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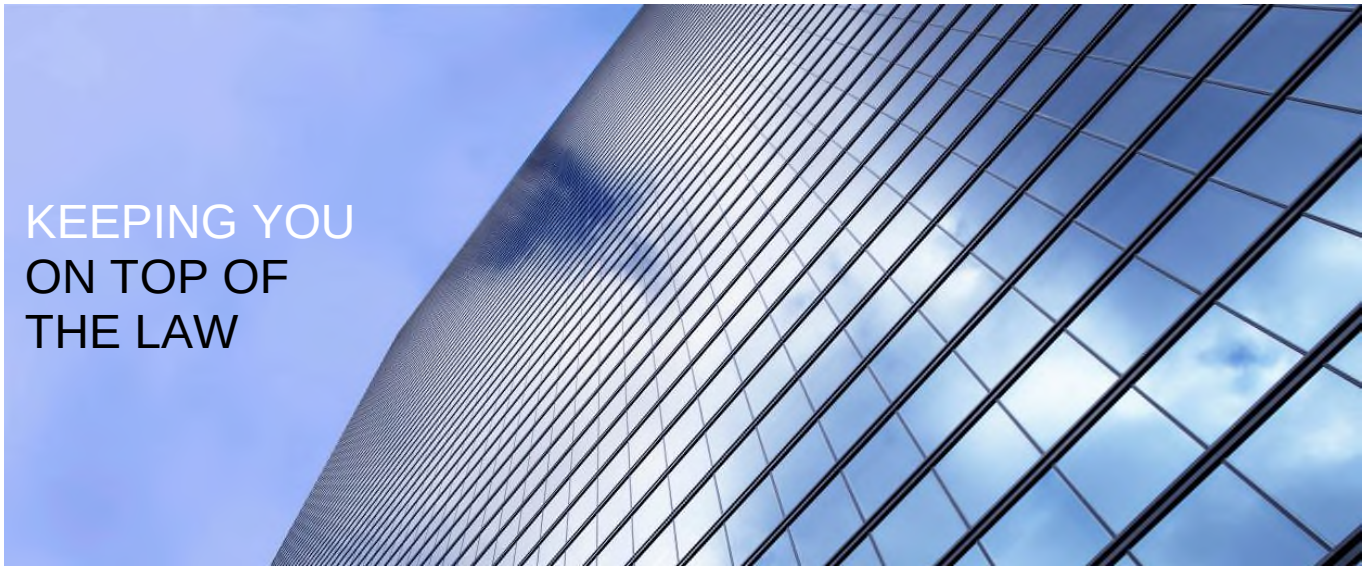

In Brief

DEALS

WONGPARTNERSHIP ACTS IN…

Ascendas Real Estate Investment Trust's acquisition of DSO National Laboratories buildings and DNV GL Technology Centre

WongPartnership acted in the acquisition by Ascendas Real Estate Investment Trust ("**Ascendas REIT**") of DSO National Laboratories buildings and DNV GL Technology Centre located at 12, 14 & 16 Science Park Drive at a purchase consideration of S$420 million from Ascendas Land (Singapore) Pte Ltd. Ascendas REIT is Singapore's first and largest listed business space and industrial real estate investment trust. Its diversified portfolio of 102 properties in Singapore comprises business and science park properties, hi-specs industrial properties, light industrial properties, logistics and distribution centres, integrated development, amenities and retail properties. According to the manager of Ascendas REIT, the acquisition will extend Ascendas REIT's market leadership in the overall business and science park space.

Partners from a number of WongPartnership's Practice Groups are involved in the transaction including Chan Sing Yee from the Corporate/Mergers & Acquisitions Practice, Serene Soh from the Corporate Real Estate Practice and Tan Shao Tong from the Tax Practice.

Other recent matters that WongPartnership was involved in were:

DESCRIPTION	TYPE
Sale by Tembusu Growth Fund II Ltd. of its 36% stake in Ednovation Pte Ltd. to CDH Investments.	Corporate/M&A / Debt Capital Markets / Banking & Finance

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INSURANCE

"Accidents" happen

But only if you don't intend or expect it to. The Singapore Court of Appeal looks into the definition of "accident" in the context of insurance policies.

Quek Kwee Kee Victoria (executor of the estate of Quek Kiat Siong, deceased) and another v American International Assurance Co Ltd and another [2017] SGCA 10 (Singapore, Court of Appeal, 2 February 2017)

The Court of Appeal has construed the term "accident" for the first time in the context of personal accident insurance policies. The overarching issue was whether the injury resulting in the death of Quek Kiat Siong (the "**deceased**" or the "**insured**") was caused by "accident". If the death was caused by "accident", the deceased's estate (the "**Estate**") would be entitled to the assured sum under two insurance policies (the "**Insurance Policies**").

The Court of Appeal held that an injury caused by or sustained in an "accident" under the Insurance Policies connotes "an injury sustained in circumstances where the insured *neither intended nor expected* to suffer the injury and where the injury is not the result of the natural progression of disease".

However, the Court of Appeal also held that these were only *general* principles to guide a court in construing the scope of a personal accident insurance policy. These principles would be subordinated to the express language used in each policy. It therefore remains theoretically open to an insurer to stipulate the type of risk that it would accept by means of appropriate inclusion or exclusion clauses.

WongPartnership acted for the successful Appellants, Ms Quek Kwee Kee Victoria and Mr Ker Kim Tway (the executors of the Estate).

Our Comments/Analysis

The landmark decision sets out the general principles and framework for construing the definition of "accident" in the context of personal accident insurance policies. This is the first time that this issue has come before the courts and the Court of Appeal took the opportunity to review the authorities in other jurisdictions and to set out some general principles.

In doing so, the Court of Appeal has adopted an approach similar to that adopted in other jurisdictions (save for England) which have moved away

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from the 'means-result' distinction that "was not in harmony with the understanding of the common man". The Court of Appeal preferred the view that the use of phrases such as "accidental means" (as opposed to "accidental death"), would not restrict the policy coverage to those situations where the proximate cause of the insured's injury or death was not a deliberate or voluntary action on the part of the insured.

The Court of Appeal's decision has lent clarity to an area which has not previously been expounded upon in our courts. The decision resolves the uncertainty over which approach to take when construing accident policies, which has been somewhat clouded by the fact that certain English decisions have followed a more restrictive approach (applying the 'means-result' distinction) than other Commonwealth jurisdictions (such as Australia, New Zealand, Canada and Scotland) and the United States.

The impact of this decision will rest on how much reliance insurers in Singapore have placed on the 'means-result' test in the drafting of policies and in the pricing of products notwithstanding that the 'means-result' test has not previously been raised before the Singapore Courts. Although this summary does not deal with the 'means-result' test, other jurisdictions suggest that in comparison, the present approach would lead to a wider definition of what constitutes an "accident", and accordingly, more payouts on accident policies (subject to the exclusions thereunder). Insurers may also relook the drafting of accident insurance policies and the exclusions thereunder given the Court of Appeal's position that the express language used in each policy will take precedence.

Further, the Court of Appeal also agreed with the application of the subjective test relating to the intentions and expectations of the insured, which has been adopted in other jurisdictions. The Court of Appeal emphasised that in assessing the subjective expectation of the insured, knowledge or awareness of possible risks that could transpire thus causing injury, should not be equated with "expectation", which connotes the actual belief of the insured that the injury is more likely than not to occur.

However, the Court of Appeal has also left open certain questions which will need to be the subject of clarification in future decisions. For example, it remains to be seen how the test will be applied to personal accident insurance policies where the "accident" involves an insured child or an insured person who lacks capacity, and where a guardian or attorney makes decisions on behalf of such person in the course of events leading to the accident.

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Background

Death of the deceased and claim under the Insurance Policies

In the present case, the deceased consumed various medication (including prescribed medication) on the night of 3 August 2012 and the combined medication caused the deceased to suffer from respiratory depression. This led to pulmonary haemorrhage and multi-organ failure which eventually resulted in death. The deceased was found on the morning of 4 August 2012, rushed to the hospital and pronounced dead thereafter.

The Appellants are the executors of the Estate and claimed against the respondents under the two Insurance Policies. The Insurance Policies were purchased by the deceased from the first respondent. The Insurance Policies comprised the "PA Policy" purchased in September 2001 and the "Platinum Policy" purchased in November 2008. In 2012, the Insurance Policies were transferred to the second respondent (the "**Respondent**").

The Respondent denied that the deceased's death was accidental. The Respondent informed the first Appellant that the claim was not payable because the coroner had found that the deceased had committed suicide and notified the Appellants' solicitors that under the Insurance Policies, the deceased "must have sustained bodily injury in an accident before the sum assured is payable" and as there was "no evidence of an injury sustained in an accident", the assured sums were not payable to the Estate.

PA Policy

Under the PA Policy, the Respondent is obliged to pay the assured sum of $200,000 to the Estate "[w]hen injury results in loss of life of the Assured within three hundred and sixty five (365) days after the date of the accident". The PA Policy defines "injury" to mean "bodily injury effected directly and independently of all other causes by accident". However, the PA Policy does not define the term "accident".

Platinum Policy

Under the Platinum Policy, the Respondent is obliged to pay the assured sum of $1 million to the Estate "[w]hen injury results in loss of life of the Assured within three hundred and sixty five (365) days after the date of the Accident". The Platinum Policy defined "injury" to mean "bodily injury sustained in an Accident and effected directly and

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independently of all other causes and therefore not due to illness or disease". Unlike the PA Policy, the Platinum Policy does define "accident" and it is "an unforeseen and involuntary event which causes an injury".

Circumstances prior to the deceased's death

By way of further background, the deceased suffered from severe chronic back pain and had also developed insomnia, depression and anxiety. Between 2009 and 2012, the deceased was hospitalised on various occasions for treatment for these ills. In July 2009, the deceased consulted Dr Yeo Sow Nam ("**Dr Yeo**"), a pain specialist, in connection with his chronic back pain. In early 2010, Dr Yeo referred the deceased to Dr Ang Yong Guan ("**Dr Ang**"), a psychiatrist. On 2 July 2012, after two bad falls, the deceased admitted himself to Mount Elizabeth Novena Hospital for the treatment of his back pain by Dr Yeo and was concurrently co-managed for his depression by Dr Ang. The deceased was discharged on 31 July 2012. Upon discharge, Dr Ang prescribed 6 months' supply of 8 types of medication (including mirtazapine, bromazepam, olanzapine and diazepam, which were found to elevated in the deceased's post-mortem blood samples) and Dr Yeo prescribed 6 weeks' supply of 6 types of medication. The deceased was discharged with around 2,500 tablets. While the deceased had been on most of these medicines prior to hospitalisation in July 2012, certain of the prescribed medicines were introduced at different times and others had their dosages increased during the hospitalisation.

Investigations into the deceased's death

The autopsy report from Dr Henry Chua ("**Dr Chua**"), supervised by a forensic pathologist, Associate Professor Teo Eng Swee ("**Prof Teo**"), noted that the cause of death was "cardio-respiratory failure pending further investigations". The Health Sciences Authority (the "**HSA**") carried out a toxicology assessment and based on its report (the "**Toxicology Report**"), Dr Chua and Prof Teo issued the Final Cause of Death report (the "**FCOD Report**") which concluded that the deceased's post-mortem blood levels of four drugs – mirtazapine, bromazepam, olanzapine and diazepam – were "elevated". These were the psychiatric medicines Dr Ang prescribed. The conclusion was premised on comparing the drug concentrations from samples of the deceased's post-mortem blood with a range of values derived from measurements made in living persons who had

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consumed these substances. The FCOD Report also concluded that the cause of death was "multi-organ failure with pulmonary haemorrhage, due to mixed drug intoxication" and that it was "not due to a natural disease process".

Court of Appeal

Pleadings

In short, the Appellants' pleaded case was that the deceased's death was a result of the drug interactions from his prescribed medications and was completely accidental and unintended and the Respondent's defence was, *inter alia*, that the injuries that caused the deceased's death were not caused by an accident and that this was therefore not an event covered by the Insurance Policies and/or that the death of the deceased was caused by suicide and was therefore an excluded event.

Issue

The overarching issue was whether the injury resulting in the death of the deceased was caused by "accident". Given the contractual nature of an insurance policy, the entitlement of the insured to the assured sum depends on the precise manner in which the insured risk has been defined in the policy and on how that is applied to the facts. This required the Court of Appeal to:

- characterise the scope of the coverage afforded by the Insurance Policies; and
- decide whether, on the facts presented, the circumstances of the deceased's death fell within that scope.

Scope of coverage under the Insurance Policies

Scope of coverage

In characterising the scope of coverage, the Court of Appeal considered the construction of the Insurance Policies, the meaning of "accident" under the Insurance Policies and the relevant legal principles and decisions on the understanding of the term "accident" in decisions across the Commonwealth. While the Court of Appeal referred broadly to other cases seeking to define the scope of "accident", the Court of Appeal also remarked that there is limited scope for precision in defining the term and that given the contractual

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nature of an insurance policy, there is relatively little by way of general principle that can be gleaned from an extensive review of previous authorities.

"Accident"

Following the Court of Appeal's analysis of the understanding of "accident" in other Commonwealth decisions, the Court of Appeal considered the insured risk in the context of the Insurance Policies and held that an injury caused by or sustained in an "accident" under the Insurance Policies connotes an injury sustained in circumstances where the insured neither intended nor expected to suffer the injury and where the injury is not the result of the natural progression of disease. In the present case, an injury suffered by an insured as a result of the consumption of medication may be classified as an injury caused by "accident" where the insured did not intend or expect to suffer the injury when he consumed the medication.

PA Policy and Platinum Policy

The Respondent conceded that in respect of the PA Policy which did not define the term "accident", the understanding of that term as developed in case law is applicable.

With respect to the Platinum Policy, the Court of Appeal dismissed the argument that because the deceased intended to consume the medication, there was no "involuntary event" that caused an accident resulting in the deceased's death.

The Court of Appeal held that it is the proximate event causing the injury which must be involuntary. An accident would occur where the insured suffers injury involuntarily and unexpectedly while doing something, which although intentional, is not expected or intended to have that consequence. Here, the involuntary event would be the unexpected and unintended reaction of the deceased's body to the medication. Given the wide definition of "accident" in the Platinum Policy, the deceased's death could be classified as an "accident" under the Platinum Policy as long as he did not intend or expect to cause his death when he consumed the medication.

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Burden of proof in proving an "accident"

Framework for burden of proof

The Court of Appeal also set out the framework for the burden of proof:

- the claimant has the legal burden of proving that the insured's injury or death was caused by "accident" and that the insured did not subjectively intend or expect to be injured;
- where the insured's subjective intentions or expectations are unclear or impossible to ascertain, the claimant may, in the alternative, advance a case based on the intentions or expectations of a reasonable person in the position of the insured in terms of what is known of his personality, circumstances and characteristics;
- once it is *prima facie* established that the insured did not intend or expect to suffer the injury, the insurer has the burden to demonstrate the converse; and
- the ability of the claimant to demonstrate the insured's intention or expectation on a *prima facie* basis would likely vary according to the circumstances in which the insured's injury results (e.g. whether the injury was an extraordinary or natural consequence of the actions).

Did the circumstances of the deceased's death fell within the scope of coverage?

Does the evidence show the deceased intended or expected to die?

The broad question then was whether considering all the circumstances, the deceased's death was the result of an injury caused by "accident". On a construction of the Insurance Policies, the key factual issue to be decided was whether, on the evidence, it can be concluded that the deceased intended or expected to die when he consumed the medication.

Subjective inquiry

The inquiry into whether the insured intended or expected to suffer the injury is to be assessed from the insured's subjective perspective. "Expectation" in this context, connotes the actual belief of the insured that the injury is more likely than not to occur. The inquiry:

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- begins with the deceased's subjective intentions; and

- (if the evidence is insufficient to disclose the deceased's subjective viewpoint) shifts to the objective perspective of a reasonable person with the deceased's attributes.

Did the deceased consume an overdose?

The Court of Appeal took the approach that finding out what the deceased did before his death would form the context against which the Court of Appeal could assess the deceased's intentions. The anterior question therefore is whether the deceased consumed more than the prescribed dosage of medication. As a preliminary point, the Court of Appeal held that even if there was an overdose (i.e. the deceased took more medication than prescribed), that does not necessarily lead to the conclusion that the deceased had done so expecting to die. Knowledge that injury could be a possible result of a deliberate action does not, in all circumstances, lead to a finding that the deceased had subjectively intended or expected to suffer the injury, although the overdose might more readily demonstrate that the deceased had expected or intended to suffer injury.

In considering the anterior question, the Court of Appeal also considered the questions of: (i) whether it followed from the fact that the levels of four of the medication prescribed to the deceased were elevated that the deceased had overdosed, (ii) whether there were other plausible explanations, and (iii) was there an inherent risk of injury in prescribing the particular mix and quantity of medications?

As a starting point, the Court of Appeal analysed the scientific and medical evidence as these would provide the most objective assessment of what the deceased ingested, and would allow the Court to infer that the deceased had consumed more drugs than prescribed. The Court of Appeal considered the Toxicology Report, the FCOD Report and the evidence of the witnesses. The Toxicology Report and the FCOD Report indicated that the post-mortem blood levels of four of the medications prescribed were present at levels that were seemingly elevated. The evidence of the expert witnesses on the elevated levels was not unequivocal. Opinions included the possibility of an idiosyncratic adverse reaction or interactions on the part of the deceased to the variety and quantities of drugs prescribed, that the death

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could have ensued even if all the drugs had been ingested at prescribed levels and that the elevated levels that were found in the deceased's post-mortem blood could have resulted from factors other than the quantity of the drugs consumed.

From the evidence of the scientific and medical experts, the Court of Appeal found that given the quantity and variety of drugs prescribed to the deceased, even if these had been taken in their prescribed doses (which were at the high end), this could have resulted in the adverse reactions that led to his death.

The Court of Appeal then considered what caused the elevated levels of the drugs and found that the evidence pertaining to the possible explanations was equivocal. Although the toxicology evidence might have tended to support the overdose theory, it by no means ruled out the possibility that the elevated levels could be due to other causes including a combination of liver and kidney dysfunctionality, possible inhibition of the P450 group of enzymes, and/or the post-mortem redistribution process as raised by the expert witnesses. Certain expert witnesses also raised the inherent uncertainties in comparing post-mortem blood levels with ante-mortem plasma levels in living subjects.

The Court of Appeal also considered the deceased's practices when consuming his medication and found that it was unclear from the evidence adduced whether the deceased was diligent in consuming his medication and found that there was little that can be gleaned from this.

The deceased's state of mind

The evidence relating to the deceased's state of mind was pertinent in two ways: (i) to the extent that the scientific, medical, and other circumstantial evidence did not sufficiently reveal the likely character of the deceased's actions immediately prior to his death, the evidence relating to his state of mind should be taken into account to aid in coming to a conclusion on this and (ii) the evidence relating to the deceased's state of mind could be critical to whether, in the circumstances, the injury leading to the deceased's death was an "accident" within the meaning of the Insurance Policies. All other things being equal, the evidence that the

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deceased's state of mind was positive rather than negative, would tend to militate against the notion that the deceased had intended or expected to die.

The Court of Appeal found that the psychiatric evidence demonstrated that the deceased was not considered by those attending to him to be a suicide risk. The Court of Appeal also considered the other circumstantial evidence raised, such as the manner in which the deceased was conducting his affairs prior to his death and his making of plans for the future. In the Court of Appeal's judgment, the evidence of the deceased's circumstances tended to be more positive than negative and strongly suggested that there was no lack of desire to carry on living.

Was the death caused by "accident"

Accordingly, the Court of Appeal found that there were only three broad scenarios that could account for the deceased's actions and intentions prior to death:

- the deceased overdosed with the intention or expectation of suffering injury that would result in death;
- the deceased overdosed without intending or expecting to suffer any injury resulting in death; or
- the deceased took his medication in accordance with the prescription and harboured no intention or expectation of suffering injury resulting in death.

On the weight of the evidence, the Court of Appeal found that on a balance of probabilities, what occurred was either of the latter two scenarios and not the first, and that the last scenario offers the best explanation of all the surrounding circumstances. Applying the framework, the Court of Appeal was satisfied that the Appellants raised a *prima facie* case that the deceased had no intention or expectation of suffering injury or death when he consumed his medication on the night of 3 August 2012 and that the Respondent had not discharged its evidential burden of proving otherwise. The deceased's death was therefore the result of an injury caused by or sustained in an "accident" within the scope of the Insurance Policies and the Estate was entitled to the assured sums under the Insurance Policies.

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COMPANIES

Representative action to control conduct of on-going proceedings need not show actual lack of diligent prosecution

The Court of Appeal held that, in a section 216A application, the applicant need only show that it was probable that the company would not diligently prosecute, as opposed to actual lack of diligent prosecution

***Chong Chin Fook v Solomon Alliance Management Pte Ltd and others and another matter* [2017] SGCA 05 (Singapore, Court of Appeal, 11 January 2017)**

The Court of Appeal granted conditional leave to Chong Chin Fook (the "**Appellant**") for the Appellant to take control of a suit under section 216A of the Companies Act. In doing so, the Court of Appeal held that in order to ascertain whether or not the company concerned would diligently prosecute 'on-going' proceedings, the applicant need only show that it was probable that the company would not diligently prosecute the suit, as opposed to an actual lack of diligent prosecution by the company, and that conflicts of interest on the part of the directors would go towards proving such probability. The mere existence of conflicts of interest on the part of the Appellant also did not mean that it was not *prima facie* in the interests of Solomon Alliance Management Pte Ltd (the "**Company**") for the Appellant to take control of the conduct of the suit in question as this could be ameliorated by imposing conditions on the leave granted.

Our Comments/Analysis

In coming to the above decision in this case, the Court of Appeal confirmed the distinction between (i) a section 216A application in respect of on-going proceedings and (ii) a section 216A application in respect of proceedings which have yet to commence. The Court of Appeal focussed on the conflicts of interest on the part of the directors in control of the proceedings, which were "rife" in the present case, and exercised its discretion to impose conditions pursuant to section 216A(5) of the Companies Act in order to manage conflicts of interest on the part of the Appellant.

Given the particular and extensive conflicts of interest in the present case, it remains to be seen how the "probable" test will be applied in other cases with varying degrees of conflicts of interest, especially in the case of joint venture companies established by large conglomerates where there may be inherent

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and unavoidable conflicts of interest or where parties have agreed to procedures and mechanics (in a shareholders agreement or otherwise) for the institution and conduct of proceedings which may involve conflicts of interest. Although some comfort may be drawn from the Court of Appeal's observation that the situation may be different where the on-going proceeding was commenced by an independent board and that in such a case, it would be rare for the Court to grant leave, complete independence may not always be possible. Whether these are factors which the Court may take into account in determining the "probability" of lack of diligent prosecution or whether the Court may instead take these into account in determining the conditions to be imposed on leave granted is a matter for clarification in future decisions.

Although section 216A applications have always been available, the decision highlights that a company with multiple shareholders and conflicts of interest on the part of its directors needs to be aware that, despite the actual diligent prosecution of an on-going proceeding (or the lack of evidence otherwise), a member (or any other proper person as determined by the Court) may be granted leave to take over conduct under section 216A where it is probable that the conflicts of interest may lead to the lack of diligent prosecution.

Background

Issues before the Court of Appeal

This decision concerned an application under section 216A of the Companies Act to allow the Appellant, a shareholder of the Company, control of the conduct of proceedings on behalf of the Company. The following issues arose for determination:

- whether the Appellant had taken out the application in good faith;
- the appropriate legal criterion to be applied in an application under section 216A in order to ascertain whether or not the company concerned would diligently prosecute the on-going proceedings concerned and whether the Appellant had satisfied the criterion; and
- whether it appeared to be *prima facie* in the interests of the Company that the action be prosecuted and/or defended.

In coming to its decisions, the Court of Appeal made particular note of the instances of conflicts of interest on the part of the Appellant and the other directors of the Company

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who were appointed after the Appellant was removed as sole director of the Company. The relationships and interests of the newly appointed directors and their connection with the on-going proceedings concerned are set out further below.

Parties involved

Founding and business of the Company

The Appellant, Pang Chee Kuan Capellan ("**Pang**"), Helen Chong ("**Helen**"), the third respondent ("**Goh**") and Thomas Chin were the founders of the Company. The Appellant was, at all material times, a substantial but minority shareholder of the Company, holding at least 24.4% of the shares in the Company. The Company is a provider of business and management consultancy services. On 17 August 2009, the Company appointed Pang as a sales agent pursuant to an independent contractor agreement pursuant to which Pang was appointed to market investment products on behalf of the Company. The investment products marketed by Pang included products from Dolphin Capital GmbH (the "**Dolphin Products**").

Disputes begin

From 2013 onwards, disputes began to arise over the management of the business and Pang's sales of the Dolphin Products fell by approximately 96%. The Appellant was convinced that Helen and Pang were working together to divert business from the Company. The Appellant engaged a private investigation firm to look into the matter. It appeared from the private investigator's report that Pang had represented to the private investigator's employee that he was marketing the Dolphin Products on behalf of a third party and not the Company, the email used by Pang indicated that the sender was Helen's daughter and the contract attached to the email was scanned from a machine that belonged to Shenton Wealth Holdings, a company in which the Appellant averred that Helen had an interest in. The Appellant, acting as the then sole director of the Company, then instructed the Company's solicitors to, *inter alia*, send letters of demand to Pang alleging breach of the independent contractor agreement by diverting business and commence Suit No. 215 of 2015 ("**Suit 215**") on 5 March 2015 against Pang for breaches of the independent contractor agreement.

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The Appellant was subsequently removed as a director by the shareholders of the Company on 10 March 2015. The new directors of the Company were:

- June Lim ("**June**"), Pang's niece; and
- Goh.

Minority oppression suit and section 216A application

The Appellant thereafter commenced a separate suit for minority oppression against the other shareholders of the Company (the "**Minority Oppression Suit**") and made an application under section 216A to allow the Appellant to control the conduct of the proceedings of Suit 215 on behalf of the Company. On 29 February 2016, June resigned as a director leaving Goh as the only director of the Company.

Relationships and interests of the directors

Relationships and interests

As mentioned, the Court of Appeal made particular note of the instances of conflicts of interest on the part of the directors of the Company. In particular, June was Pang's niece, Goh was the Head of Administration of a company in which Helen had an interest, Pang was represented by June's husband in Suit 215 (notwithstanding that June was director of the Company suing Pang in Suit 215) and Pang, Goh and Helen were represented by June's husband in the Minority Oppression Suit.

Court of Appeal

Whether the Appellant had taken out the application in good faith

Appellant was acting in good faith

The Court of Appeal held:

- that the Appellant had an honest belief in the merits of Suit 215; and
- that the Appellant's collateral purpose was sufficiently consistent with achieving justice for the Company,

and, on the above bases, was satisfied that the Appellant had demonstrated that he was acting in good faith.

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Honest belief

The Court of Appeal held that, on the evidence, the Appellant had an honest belief in the merits of Suit 215 taking into account the advice from the Company's earlier lawyers that there was a case against Pang and the ostensible confirmation of diversion of business from the private investigators. This was notwithstanding the subsequent advice from the Company's new lawyers that Suit 215 be withdrawn, the strong language used by the Appellant in his communications and the acrimony and hostility between the parties.

Collateral purpose

The Court of Appeal also affirmed the principle in *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340, that the mere presence of a collateral purpose on the part of the Appellant would not preclude an application under section 216A if the Appellant could demonstrate that the collateral purpose was sufficiently consistent with the purpose of doing justice to the Company. Notwithstanding any personal vendetta, a successful Suit 215 would restore value to the Company which it has been allegedly deprived of.

The appropriate legal criterion to be applied in an application under section 216A in order to ascertain whether or not the company concerned would diligently prosecute the on-going proceedings concerned and whether the Appellant had satisfied the criterion

"Probable" lack of diligent prosecution

The Court of Appeal held that in an application under section 216A, in order to ascertain whether or not the company concerned would diligently prosecute the on-going proceedings concerned, the applicant need only show that it was probable that the company would not diligently prosecute the suit, as opposed to an actual lack of diligent prosecution by the company. This clarifies the threshold to be met in determining whether a company has diligently prosecuted or defended an on-going proceeding and cements the suggestion that the threshold may be different from that where proceedings have yet to be brought (or are discontinued). In finding that the probable threshold was satisfied, the Court of Appeal remarked that "even though the Company appeared to be conducting the suit with diligence, the conflicts of interest on the part of the directors were sufficient to demonstrate that it was probable that the Company would not, going forward, prosecute the action diligently".

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Whether it appeared to be prima facie in the interests of the Company that the action be prosecuted and/or defended

Interests of the Company

The Court of Appeal affirmed the approach that the standard of proof required under this limb is low and that the Court had to consider whether it was *prima facie* in the interests of the Company that the action be prosecuted and whether the Appellant was the proper party to represent the Company's interests. The High Court had earlier decided that the Appellant was not the proper party given the potential conflict of interest if the Appellant had control of the conduct of Suit 215. In this case, the Appellant was facing a claim of contribution and/or indemnification from the Company and if the Company were free to act in its own interests, it might, for instance, look to the Appellant to bear full responsibility for the proceedings in the event it is unsuccessful against Pang. The Court of Appeal reversed the High Court's decision and held that this limb was satisfied. The mere existence of conflicts of interest on the part of the Appellant did not mean that it was not *prima facie* in the interests of the Company for the Appellant to take control of the conduct of the suit in question. Any concerns as to whether the Appellant was the proper party and as to the conflicts of interest could be ameliorated by the court's discretion to impose conditions pursuant to section 216A(5).

Given the grave conflicts of interest on the part of June and the conflicts on the part of Goh, the Court of Appeal held that it was probable that the Company would not diligently prosecute Suit 215 against Pang. The Court of Appeal also found that the Appellant was acting in good faith and that the conflict of interest on the Appellant's part could be ameliorated by the imposition of conditions. The Court of Appeal therefore granted conditional leave to the Appellant under section 216A on condition, *inter alia*, that the Appellant indemnifies the Company for all costs incurred in Suit 215 from the commencement of suit till disposal in the event the Company is unsuccessful in Suit 215 as well as for all damages arising out of the counterclaim in Suit 215, if any and provides security for costs the Company would likely have to pay if it was unsuccessful in prosecuting the action in Suit 215.

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INSOLVENCY

Post-winding up payments for the benefit of the company and its creditors may be validated

The High Court exercised its discretion to retrospectively validate payments made after the commencement of winding up

***Centaurea International Pte Ltd (in liquidation) v Citus Trading Pte Ltd* [2016] SGHC 264 (Singapore, High Court, 1 December 2016)**

In a first for Singapore courts, the High Court in *Centaurea International Pte Ltd (in liquidation) v Citus Trading Pte Ltd* exercised its discretion under section 259 of the Companies Act to retrospectively validate payments made by a company after the commencement of a winding up application. In doing so, the High Court laid out the framework and considerations for the exercise of such discretion. Given that validation is discretionary, there will still be attendant risks in relation to such payments and prospective validation under section 259 should still be sought to minimise such risks. However, trade creditors in particular can take heart from the confirmation that retroactive validation of such payments is possible under section 259.

Our Comments/Analysis

This case confirms that the default position under Singapore law remains that payments made after the commencement of winding up would still be void unless the Court otherwise orders, a discretion which has always been available. However, the High Court has now clarified that it is to exercise its discretion to grant retrospective validation if there are "special circumstances making such a course desirable in the interest of the unsecured creditors as a body". Further, the High Court has also clarified that the relevant time of the inquiry for the purpose of retrospective validation is the time at which the payment was made, whether it was "likely" to "benefit" the general pool of unsecured creditors and not with the benefit of hindsight whether the payments turned out to benefit the creditors.

From a business perspective, the decision may not be a game-changer as the decision deals with the situation where a creditor acts in good faith and does not have actual notice of the commencement of winding up. In such a case, a creditor without actual notice of the winding up would, in any event, not be in the position to "plan" for the receipt of such payments and provide for the risk that the payment could be set aside pursuant to section 259 of the

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Companies Act. Moreover, in receiving payment and in conducting its business arrangements, it would not be practical for a creditor to constantly assess whether such payment was likely to benefit the general pool of the debtor's unsecured creditors at the time of payment. That said, the decision serves as a timely reminder that parties should continue to exercise caution in dealing with companies in financial distress.

In addition, it should be noted that the Court clearly distinguished the situation where the creditor has actual notice of the commencement of winding up. In that regard, while the Court clarified that notice of a winding up application published in newspapers would not amount to actual notice of the commencement of winding up, it nevertheless highlighted that where actual knowledge was present, the creditor should ideally seek prospective validation. The question which remains and which was not before the High Court is what considerations will be taken into account in seeking to validate payments made and received notwithstanding actual notice of the commencement of winding up.

Background

Sale and purchase of bunkers and credit limit

Centaurea International Pte Ltd ("**Centaurea**") was engaged in the business of supplying bunkers to vessels. Citus Trading Pte Ltd ("**Citus**") is an international trader dealing in commodities including crude oil, petroleum distillates and petrochemicals. The parties started their business dealings in May 2013 and Centaurea would purchase the bunkers from oil traders including Citus in order to supply them to vessels. The sale of bunkers by Citus to Centaurea was on credit terms subject to a credit limit and was secured by (i) a personal guarantee from Centaurea's director, Lim Tiong Ling and (ii) a mortgage over *MT Sirima 1*, a vessel owned by Centaurea's affiliate company.

Winding up proceedings

On 1 July 2013, another creditor of Centaurea, Navig8 Pool Inc ("**Navig8**") commenced winding up proceedings against Centaurea. This was advertised in the Gazette, The Straits Times and the Lianhe Zaobao on 3 July 2013. After the commencement of the winding up proceedings, Centaurea made five payments totalling US$1,526,803.53 to Citus between 5 to 31 July 2013 in settlement of various pre-liquidation invoices.

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Following receipt of the first three payments, the parties entered into two further transactions on the usual credit terms and after receipt of the balance two payments, the parties entered into a final transaction on the usual credit terms. Centaurea did not make any direct payment for the last three transactions.

The winding up order was made on 23 August 2013 and the liquidators of Centaurea subsequently sought a declaration that these payments are void under section 259 of the Companies Act and Citus sought to rely on the Court's discretion under section 259 to validate the payments.

Exercise of discretion under section 259

When would a court exercise its discretion and permit a departure from the pari passu rule?

Avoidance of dispositions and discretion under section 259

The underlying rationale of section 259 is to prevent the dissipation of the assets of the company so as to procure so far as practicable the rateable payments of the unsecured creditors' claims. The High Court held that a departure from this rationale and the exercise of its discretion is only permitted where there are special circumstances making such a course desirable in the interest of the unsecured creditors as a body and that this would be satisfied if the transactions to be validated were "likely" or "apt" to be for the benefit of the general pool of unsecured creditors.

In determining whether there was benefit, the key questions before the Court were:

- the relevant time for the determination of whether there was benefit; and
- the factors to be considered in determining whether there was benefit.

Relevant time for determination of benefit

Time of payment

The High Court held that in the case of a retrospective validation where the recipient of the payment had no notice of the commencement of winding up, the relevant time for determination of whether the payment was "likely" or "apt" to

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benefit the general pool of unsecured creditors is the time of the payment. The inquiry is not made with the benefit of hindsight.

Factors to be considered in determining whether there was benefit

Factors

In considering whether the payments were "likely" or "apt" to benefit the general pool of unsecured creditors in the present case where Citus had no actual notice of the commencement of winding up, the Court considered:

- whether the payments were made in good faith in the ordinary course of business without actual notice of the commencement of winding up;
- the purpose of the payments; and
- whether the payments allowed the company to continue trading (although it would not be in the interests of the creditors if the transaction was part of a course of trading by the company at a loss),

each at the time the payment was made. As the determination is not to be made with hindsight, it is not relevant whether the payments did in fact benefit the company and its unsecured creditors.

Was there benefit?

Validation

The High Court validated the payments. In doing so, the High Court found that Citus did not have actual knowledge of the commencement of winding up of Centaurea (notwithstanding the publications) when it received the payments and, at the point of making the payments, there was benefit to Centaurea and its creditors. It was not disputed between the parties that the payments were made in good faith and in the ordinary course of business. The payments freed up the credit limit and allowed Centaurea to obtain additional supplies as stock on credit terms in order to continue its business. The securing of additional supplies was, at the time of the payment, "likely" or "apt" to be for the benefit of Centaurea and its general body of creditors.

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DATE	TITLE
1 March 2017	Corporate Governance – Special Update: MAS Announces Establishment of Corporate Governance Council to Review the Code of Corporate Governance
21 February 2017	LegisWatch: Proposed Changes to the Regulatory Regime For Managers of Venture Capital Funds
13 February 2017	LegisWatch: "Does my family office need a licence in Singapore?" – Clarity from MAS is now given
7 February 2017	Special Update: Changes to Filing Fees For Intellectual Property Registrations in Singapore

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