Law Studies 85 at 89.

[14] Corporations Act 2001 (Australia) s 411(4)(a)(i); Companies Act 2006 (United Kingdom) s 899(1). Note that for the purposes of the recently enacted Part 26A restructuring plan under UK's 2006 Act, the requisite level of majority is 75% in value only (*ie*, the headcount test is not required for the purposes of a Pt 26 Plan: s 901F (1)).

[15] Payne, *supra* note 11 at 291.

[16] An example is that the UK version of the scheme regimes are not, whereas the Australian style of the scheme procedures are, linked to a stay of proceeding provision: Corporations Act 2001 (Australia) s 415D (1)(b); Companies Act 1967 s 210 (10). A further example is that under the Australian scheme regime the court does not have power to sanction a proposed scheme unless, *inter alia*, the regulator, the Australian Securities and Investment Commission (ASIC), had a reasonable opportunity to (i) examine the scheme terms and the draft disclosure document and (ii) make submissions to the court: Corporations Act 2001 (Australia) s 411(2)(b). Other versions of scheme regimes do not contain similar provisions.

[17] Austin & Ramsay, *supra* note 8 at [24.050].

certain central requirements remain common for all versions of the scheme procedure. Apart from the decision-making mechanism that has been referred to, the scheme regimes in all jurisdictions share at least two common features in terms of the nature and scope of the procedure, namely: (i) that an SOA relates to a *scheme* between the company and its members or creditors and in the absence of such a scheme, the court does not have jurisdiction,[18] and (ii) that, as noted, the scheme provisions are silent on whether or not the circumstances in which a plan involving TPRs is within the concept of 'scheme' (hence the court's scheme jurisdiction).

A scheme is constituted by either a 'compromise' or 'arrangement'. Therefore, in closing the statutory gap in the SOA provisions, the court must determine whether the company's proposal, which may involve a TPR, constitutes either a compromise or an arrangement. The court does this by using a test for determining whether that proposal falls within the definition of 'scheme'. Courts agree that a scheme may incorporate a TPR mechanism, although they differ in the test for deciding the circumstances in which a release is permitted (the jurisdictional test), hence the two tests. The tests are referred to in reported cases as the 'test of necessity' (the necessity test) and the 'sufficient nexus test' (the nexus text) respectively.[19] To identify policy concerns on the development of jurisprudence on TPRs, an examination of both the content of the two tests and the contexts in which TPRs are sought is necessary.

## III. The Contexts in Which TPRs are Necessary

A case review reveals that, where the SOA is used as an insolvency or restructuring tool, TPRs have been sought in at least six different situations. These include: (i) where the third party to be released is a guarantor of the company's debt, (ii) where two entities act as co-principal debtors or where the third party to be released has been granted indemnity, (iii) where the third party to be released is involved in the preparation of the scheme, (iv) a situation similar to that in *In re T&N Ltd (No 4)*,[20] (v) large and complex group liquidation involving multiple parties, and (vi) where it is necessary to release the principal debtor as a third party.

### A. *Guarantors*

A company's debt may be guaranteed by a third party, such as the debtor's directors,[21] the firm's holding company[22] or subsidiaries,[23] other members of the same

18 *Re A & C*, *supra* note 8 at 573; *T&N (No 4)*, *supra* note 3; Austin & Ramsay, *supra* note 8 at [24.040].

19 These two tests will be examined shortly.

20 *T&N Ltd (No 4)*, *supra* note 3 and accompanying text.

21 *Daewoo, supra* note 2 (where the third party released was a director of the debtor); *Trust Company (Nominees) Ltd, Re Angas Securities Ltd v Angas Securties Ltd (No 5)* [2019] FCA 482 [*Trust Company*].

22 *Re Lecta Paper UK Ltd* [2020] EWHC 382 (Ch) [*Lecta paper*]; *Nordic, supra* note 9; *Re DTEK Energy BV* [2021] EWHC 1456 (Ch).

23 *Empire Capital, supra* note 9; *Pathfinder*, *supra* note 9 (where the guarantor is the subsidiary of a subsidiary); *Port Finance, supra* note 9.

corporate group,[24] financial guarantors,[25] or the debenture trustee.[26] In this situation, where the debtor proposes a scheme, it may be necessary to include a TPR clause in the scheme plan. Absent such a release, the creditors would be entitled to sue the guarantor, in which case the guarantor would have the right to claim the entire amount back from the debtor. This 'ricochet claim' would undermine the scheme in that it would make the debtor remain liable for the very amount sought to be compromised through the scheme.[27]

### B. *Co-contributor and Indemnity*

Where two entities act as co-principal debtors, say entity A and entity B, the scheme proposed by entity A may provide for the release of the liabilities of both entity A and entity B. For the reasons just discussed, this arrangement is necessary for the success of the scheme. The source of entity B's right to make a ricochet claim against entity A is the warranty or indemnity arrangement made between the two principal debtors.[28]

### C. *Parties Involved in the Scheme Preparation*

To facilitate the preparation of the scheme, it is necessary to request that the creditors waive their (potential) claims against those involved in the preparation of the scheme. These may include the debtor's legal advisers, directors, and employees, as well as the *ad hoc* group representing the whole body of creditors in the negotiation of scheme terms (if any).[29] A refusal to grant a release to these parties is likely to disincentivise them from participating in the preparation of the scheme. A release in this context is therefore essential for the success of the scheme.

### D. *The T&N (No 4) Situation*

This is a situation where the scheme involves, instead of a compromise between the debtor and its creditors, an arrangement between the creditors and third parties. The scheme proposed in *T&N (No 4)* was an arrangement under which the

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[24] *La Seda, supra* note 2; *Lecta Paper*, *supra* note 22; *Re Codere Finance 2 (UK) Ltd* [2020] EWHC 2683 (Ch) [*Codere Finance*]; *Re Hema UK 1 Ltd* [2020] EWHC 2558 (Ch); *Re Smile Telecoms Holdings Ltd* [2021] EWHC 395 (Ch).

[25] *Ballantyne, supra* note 9; *Re Colouroz Investment 2 LLC* [2020] EWHC 1864 (Ch) [*Colouroz*].

[26] *Trust Company*, *supra* note 21.

[27] *Re Noble Group Ltd* [2019] BCC 349 at [24]–[26] [*Noble Group*].

[28] *Colouroz*, *supra* note 25 at [72]; *Lecta Paper, supra* note 22 at [20]–[21].

[29] *Noble Group, supra* note 27. The need for releasing this type of third party is also recognised in reorganisation cases decided under Chapter 11 of the U.S. Bankruptcy Code: *In re Drexel Burnham Lambert Group*, 960 F.2d 285 at 293 (United States Court of Appeals for the Second Circuit, 1992); Michael S Etkin & Nicole M Brown, "Third Party Releases? – Not So Fast! Changing Trends and Heightened Scrutiny" (2015) 29(3) Association of Insolvency & Restructuring Advisors Journal 22 at 22.

so-called 'employers' liability' claimants (EL claimants)[30] were required to release their (contingent) claims against the providers of the EL insurance (EL insurers), which allegedly covered harms caused by exposure to asbestos. The holders of the EL policies were the scheme companies. On entering into the Administration order procedure, the companies' rights against the EL insurers were transferred to the EL claimants pursuant to the Third Parties (Rights against Insurers) Act 1930 (United Kingdom).

The scheme was proposed to settle the proceedings commenced by the Administrators against the two EL insurers to test the extent of the cover provided by the policies. Under the proposed schemes, the EL claimants were to release their claims against the EL insurers. As a *quid pro quo* for the release, the insurers were to contribute funds into a trust created for the purposes of, *inter alia*, meeting the claims of the EL claimants.

David Richards J held that the arrangement was within the meaning of the scheme for the purposes of s 425 of Companies Act 1985 (United Kingdom). This was because, *inter alia*, the rights of the company and those of the EL claimants and the EL insurers were interrelated, and all parties had an interest in a release of the EL claimants against the EL insurers.[31] Being a condition for the insurers' participation (and hence monetary contribution), the release was essential for the success of this beneficial scheme.

### E. *Large Scale Group Liquidation Involving Multiple Parties*

This is the situation in *Opes*.[32] There, schemes were proposed to compromise on a spate of actions by the former clients of the scheme companies. The schemes were propounded between a stockbroking services company, Opes Prime Stockbroking Ltd, and each of the three related companies on the one hand, and the creditors of each of these Opes entities on the other. The schemes were proposed for the purposes of, instead of the restructuring, the creditors' voluntary *winding-ups*, of these *Opes* entities.

The creditors' actions were brought on the ground of the alleged misleading conduct in the group's securities lending activities. The same plaintiffs also brought actions against the ANZ Bank and Merrill Lynch. The grounds of the actions against ANZ and Merrill Lynch included the banks' knowing receipt of securities as a result of an Opes entity's alleged breach of trust or fiduciary duties, as well as the banks' knowing involvement in Opes companies' misleading conduct. The liquidators

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30 'Those third parties…fell into three categories, namely (i) employees or former employees of the companies who had or might in future have claims for damages for personal injuries arising out of exposure to asbestos, (ii) dependents or relatives of such employees who had or might in the future have claims under the Fatal Accident Act 1976, and (iii) persons, principally employers, who had or might in the future have contribution claims under section 1 of the Civil Liability (Contribution) Act 1978': *T&N Ltd (No 4)*, *supra* note 3 at the headnote.

31 *T&N (No 4), supra* note 3 at [51]–[52].

32 *Opes, supra* note 3. For a more detailed discussion of the facts in this case see Jason Harris, 'Adjusting Creditor Rights Against Third Parties During Debt Restructuring', at http://ssrn.com/abstract=1794584 (28 March 2023).

and the Australian Securities and Investment Commission (ASIC) also foreshadowed claims against the banks. ASIC also foreshadowed claims against Opes Prime Stockbroking and its directors. The schemes were proposed as a result of the mediations with the banks.

The scheme proposal included a term on the release of the clients' claims against the banks and a subsidiary of Opes Prime Stockbroking, whose sole job was to hold securities as nominees for third parties. As the *quid pro quo* for the release, the banks would contribute AUD 226 million into a fund established for meeting the claims of the group's former clients. The purpose of the scheme was to, *inter alia*, resolve complex litigation arising from insolvency. The release of the banks, which was a precondition for the banks' financial contribution, would improve the claimants' position, and was essential for the success of the scheme.

### F. *Principal Debtor as Third Party*

Where a scheme is used as the insolvency/restructuring tool, there may be circumstances in which it is necessary or preferable for an entity other than the debtor to act as the scheme company releasing the debtor as a third party. This type of arrangement is necessary where, for example, the debtor is not in a position to propose a scheme because, under the terms of the loan agreement, proposing a scheme would constitute an 'event of default', the occurrence of which triggers enforcement actions against the debtor.[33] Another example is where the original debtor is incorporated overseas and is using a UK company to propose the scheme which helps establish a jurisdictional link with the forum state in order to use the SOA provisions provided under the law of forum state.[34] In the examples just mentioned, incorporating a release into the scheme is required for the success of the scheme.

Using a third party to promote the scheme may also facilitate the efficiency of the restructuring. An example is *Re Nordic Aviation Capital Designated Activity Co*,[35] where the scheme was proposed by the common guarantor (which was the ultimate holding company of the group) in respect of about 90 separate debt facilities. This arrangement helped achieve a speedy completion of the group restructuring scheme by, *inter alia*, providing a single point of entry across the financings of the group.[36]

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33 *AI Scheme* [2015] EWHC 1233 (Ch); *Re Gategroup Guarantee Ltd* [2021] EWHC 775 (Ch) [*Gategroup*].

34 *Codere Finance, supra* note 24; *Port Finance*, *supra* note 9.

35 *Nordic, supra* note 9.

36 For a discussion of this case, see Arthur Cox, "COVID-19 Restructuring Themes and Trends: Nordic Aviation Capital DAC (the "Scheme Company") High Court Judgment Briefing" at <https://www.arthurcox.com/COVID-19/corporate-and-ma/covid-19-restructuring-themes-and-trends-nordic-aviation-capital-dac> (14 March 2023); David Baxter and Stephen Ahern, "Dublin is open fur restructuring business" (2020) *Insolvency Intelligence* 120. An entity other than the original debtor has also been used to propose the scheme for the purposes of consolidating schemes proposed to entities within the same corporate group. The need to do so may arise where, unless the various schemes proposed by group companies are consolidated into one, the requisite level of creditors' approval would be unachievable for any of the schemes proposed. In *Pathfinder*, *supra* note 9, for example, a common guarantor, which was a related entity, was used to propose the scheme to the creditors of two respective group companies, releasing the two original debtors as third parties. While the Court of Appeal upheld the objectors' appeal against the convening leave granted by the court below on the ground of inadequate disclosure,

## IV. The Alternative Jurisdictional Tests

It is by now clear that there are often circumstances under which a TPR is required for securing the success, or increasing the efficiency, of the scheme. To be considered next are the policy concerns, if any, that either of the two jurisdictional tests may give rise to.

### A. *The Nexus Test*

This test is formulated by Finkelstein J in the landmark case, *Re Opes Prime Stockbroking Ltd (recs and mgrs apptd) (in liq)*:[37] "…Provided there is a sufficient nexus between a release and the relationship between the creditor and the scheme company, the scheme can validly incorporate the release."[38] To establish this 'sufficient nexus', according to Aedit Abdullah J in *Empire Capital*:

> [w]hat matters is … the nexus or connection between what is proposed and the liability of the applicant company. Breaking it down further, *there must be some connection between the applicant company's debt and what is sought to be released* [*ie*, the third party's liability].[39] [emphasis added]

The nexus test, as interpreted by Aedit Abdullah J, appears to be straightforward to apply. That said, how 'sufficient' the connection needs to be for a TPR to fall within the scheme jurisdiction may conceivably be contested. The answer to this question, it is submitted, is clear. In *In re Lehman Brothers International (Europe) (No.2),*[40] Lord Neuberger MR expressed the view, at [83] that, in relation to the scheme's capability of extending to or varying claims which the company creditors had against third parties, the decision in *T&N (No 4)* was near the outer limit of the scope of s 895 [of Companies Act 2006 (UK)]. According to Aedit Abdullah J, this was because in *T&N (No 4),* "the applicant company's liabilities were only remotely affected in the scheme – that is, in substance, only the claims against the third party were affected."[41] In *T&N (No 4)*, the company's liabilities were *potentially* affected

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it opined, *obiter dictum*, that the third-party release arrangement in the circumstance was "nothing objectionable" (at [23]). While the fairness of combining schemes for the purposes just mentioned may be subject to debate, the concern of the court at the convening stage, as the judge of the first instant case (*Empire Capital*, *supra* note 9) points out at [11], focuses on the scheme jurisdiction and fairness is a matter to be dealt with at the sanction stage.

37 *Opes*, *supra* note 3 at [55].

38 His Honour formulated this test through a review of a body of precedents, the most influential of which appears to be Blair JA's decision in the Canadian case of *Re Metcalfe & Mansfield Alternative Investments II Corp* 92 Ontario Reports (3d) 513 (Court of Appeal for Ontario, Canada), where Blair JA held, at [70], that the test for justifying a TPR, for the purposes of a Plan of Compromise and Arrangement provided for underthe Companies' Creditors Arrangement Act (RSC, 1985, c. C-36) (Canada), is 'a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan'.

39 *Empire Capital*, *supra* note 9 at [65].

40 [2010] Bus LR 489 [*Lehman Brothers*].

41 *Empire Capital, supra* note 9 at [53].

by the scheme. If the litigation was not settled, the company's liabilities could be affected in case the EL insurers succeeded in excluding harms caused by exposure to asbestos from the policy coverage.[42]

If Lord Neuberger MR's view on the outer limit of the scope of the scheme provision is right, it would be safe to treat the degree of the connection between the required release and the debt of scheme company in *T&N (No 4)* as the benchmark of the requisite degree of sufficiency. That is, for the purposes of the nexus test, sufficient connection may be proven if the liabilities of the scheme company would be *potentially* affected by the proposed release.

### B. *The Necessity Test*

The necessity test appears to have been understood, in reported cases, in at least two different ways. For the Singapore Court of Appeal, 'necessity', for the purposes of what the Court referred to as 'the test of necessity' in *Pathfinder*, appears to mean simply the need for releasing the creditors' claims against the third parties for compromising the scheme company's liability to the creditors. In that case, the original debtors were treated as third parties to be released under the scheme. The dissentients objected to the scheme on the basis that a release of the third parties (which were original or 'primary' debtors) was unnecessary for the creditors to reach a compromise with the scheme company (which was a common guarantor of the 'primary debtors').[43]

In contrast, the concept of 'need', as understood by Snowden J of the UK High Court (as he then was), is arguably narrower in scope. For Snowden J, the justification for a release was the need to prevent the proposed compromise between the creditors and the debtor from being undermined by the third party's subrogation claim. According to his Lordship, a third-party release would be within the court's scheme jurisdiction:

> *if it is necessary to avoid the main compromise of the creditor's claim against the company being undermined by a "ricochet" claim* for contribution or indemnity in respect of the balance by the third-party … against the company.[44] [emphasis added]

Clearly, a crucial difference between the two understandings of the necessity test is whether a ricochet claim is required.

Both versions of the necessity test appear to have germinated from Patten LJ's *obiter dictum* on scheme jurisdiction in *In re Lehman Brothers International (Europe) (No.2)*[45] that:

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[42] *T&N (No 4), supra* note 3 at [51]–[52].

[43] *Pathfinder, supra* note 9 at [74], [75], [79]

[44] *Noble Group, supra* note 27 at [26]. See also a paper authored by his Lordship (apparently as a barrister): Richard Snowden QC, 'Schemes of Arrangement and Company Voluntary Arrangements' at <https://www.ilauk.com/docs/schemes_and_cvas.pdf> (16 March 2023).

[45] *Lehman Brothers, supra* note 40.

> [i]t seems to me entirely logical to regard the court's jurisdiction as extending to approving a scheme which varies or releases creditors' claims against the company on terms which require them to bring into account and release rights of action against third parties designed to recover the same loss. The release of such third party claims is merely ancillary to the arrangement between the company and its own creditors.[46]

His Lordship added that:

> [i]t seems to me that an arrangement between a company and its creditors must mean an arrangement which deals with their rights *inter se* as debtor and creditor. That formulation does not prevent the inclusion in the scheme of the release of contractual rights or rights of action against related third parties *necessary in order to* give effect to the arrangement proposed for the disposition of the debts and liabilities of the company to its own creditors.[47] [emphasis added]

The above-quoted words by Patten LJ were expressly referred to in the Singapore Court of Appeal's decision in *Pathfinder Strategic Credit LP v Empire Capital Resources Pte Ltd* as constituting 'the test of necessity'.[48] The label of the necessity test has since been used, apparently in the same sense, in a number of subsequent cases decided outside the UK.[49]

Snowden J's understanding of Patten LJ's words on scheme jurisdiction is evidenced in Snowden J's words in *Re Noble Group Ltd,*[50] where his Lordship noted, at [24], that it was well-established that the court had jurisdiction to sanction a scheme whose terms requested the creditors to release their claims against a third party:

> where such a release is *necessary* in order to give effect to the arrangement between the company and the scheme creditors. That *test* is most clearly satisfied where the scheme compromises debts which are guaranteed and where, absent such a release, pursuit of the guarantor by a scheme creditor would undermine the compromise between the creditor and the company.[51] [emphasis added]

On the test for court's scheme jurisdiction, Snowden J added, at [26], that:

> As a matter of jurisdiction, the release of such a claim might fall within Part 26 [of the Companies Act 2006 (UK)] if *it was necessary to avoid the main compromise of the creditor's claim against the company being undermined by a 'ricochet claim'* for contribution or indemnity in respect of the balance by the third-party … against the company. [emphasis added]

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46 *Ibid* at [63].

47 *Ibid* at [65].

48 *Pathfinder, supra* note 9 at [74], [75], [79].

49 *Ballantyne, supra* note 9 at [102]; *Nordic*, *supra* note 9; *Re China Singyes Solar Technologies Holdings Ltd* [2020] HKCFI 467 at [8]–[9]; *Port Finance, supra* note 9 at [68];

50 *Noble Group, supra* note 27.

51 *Ibid* at [24].

Snowden J also stressed the requirement for a "*ricochet claim*" in *Re Colouroz Investment 2 LLC*,[52] as well as in, *inter alia*, *Re Port Finance Investment Ltd*.[53]

Snowden J's version of the necessity test has since been adhered to in most, if not all, cases decided within the UK.[54] This fact suggests that at least within the UK, 'necessity' as explained by Snowden J has become part of the settled jurisprudence on third-party releases. Given the large number of decisions on scheme jurisdiction made by the UK courts, the necessity test discussed in this paper is Snowden J's version of that test.

### C. *Summation*

To sum up, under the nexus test, for a scheme to validly incorporate a TPR, there must be some nexus or connection between the company's debt and the liability of the third party. The nexus is sufficient where the liabilities of the debtor would be *potentially* affected by the release. Under the necessity approach, a TPR is within the scheme jurisdiction where a refusal to grant the release would result in a 'ricochet claim' against the debtor.

Are the two tests, in any case, distinct? Is it possible to see the necessity test as a subset of the nexus test? Would a guarantor, for example, not be liable under both tests for the debt of the company where the firm has defaulted on its debt? The answer is 'no'. The ricochet claim requirement, which is the crux of the necessity test, does not form part of the nexus approach. It is therefore logically impossible to see the necessity test as a subset of the nexus test. In fact, the difference between the two tests has been recognised in cases decided by the courts in the UK and a number of other jurisdictions of British extraction.[55] The courts in some of these cases, at least one of which is a UK court, have also expressed the view that the nexus test was preferrable to the necessity test.[56]

## V. Policy Concerns

Given the difference between the alternative jurisdictional tests, does an application of these tests cause any policy concerns? If the answer is 'yes', how should the concerns be addressed? An answer to these questions hinges on what it is meant by 'legal policy'.

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52 *Colouroz, supra* note 25 at [26].

53 *Port Finance, supra* note 9 at [68] ('At paragraphs [66]–[73] of his judgment, Trower J noted that courts in other jurisdictions such as Singapore and Ireland have held that the existence of such a "ricochet claim" is unnecessary to enable a scheme to be sanctioned, but that is appeared to be necessary according to the current state of England law as explained by Patten LJ in *Lehman Brothers.*')

54 *Ibid.*

55 *Empire Capital, supra* note 9; *Pathfinder, supra* note 9; *Ballantyne, supra* note 9; *Nordic, supra* note 9; *Swissport, supra* note 9 at [73]; *Port Finance, supra* note 9 at [68].

56 *Swissport, supra* note 9 at [73].

### A. *Legal Policy*

Consistent with the definition of legal policy provided by Justice Barak as mentioned previously,[57] the authors in *Bennion on Statutory Interpretation* point out that:

> Legal policy consists of the principles which the judiciary consider the law has a general duty to uphold. It is sometimes referred to as public policy, but it is the judge's view of the public policy, and is confined to justiciable issues.[58]

The principles, that the judges consider the law has a duty to uphold, are likely to include principles that apply generally, as well as specific principles relevant to the context in which, and the purposes for which, a decision is made. A legal policy always relevant for assessing the quality of legal rules is the principle that the law should be coherent and self-consistent.[59] Policies that are more context specific, for the purposes of this paper, include guiding principles of the corporate insolvency law and practice. A rule on TPR constitutes a fibre in the law of corporate insolvency. Policy concerns that the development of such a rule gives rise to may, for this reason, be examined through an assessment of (i) the quality of the rule in light of the general legal policy on law making, as mentioned above, and (ii) the extent to which the rule enables the court to achieve policy goals in the context of insolvency.

### B. *The Policy Regarding Self-consistency*

The rationale behind the policy that the law should be self-consistent, as Bennion points out in the second edition of his *Statutory Interpretation*, is that:

> [a]s interpreters of statute and enunciators of the common law, the judiciary have the responsibility to maintain the consistency and coherence of the law as a whole. This includes both legal doctrines and practical application.[60]

As noted, there are situations where the success of the scheme requires a release of third parties who do not have a ricochet claim against the debtor. A decision to release the third parties in these situations can therefore not be based on the necessity test. To the extent that a release cannot be rationalised on the basis of a ricochet claim, the necessity test is arguably not self-consistent. It is therefore fair to suggest

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57 Barack, *supra* note 10 and accompanying text.

58 Diggory Bailey & Luke Norbury, *Bennion on Statutory Interpretation, 7th ed* (United Kingdom: LexisNexis Butterworths, 2019) at [26.1]. *Cf* Professor Neil MacCormick's definition of 'policy' in legal discourse: Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978) 263 ('…Policy has become a hideously inexact word in legal discourse, but if we wish to use it with any exactitude at all, we had better use it as denoting those courses of action adopted by Courts as securing or tending to secure states of affairs conceived to be desirable.')

59 Bailey & Norbury, *supra* note 58 at [26.10].

60 Francis Bennion, *Statutory Interpretation: A Code*, 2nd ed. (London: Butterwords, 1992)) at 539 (art 263) and 558 (art 268).

that the lack of self-consistency is a policy concern that the necessity test gives cause to.

### C. *Context-specific Policy Goals*

Numerous policy rationales for the insolvency system have been identified and debated in literature.[61] Policy objectives that are directly relevant to the subject under discussion include (i) securing equitable treatment of similarly situated creditors,[62] (ii) preserving existing rights (thereby upholding the legitimate expectations of transacting parties at time of transaction),[63] and (iii) enhancing the asset value for creditors.[64] Policy goal (i) is aimed at resolving the 'first-come, first-served issue' in debt collection outside of the bankruptcy law, as well as distributing asset value according to the equality principle (with exceptions which provide enhanced collection rights for a selected group of creditors who, as a matter of social policy, require preferential treatment).[65]

The significance of policy goal (ii) lies in the need for protecting the most established forms of transactions and "thereby reducing the impact of bankruptcy filing on ordinary commercial expectations."[66] This policy objective reflects the general principle that the law should uphold legitimate expectations of transacting parties at the time of transaction, thereby ensuring predictability of the marketplace.[67] The rationale behind policy goal (iii) is that:

> if the rule can increase the value of the failing firm, it will reduce the total costs imposed on the parties dealing with the failing debtor [notably creditors]. If the cost of producing the increase in value is less than the value obtained, then the rule has increased net values, which is the desired result.[68]

An increase in value helps maximise returns for the creditors.

Accordingly, the first issue to consider, in considering policy issues regarding a given rule, is the properties of the rule in facilitating equitable treatment of creditors in terms of their collection rights. The second issue is the effect of TPRs on the creditors' legitimate expectations created at the time of transaction, and the third is the extent to which the alternative jurisdictional tests help enhance asset value for creditors.

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61 Elizabeth Warren, 'Bankruptcy Policymaking in an Imperfect World' (1993) 92 Mich L Rev 336; Bob Wessels, Bruce A Markell, Jason J Kilborn, *International Cooperation in Bankruptcy and Insolvency Matters* (Oxford: OUP, 2009).

62 Warren, *supra* note 61 at 352–353; Wessels, Markell, Kilborn, *supra* note 61 at 16.

63 Warren, *supra* note 61 at 359; Wessels, Markell, Kilborn, *supra* note 61 at 16.

64 Warren, *supra* note 61 at 344; Wessels, Markell, Kilborn, *supra* note 61 at 14.

65 Thomas H Jackson, *The Logic and Limits of Bankruptcy Law* (BeardBooks, 1986) at 9; Warren, *supra* note 61 at 353.

66 Warren, *supra* note 61 at 359.

67 Wessels, Markell, Kilborn, *supra* note 61 at 16.

68 Warren, *supra* note 61 at 344.

### D. *Equitable Treatment of Creditors*

Where creditors' rights against the company are different, equitable treatment of creditors may need to be achieved through an appropriate application of the class composition and cramdown mechanisms. For example, the protection of preferential creditors (statutorily preferred creditors such as employees) may be ensured by classing the category of preferential creditors separately for the purposes of voting[69] unless it is shown that the claims of this class of creditors would be fully satisfied under the scheme plan.[70]

Where the scheme involves a TPR, in case only one or some of the creditors has/have a claim against the proposed releasee, the protection of those who do not have a claim against the releasee may, it is submitted, be ensured by classifying the two respective groups of claimants separately for the purposes of voting.[71] Where necessary, it should be possible to ensure that the '*quid pro quo*' paid by the third party is distributed only among creditors who have a claim against the releasees. This could be done by, for example, incorporating a term to this effect into the scheme plan. The scenario just discussed appears to be rarely seen in practice.[72] This fact suggests that incorporating a release mechanism into a scheme should rarely cause concerns on the equitable treatment of creditors. This should be the case irrespective of which of the alternative tests is adopted for determining the scheme jurisdiction.

### E. *Effect on Existing Rights*

The concern here is whether a TPR would disappoint legitimate expectations that creditors had held at the time of the credit transaction.[73] In the context of a scheme involving TPRs, this question may be answered by considering two further issues. The first is whether the debtor's proposal of a creditor's scheme would fall within reasonable bounds of expectation for a creditor at the time of transaction. If the answer is 'yes', the follow-up question would be whether the possibility of being required to release their claims against third parties for the purposes of such a scheme could also be reasonably expected by the creditor. The answer to the first question must be 'yes'. At the time of the transaction, the possibility of the company becoming insolvent should have been within the contemplation of a reasonable creditor. The SOA has been used as an insolvency/restructuring tool since the 19$^{th}$ century.[74] The possibility of participating in a creditors' scheme should thus be within the bounds of expectation of a reasonable creditor at the time of transaction.

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69 The proposed scheme is not approved unless it has the support of all classes of claimholders.

70 *Re S Megga Telecommunications Ltd* [2002] HKEC 1344 (Court of First Instance, HK).

71 See Snowden J's comments in *Noble Group, supra* note 27 at [26].

72 Snowden J did mention this scenario in *Noble Group, supra* note 27 at [26] but his Lordship did not refer to any cases where this was the case.

73 See Ilya Kokorin, "Third-Party Releases in Insolvency of Multinational Enterprises Groups" (2021) ECFR 107 at 137.

74 Payne, *supra* note 11 at 290.

As for the follow-up question, the practice of incorporating TPRs into a scheme is by now well-established.[75] A reasonable creditor should therefore be aware of this norm. It follows that the possibility that creditors are required to release their claims against third parties for the purposes of a scheme should be within the bounds of a claimant's expectations at the time of the transaction.[76] In any case, a TPR is unlikely to impair the creditors' existing rights. This is because the creditors, at least those who have a claim against the releasees, are in most, if not all, cases expected to benefit from a release.[77] Incorporating a TPR mechanism in a creditors' scheme should therefore raise no alarm regarding the need to protect the creditors' existing rights. Again, this would be the case irrespective of which of the two tests is chosen to determine the scheme jurisdiction.

### F. *Asset Value Enhancement*

The concern regarding asset value enhancement may be examined through a consideration of two issues. The first is the general effect of TPR on asset value. The second is whether an adoption of either of the two tests gives cause for concern in terms of asset value enhancement.

#### 1. *The general effect*

Where the creditors are required to release their claims against a third party, the former would usually receive a higher return under the scheme as compared to the alternative of an immediate liquidation. The higher return is funded by fresh monies made available for a distribution among the creditors. The fresh monies may come from sources such as the funds that the third party pays as a *quid pro quo* for the release,[78] capital injections by new investors,[79] new debt facilities,[80] or other types of financial arrangements made by the debtor.[81] The fresh funds enhance the asset value for creditors. This conclusion is corroborated by the fact that creditors' schemes involving a TPR are typically supported by unsecured creditors at an overwhelming level of majority.[82] It can therefore be concluded

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75 *Far East Capital, supra* note 3 at [14].

76 This view should arguably be more defensible where a statutory restructuring procedure includes provisions on TPRs. Examples of where this is the case include the recently enacted Dutch scheme of arrangement (Wet homologatie onderhands akkoord 2020 (The Netherlands) (WHOA) art 372, and the German pre-insolvency rescue procedure known as the StaRUG-Scheme. Both procedures provide for TPRs with regards to subsidiaries acting as guarantors or security providers: Bil, *supra* note 5.

77 Notes 23-26 *supra* and accompanying text.

78 *T&N (No 4)*, *supra* note 3; *Opes, supra* note 3.

79 *La Seda, supra* note 2; *Lecta Paper, supra* note 22.

80 *Far East Capital, supra* note 3.

81 *Noble Group, supra* note 27.

82 The levels of support (in value) by unsecured creditors in the following cases illustrate the point: *La Seda, supra* note 2: 95%; *Lecta Paper, supra* note 22 (99.99%); *Swissport, supra* note 9 (100%); *Ballantyne*, *supra* note 9 (98.12%); *Nordic*, *supra* note 9 (98%).

that, in the context of creditors' schemes, third-party releases help maximise asset value for creditors.

Where the debtor is a member of a corporate group, its debts are often guaranteed by the holding company, a subsidiary, or a sister company. Where this is the case, an issue may arise as to whether cross-guarantees *etc*, would dilute returns to non-guaranteed (non-secured) creditors in insolvency. Squire believes that this would be the case where the bankruptcy judge resorts to "the doctrine of substantive consolidation".[83] According to Squire, the judges may do so because, *inter alia*, "firms lose the incentive to keep track of which assets and liabilities properly belong to which constituent entities."[84]

Squire's asset dilution concern is arguably invalid in the context of a scheme involving TPRs. Judges within jurisdictions where the SOA is provided for are unlikely to resort to the doctrine of substantive consolidation. In these jurisdictions, firms and their officers are typically subject to a statutory duty to keep financial records.[85] Under the Companies Act 2006 (UK), for example, the directors of each company must also prepare yearly accounts for the company,[86] and if the company is the parent company, the directors must, in addition to preparing individual accounts for the year, prepare group accounts for the year (unless an exception applies).[87] It should also be noted that Squire was not making the statement quoted above in the context of restructuring plans, etc. involving TPRs. Group guarantees *etc* should therefore not cause concern regarding asset value enhancement.

2. *Effect under the nexus test*

As noted, what needs to be established for applying the nexus test is the connection between the company's debt and the third party's liability. For the reasons discussed,[88] an application of this test should be relatively straightforward and uncostly. The fact that the nexus test applies irrespective of the sources of the third party's alleged (existing or contingent) liability suggests a wide scope of application for that test. Additionally, the fact that under the nexus test, the permissibility of a release does not hinge on the existence of a ricochet claim by the releasee against the debtor leads to the same conclusion.[89] It follows that the nexus test facilitates the maximisation of the number of insolvency/restructuring transactions, which, generally, enhances asset value for creditors. It is therefore reasonable to conclude that, in terms of the enhancement of asset value, the nexus test should give cause for little, if any, concern in terms of asset maximisation.

[83] *Richard Squire*, "Strategic liability in the corporate group" (2011) 78 U Chicago L Rev 605 at 608.
[84] *Ibid* at 608.
[85] For example, Corporations Act 2001 (Australia) s 286 and Companies Act 2006 (United Kingdom) ss 386–389.
[86] Companies Act 2006 (United Kingdom) s 394.
[87] Companies Act 2006 (United Kingdom) s 299.
[88] Notes 38-42 *supra* and accompanying text.
[89] Notes 50, 55-56 *supra* and accompanying text.

### 3. *Effect under the necessity test*

Under this test, it will be remembered, that the crux of permitting a third-party release is whether the intended releasee has a ricochet claim against the debtor. A difficulty of the necessity test, it is submitted, is that there are situations where the indented releasees do not have an existing ricochet claim against the debtor. Examples include contexts (c) (where the third parties include the company's legal advisers, directors, employees, and other parties involved in the preparation of the scheme), (d) (the *T&N (No 4)* situation), and (e) (the *Opes* situation), and (f) (the original debtor as third party) discussed in Part III.

In a context (c) situation, the intended releasees may not have a ricochet claim, since it is not certain that all these individuals have an indemnity claim against the debtor. According to Snowden J, a release of the third parties in context (c) may be justified "by a need not to allow scheme creditors to undermine the terms of the scheme itself, and have become a regular feature of schemes."[90] This justification, except where an indemnity is given to the intended releasees, is arguably at odds with the 'ricochet claim' requirement. If this is right, a TPR release in context (c), where no indemnity is given to the releasees, cannot be rationalised under the necessity test.

In contrast, there would be no difficulty in granting the third parties in context (c) releases under the nexus test. All that is required under that test is a sufficient connection between the company's debt and the (potential) liability of the individuals involving in the preparation of the scheme. Such a connection does exist in context (c). The liability of the company is interrelated with that of those group of intended releasees in the sense that it is impossible for the debtor to obtain a release from its creditors absent a release of those involved in the preparation of the scheme.

As for context (d), the release of the EL insurers in *T&N (No 4)* cannot be rationalised under the necessity test either. A failure to grant release to the EL insurers would not result in a ricochet claim by the insurance companies, who did not have a claim by subrogation against the company. On the other hand, if the EL insurers succeed in their case on the scope of the insurance cover, the EL claimants would be able to make their claims against T&N, the company. However, the EL claimants against the company in this situation were not ricochet claims either, in that they were not claims by subrogation - they have a claim against the company in the first place. As to context (e), the third parties to be released in *Opes* were co-defendants (the banks) holding no claims by subrogation against the defendant Opes entities. A release of the banks would not have been permitted had the court decided the case strictly by the necessity test.

In context (f), the limitation of the necessity test is also obvious. As noted, releasing the original debtor as a third party is often necessary for commercial reasons.[91] The original debtor is unlikely to have a pre-existing ricochet claim against the entity acting as the scheme company, be it (the latter) a guarantor or an artificially created co-obligor. Leaving aside the question on the justification of treating a 'ricochet claim' as a necessary, rather than sufficient, condition for TPRs, if the court in the

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[90] *Noble Group, supra* note 27 at [25].

[91] Notes 33–35, *supra* and accompanying text.

situations just discussed insists on the 'ricochet claim' requirement, the only way to obtain a release is to create a ricochet claim specifically for this purpose. This can be done by, for example, executing a deed of indemnity/contribution between the scheme company and the third party.[92] The creation of ricochet claims this way would, of course, incur costs. It follows that an application of the necessity test may give cause for concern in terms of maximisation of asset value.

## VI. Conclusion

Given the wide range of purposes a scheme may serve,[93] a TPR rule for the purposes of an SOA is arguably more significant than that for the purposes of a dedicated restructuring procedure. There appears to be a high degree of judicial consensus that TPRs are permissible for the purposes of a creditors' scheme.[94] There is still uncertainty, however, about the appropriate conditions for incorporating a TPR into a scheme. Deciding scheme jurisdiction with the nexus test is unlikely to give cause for concern in terms of the self-consistency of the rule and of achieving the three policy objectives noted previously. In contrast, the use of the necessity test, because of the 'ricochet claim' requirement, may in certain situations give cause for concern regarding self-consistency and the achievement of the policy objective of enhancing asset value. An easy way to address these concerns, it is submitted, is to adopt the nexus test for all cases.

The nexus test already commands the support of judges in a number of significant jurisdictions outside the UK.[95] There have also been calls for adopting the nexus test in the UK. In *Re Swissport Fuelling Ltd,*[96] Trower J observed that "[i]t may be that on the issue of third party releases, the Singapore Court of Appeal has blazed a more straightforward trail which English law ought to follow…." His Lordship

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92 *Swissport, supra* note 9; *Port Finance, supra* note 9.

93 See *supra* notes 10, 11, 31 and their accompanying text.

94 Since *T&N (No 4)*, *supra* note 3, there have not been many of what Finkelstein J in *Opes, supra* note 3, calls 'anti-release' cases in jurisdictions where the SOA is provided for. The record of US courts' recognition, under Chapter 15 of the US Bankruptcy Code of schemes involving TPRs helps fortify this issue: *In re Metcalfe & Mansfield Alternative Invs*, 421 Bankruptcy Reporter 685 (United States Bankruptcy Court for the Southern District of New York, 2010); *In re Agrokor DD* 591 Bankruptcy Reporter 163 (United States Bankruptcy Court for the Southern District of New York, 2018); *In re Avanti Communications Group PLC*, 582 Bankruptcy Reporter 603 (United States Bankruptcy Court for the Southern District of New York, 2018). The US courts' views vary on TPRs in the context of Ch 11 cases (the plenary cases): *Opes, supra* note 3 at [49] ; Eamonn O'Hagan, "On a Related Point: Rethinking Whether Bankruptcy Courts Can "Order" the Involuntary Release of Non-Debtor, Third-Party Claims" (2015) 23 Am Bankr Inst L Rev 531; Coco, *supra* note 4. This fact, however, does not bear direct relationship with the views of the U.S. courts on the effect of foreign schemes involving TPRs.

95 The nexus test is developed by the Federal Court of Australia (*Opes, supra* note 3). The Singapore Court of Appeal opined in *Pathfinder*, *supra* note 9 at [79] that the nexus test, because of its 'practical attraction' is preferable to the necessity test. The Irish courts in both *Ballantyne, supra* note 9 at [129] and *Nordic, supra* note 9 at [103], also expressed a preference for the nexus test. The nexus test also appears to have the support of the Hong Kong court: *Re Unity Group Holdings International Ltd* [2022] HKCU 5573 at [16].

96 *Swissport, supra* note 9 at [73].

was referring to the decision of the Singapore Court of Appeal in *Pathfinder*.[97] In that case, the Singapore Court of Appeal expressed a view, based on the nexus test, on the appropriateness of releasing the original debtor as a third party. Trower J's comment demonstrates the viability of adopting the nexus test in the UK.[98]

This paper's answer to the issues raised should be of assistance in not only furthering the development of the TPR rules in the context of creditors' schemes, but also designing or reforming TPR rules for the purposes of emerging restructuring regimes. Both the discussion of the need for TPRs and the assessment of the two tests by reference to the context-specific policy objectives should shed light on the range of circumstances under which TPRs should be permitted for the purposes of an insolvency/restructuring regime generally.[99]

97 *Pathfinder*, *supra* note 9.

98 See *supra* note 53 (Snowden J comments in *Port Finance, supra* note 9, that a ricochet claim 'appeared to be necessary according to the current state of English law as explained by Patten LJ in *Lehman Brothers*'). As noted, Patten LJ's remarks on third-parties releases in *Lehman Brothers* were made *obiter dicta*. Also, in considering issues relating to TPRs, Patten LJ was referring, at [50] *ff*, to, *inter alia*, both *T&N (No 4), supra* note 3, and *Opes, supra* note 3. As noted, in neither of these cases did the third parties have a ricochet claim against the company.

99 Notes 5–6, *supra* and accompanying text.