

INSOLVENCY

Navigating Between Scylla and Charybdis: Singapore High Court Clarifies Test for “Unfair Prejudice” and Intervening in Judicial Managers’ Decisions

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The Singapore High Court has clarified the test for determining when the court should, under section 227R of the Companies Act (now section 115 of the Insolvency, Restructuring and Dissolution Act 2018), intervene in decisions made by a judicial manager in managing the affairs of a company: *Re HTL International Holdings Pte Ltd* [2021] SGHC 86.

Our Comments

In Greek mythology, Scylla and Charybdis were mythical sea monsters situated on opposite sides of the Strait of Messina. Ships passing through these straits faced the threat of crashing into Scylla’s rocky shoals or the snare of the whirlpool of Charybdis. Any misstep in these treacherous waters could spell the doom of a ship and its crew.

In pursuit of steadying the ship, judicial managers stepping into an embattled company often need to navigate difficult waters in unfavourable conditions. Judicial managers have to make difficult decisions under time pressure, and constantly face scrutiny from creditors, shareholders, employees and other stakeholders. There are a myriad of factors that judicial managers have to contend with in deciding on a path forward. Often the preferences of different stakeholder groups may be at odds with each other. For example, a creditor may prefer a sale of assets and a quick recovery of his debts, while a shareholder may wish for the company to continue its operations in the hopes of recouping any excess value after the creditors are paid off.

The High Court in *Re HTL International Holdings Pte Ltd* [2021] SGHC 86 has provided guidance on when the courts will interfere with the commercial judgment of judicial managers where creditors or shareholders allege that there has been unfair prejudice to them. The judgment recognises the pressure and difficulties encountered by judicial managers and clarifies that the courts will rarely second-guess their decision unless their decision is not at all commercially justifiable.

This update takes a look at the High Court’s decision.

Background

In July 2020, HTL International Holdings Pte Ltd (“**Company**”) was placed under judicial management. Three judicial managers (“**JMs**”) were appointed.

The Company sought to sell its interests in its subsidiaries (“**Assets**”) to a potential buyer, Golden Hill Capital Pte Ltd (“**Golden Hill Capital**”). A few months later, another potential buyer, Man Wah Holdings Ltd (“**Man Wah**”) offered to buy the Assets.

Subsequently, in response to the JMs’ invitation, both Golden Hill Capital and Man Wah submitted revised and final offers. Shortly thereafter, the JMs sold the Assets to Golden Hill Capital.

The Company’s holding company and ultimate holding company (collectively, “**Shareholders**”) considered Man Wah’s offer superior to Golden Hill Capital’s, and applied to the High Court for the sale of the Assets to Golden Hill Capital to be set aside and that the JMs be directed to accept Man Wah’s offer.

The Shareholders’ application was brought under section 227R of the Companies Act (“**Section 227R**”) (which is now section 115 of the Insolvency, Restructuring and Dissolution Act 2018). Section 227R permits a creditor or member of a company which is the subject of a judicial management order to seek relief from the court on the ground that: (a) the judicial manager is managing the company’s affairs, business and property in a manner which is or was unfairly prejudicial to the interests of its creditors or members generally (or of some part of them); or (b) any actual or proposed act or omission of the judicial manager is or would be so prejudicial.

The Shareholders took the view that, in interpreting the term “unfairly prejudicial” in Section 227R, unfair harm could arise from a decision by a judicial manager to sell the company’s assets at an undervalue, which they alleged was what transpired here. The Shareholders also contended that the JMs’ general conduct lacked transparency and was unfair to the Shareholders, and thus perverse.

The High Court’s Decision

Dismissing the Shareholders’ application, the High Court found that it was not shown that the JMs had conducted the Company’s affairs in a manner that was unfairly prejudicial to the interests of its creditors or members generally (or some part of them).

In doing so, the High Court examined relevant English jurisprudence and distilled the following valuable guidance on the test for “unfair prejudice” and the scope of Section 227R:

- The court will not interfere with a decision of a judicial manager unless it can be shown that the judicial manager has committed plainly wrongful conduct, has been conspicuously unfair or has been perverse. Great leeway ought to be given to the judicial manager to exercise commercial judgment, which should only be impugned upon evidence of exceptional circumstances, such as those described above.
- The applicant must show the court that there has been unfair prejudice, which is more than bare prejudice. It will be very rare indeed for a commercial decision in respect of such a company to be one that is uncontroversial or spares everyone pain and loss. As most commercial decisions of a company in judicial management can be expected to cause detriment or prejudice to one or more of the creditors or members of the company, and some losses borne in unequal proportions, decisions by a judicial manager are not to be second-guessed or revisited by the court unless the

pain to the applicant is wholly unrequired, or the judicial manager's decision is not at all commercially justifiable, i.e., the pain caused to one is "out of whack" with the reward to others.

- In weighing the costs and benefits of a particular course of action, the judicial manager is justified in weighing the interests of creditors more than that of the members or shareholders.
- A sale at an undervalue can constitute unfair prejudice if the decision to sell the asset in question was perverse (that is, not logical or conspicuously unfair), e.g., not giving fair consideration to all other offers. However, a sale at an undervalue alone will not necessarily impugn the transaction; the court will generally not look behind the judicial manager's decision, unless there is something particularly lacking on the surface (e.g., refraining from taking any steps to evaluate other offers).
- The court's powers under Section 227R are not limited to forward-looking actions, but may extend to cover past, present and proposed acts or omissions.

On the facts of this case, the High Court found that the JMs' decision to sell the Assets to Golden Hill Capital was not unfairly prejudicial.

The High Court found, among other things, that:

- In the light of all the circumstances, particularly the need for a swift injection of funds to address the Assets' precarious financial position, the JMs' exercise of their commercial judgment to prefer the Golden Hill Capital offer did not evince any perverse, conspicuously unfair or plainly wrongful conduct.
- The JMs were justified in assessing that Golden Hill Capital's final offer promised greater shareholder returns, and had good grounds to find that Golden Hill Capital's final offer was at least comparable or equal to (if not better than) Man Wah's offer. In this regard, the court undertook a fact-specific inquiry into the terms of Man Wah's offer in coming to a conclusion that the JMs were justified in their assessment.
- Even if Golden Hill Capital's offer price might not have been the best, this on its own did not conclusively establish unfair prejudice. In particular, the situation of the Company meant that the additional delay of Man Wah's offer, compared to the speed with which Golden Hill Capital's offer could be effected, contributed to the High Court accepting the JMs' decision as being justifiable (the delay was about two to six months, to hold a general meeting to approve their acquisition of the Company as required under the Hong Kong listing rules). The High Court accepted, in particular, that the exigencies of the situation facing the Company were such that the JMs had to act swiftly, and that the urgency of the sale was the key thing that weighed on the JMs' minds. The JMs were therefore entitled to prefer Golden Hill Capital's offer to Man Wah's.
- The JMs had fairly evaluated both offers. The High Court noted in particular that the JMs had submitted a "detailed list of clarifications" to Man Wah, sought legal advice on the need for a shareholders' resolution under the Hong Kong listing rules for effecting Man Wah's offer, and also given both Man Wah and Golden Hill Capital equal opportunity to present "anything further" in respect of their offers before they made a final decision. Taking into account the commercial

pressures, the High Court considered that JMs could not be faulted for going ahead with what they considered was the more appropriate offer. Nor was there any misconduct by the JMs that would justify the court intervening in their decision to sell the Assets to Golden Hill Capital.

The High Court therefore dismissed the Shareholders' application.

If you would like information or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:



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